

**THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY**

UNIVERSITY OF LONDON LIBRARY

346.4

Mx North Gallery





Digitized by the Internet Archive
in 2026

THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

OF CASES DECIDED IN

THE HOUSE OF LORDS THE PRIVY COUNCIL
ALL DIVISIONS OF THE SUPREME COURT
AND
COURTS OF SPECIAL JURISDICTION

1939
VOLUME 3

Consulting Editor :

ROLAND BURROWS, LL.D., K.C.

Recorder of Cambridge

Managing Editor of Halsbury's Laws of England, Hailsham Edition

General Editor :

W. J. WILLIAMS, B.A.,

of Lincoln's Inn, Barrister-at-Law

THE LAW JOURNAL,
37-39 ESSEX STREET, LONDON, W.C.2



ALL ENGLAND LAW REPORTS ANNOTATED

CONSULTING EDITOR :

ROLAND BURROWS, Esq., LL.D., K.C.,
Recorder of Cambridge.

MANAGING EDITOR OF HALSBURY'S LAWS OF ENGLAND, HAILSHAM EDITION.

GENERAL EDITOR :

W. J. WILLIAMS, Esq., B.A.,
of Lincoln's Inn, Barrister-at-Law.

ONE OF THE EDITORS OF THE ENCYCLOPÆDIA OF FORMS AND PRECEDENTS.

ASSISTED BY

E. FULLER BRISCOE, B.A., B.Sc. (OXON.), *Barrister-at-Law.*

REPORTERS :

House of Lords	MICHAEL MARCUS, B.L. (EDIN.)	<i>Barrister-at-Law.</i>
Privy Council	T. A. DILLON, B.A. (CANTAB.)	<i>Barrister-at-Law.</i>
Court of Appeal, No. 1 ..	W. K. SCRIVENER, LL.B.	<i>Barrister-at-Law.</i>
Court of Appeal, No. 2 ..	E. FULLER BRISCOE, B.A., B.Sc. (OXON.)	<i>Barrister-at-Law.</i>
Court of Appeal, No. 3 ..	C. ST. JOHN W. NICHOLSON, B.A. (OXON.)	<i>Barrister-at-Law.</i>
Chancery Division	F. HONIG, LL.D. (HEID.) CHARLES SHELLEY MAURICE SHARE, B.A. (OXON.)	<i>Barristers-at-Law.</i>
King's Bench Division	W. J. ALDERMAN, B.A. (CANTAB.) CHARLES NEWTON GERALD ABRAHAM, B.A. (OXON.) RALPH MILLNER M. D. CHORLTON, M.A. (OXON.)	<i>Barristers-at-Law.</i>
Court of Criminal Appeal, and Railway and Canal Commission Cases	W. J. ALDERMAN, B.A. (CANTAB.)	<i>Barrister-at-Law.</i>
Probate and Divorce ..	J. F. COMPTON MILLER, M.A. (OXON.)	<i>Barrister-at-Law.</i>
Ecclesiastical Cases ..	J. F. COMPTON MILLER, M.A. (OXON.)	<i>Barrister-at-Law.</i>

These reports are cited thus :
[1939] 3 All E. R.

CASES REPORTED IN VOLUME 3

	PAGE		PAGE
ABERCESTER, LTD., LOCK v. [CH.D.] ..	562	BRIGHTON AND SUSSEX BUILDING SOCIETY,	
ADABLA v. GBEVLO AGAMA [P.C.] ..	381	BERRY (H. C.), LTD. v. [CH.D.] ..	217
ADAMS v. UNION CINEMAS, LTD. [C.A.] ..	136	BROOKS' SETTLEMENT TRUSTS, <i>Re</i> , LLOYDS	
ALDHAM v. UNITED DAIRIES (LONDON), LTD.		BANK, LTD. v. TILLARD [CH.D.] ..	920
[K.B.D.] ..	478	BROOME v. PADDESS CO-OPERATIVE SOCIETY OF	
ALEXANDER v. DICKINSON (J.) & SONS, LTD. [C.A.]	204	ORANGE GROWERS (ESTABLISHED 1900), LTD.	
ALEXANDER v. GUNTHER, <i>Re</i> GUNTHER'S WILL		[K.B.D.] ..	978
TRUSTS [CH.D.] ..	291	BROWN'S SETTLEMENT, <i>Re</i> , PUBLIC TRUSTEE v.	
ANGFARTYGS A/B HALFDAN v. PRICE & PIERCE,		BROWN [CH.D.] ..	391
LTD. [C.A.] ..	672	BURKE AND UNSWORTH v. ELDER DEMPSTER	
ASHBY (WILLIAM), LTD., HEADLEY'S WHARF,		LINE, LTD. [K.B.D. LIVERPOOL SPRING	
LTD., AND, DOREY (ONESIMUS) & SONS, LTD.		ASSIZES] ..	339
v. [C.A.] ..	23	BURTON, DOBSON SHIP REPAIRING CO., LTD. v.	
ASHTON'S ESTATE, <i>Re</i> , WESTMINSTER BANK,		[H.L.] ..	431
LTD. v. FARLEY [H.L.] ..	491	BUSH, BEACH & GENT, LTD. v. ROAD [K.B.D.]	302
ASTLE v. ASTLE (BY HIS GUARDIAN) [Div.] ..	967	BUTLER v. R. [P.C.] ..	121
ATKINS v. ATKINS [Div.] ..	872	BYRNE, FEW v., <i>Re</i> MACLENNAN [C.A.] ..	81
A.-G., POPELTT v., <i>Re</i> PAYNE [CH.D.] ..	875		
ATTORNEY-GENERAL (AT THE RELATION OF		CAMPBELL-STUART, REGIER v. [CH.D.] ..	235
MARTIN) v. FINSBURY BOROUGH COUNCIL		CANADA RICE MILLS, LTD. v. R. [P.C.] ..	991
[CH.D.] ..	995	CANADIAN NATIONAL RY. CO., MONTREAL TRUST	
ATTORNEY-GENERAL (AT THE RELATION OF		CO. v. [P.C.] ..	930
ROCHDALE CORPORATION) v. ROCHDALE CANAL		CAREW, <i>Re</i> , CHANNER v. FRANKLYN [CH.D.] ..	200
CO. [C.A.] ..	57	CARTLEDGE AND MATTHEWS, JOHNSON v.	
ATTORNEY-GENERAL, SKINNER v., <i>Re</i> WHITE		(MATTHEWS, THIRD PARTY) [K.B.D. NOTTING-	
[H.L.] ..	787	HAM SUMMER ASSIZES] ..	654
ACNE, MEYER (N.V. ARNOLD OTTO) v. [K.B.D.]	168	CASWELL v. POWELL DUFFERN ASSOCIATED	
		COLLIERIES, LTD. [H.L.] ..	722
		CAWSTON, ST. LUKE, BROMLEY COMMON (VICAR	
		AND CHURCHWARDENS) v., <i>Re</i> CAWSTON'S	
		CONVEYANCE [CH.D.] ..	1
		CAWSTON'S CONVEYANCE, <i>Re</i> , ST. LUKE, BROMLEY	
		COMMON (VICAR AND CHURCHWARDENS) v.	
		CAWSTON [CH.D.] ..	1
		CENTRAL ADVANCE & DISCOUNT CORPORATION,	
		LTD. v. MARSHALL [C.A.] ..	695
		CHANNER v. FRANKLYN, <i>Re</i> CAREW [CH.D.] ..	200
		CHESS (A FIRM), JAGUES (JOHN) & SON, LTD.	
		v. [CH.D.] ..	227
		CHIPCHASE v. CHIPCHASE [Div. DIVL. CT.] ..	895
		COLEMAN, COPEMAN v. [K.B.D.] ..	224
		COLES v. ENOCH [C.A.] ..	327
		COLIN & SHIELDS, HARTOG v. [K.B.D.] ..	566
		COLLINS, WHITE AND, APPLICATIONS OF, <i>Re</i>	
		RIPON (HIGHFIELD) HOUSING ORDER, 1938	
		[C.A.] ..	548
		COMMISSIONER OF POLICE FOR THE CITY OF	
		LONDON, BOUNDFORD v. [H.L.] ..	399
		COMMISSIONER OF POLICE FOR CITY OF LONDON,	
		LEONARD v. [H.L.] ..	399
		COMMISSIONER OF POLICE FOR CITY OF LONDON,	
		MILNE v. [H.L.] ..	399
		COMPTON v. WEST HAM COUNTY BOROUGH	
		COUNCIL [CH.D.] ..	192
		CO-OPERATIVE INSURANCE SOCIETY, LTD., MAYER	
		& SHERRATT v. [C.A.] ..	158
		COOPER, <i>Re</i> , LE NEVE FOSTER v. NATIONAL	
		PROVINCIAL BANK, LTD. [C.A.] ..	586
		COPEMAN v. COLEMAN [K.B.D.] ..	224
		COURT LINE, LTD. v. DANT & RUSSELL INC.	
		[K.B.D.] ..	314
		COWAN v. HENDON BOROUGH COUNCIL [CH.D.]	366
		CRAWFORD, SPENCE v. [H.L.] ..	271
		CROMWELL PROPERTY INVESTMENT CO., LTD.	
		v. HUCKS [C.A.] ..	257
BAILEY (T. D.), SON & CO. AND SMYTH (ROSS, T.)			
& CO., LTD., <i>Re</i> AN ARBITRATION BETWEEN			
[C.A.] ..	175		
BAKER, MULHOLLAND & TEDD, LTD. v. [K.B.D.]	253		
BARNES (INSPECTOR OF TAXES) v. HELY			
HUTCHINSON [H.L.] ..	803		
BARROWFORD HOLDINGS, LTD. v. INLAND			
REVENUE COMMISSIONERS [K.B.D.] ..	319		
BARSBY v. DONCASTER AMALGAMATED COL-			
LIERIES, LTD. [C.A.] ..	938		
BATCHELAR v. EVANS [CH.D.] ..	606		
BATTY v. SCHRODER (BARON) [K.B.D.] ..	299		
BEAUMONT-THOMAS v. BLUE STAR LINE, LTD.			
[C.A.] ..	127		
BENNETT, LADORE v. [P.C.] ..	98		
BERRY (H. C.), LTD. v. BRIGHTON AND SUSSEX			
BUILDING SOCIETY [CH.D.] ..	217		
BLACK SEA AND BALTIC GENERAL INSURANCE			
CO., LTD., REARDON SMITH LINES, LTD. v.			
THE INDIAN CITY [H.L.] ..	444		
BLUE STAR LINE, LTD., BEAUMONT-THOMAS v.			
[C.A.] ..	127		
BOMFORD v. OSBORNE [K.B.D.] ..	259		
BOND v. NOTTINGHAM CORPORATION [CH.D.]	669		
BORDERS, BRADFORD THIRD EQUITABLE BENEFIT			
BUILDING SOCIETY v. (No. 2) [C.A.] ..	29		
BORDERS, BRADFORD THIRD EQUITABLE BENEFIT			
BUILDING SOCIETY v. (No. 2) [C.A.] ..	611		
BOUNDFORD v. COMMISSIONER OF POLICE FOR			
CITY OF LONDON [H.L.] ..	399		
BRADFORD LICENSING JJ., R. v., <i>Ex parte</i>			
ILLINGWORTH [C.A.] ..	106		
BRADFORD THIRD EQUITABLE BENEFIT BUILDING			
SOCIETY v. BORDERS (No. 2) [C.A.] ..	29		
BRADFORD THIRD EQUITABLE BENEFIT BUILDING			
SOCIETY v. BORDERS (No. 2) [C.A.] ..	611		

	PAGE
CULKIN v. McFIE & SONS, LTD. [K.B.D. LIVERPOOL SUMMER ASSIZES]	613
CULL v. INLAND REVENUE COMMISSIONERS [H.L.]	761
CUNARD WHITE STAR, LTD., SUNLEY (B.) & Co., LTD. v. [K.B.D.]	641
DANT & RUSSELL INC., COURT LINE, LTD. v. [K.B.D.]	314
DAPONTE v. SCHUBERT [CH.D.]	495
DARBY, Re, RUSSELL v. MACGREGOR [C.A.]	6
DAWSON, HOIT v. [C.A.]	635
DEBTOR (No. 419 of 1939), Re [C.A.]	429
DE CHASSIRON, Re, LLOYDS BANK, LTD. v. SHARPE [CH.D.]	321
DELAMERE (LORD), INLAND REVENUE COMMISSIONERS v. [K.B.D.]	386
DELGOFFE v. FADER [CH.D.]	682
DICKINSON (J.), & SONS, LTD., ALEXANDER v. [C.A.]	204
DICKSON v. JONES [CH.D.]	182
DOBSON SHIP REPAIRING CO., LTD. v. BURTON [H.L.]	431
DONCASTER AMALGAMATED COLLIERIES, LTD., BARSBY v. [C.A.]	938
DOREY (ONESIMUS) & SONS, LTD. v. HEADLEY'S WHARF, LTD., AND ASHBY (WILLIAM), LTD. [C.A.]	23
DRAPER v. TRIST [C.A.]	513
EAVES v. EAVES [CH.D.]	500
EDMONDS & CO., LTD. v. FAGIN [K.B.D.]	974
EGERTON v. JONES [C.A.]	389
ELDER DEMPSTER LINES, LTD., BURKE AND UNWORTH v. [K.B.D. LIVERPOOL SPRING ASSIZES]	339
ENCOCH, COLES v. [C.A.]	327
ETHORPE, LTD., SHACKLOCK v. [H.L.]	372
EVANS, BATCHELAR v. [CH.D.]	606
EXPORTKLEB of MOSCOW, RADCLIFFE (W.I.) S.S. CO., LTD., AND WYNNSTAY S.S. CO., LTD. v., THE LLANISHEN [K.B.D.]	528
FADER, DELGOFFE v. [CH.D.]	682
FAGIN, EDMONDS & CO., LTD. v. [K.B.D.]	974
FALCONER, HUGHES AND, v. NEWTON [K.B.D.]	869
FARLEY, WESTMINSTER BANK, LTD. v. [H.L.]	491
FAWCETT v. JOHNSON'S SERVICE GARAGE [C.A.]	377
FEW v. BYRNE, Re MACLENNAN [C.A.]	81
FINSBURY BOROUGH COUNCIL, ATTORNEY-GENERAL (AT THE RELATION OF MARTIN) v. [CH.D.]	995
FLETTONS, LTD., LEGGE v. [K.B.D.]	220
FOX (C. R.), MAYOR, ALDERMEN & CITIZENS OF THE CITY OF OXFORD & URBAN HOUSING CO., LTD. v. [CH.D.]	839
FRANCKLYN, CHANNER v., Re CAREW [CH.D.]	200
FRED'S SECURITIES CO., INLAND REVENUE COMMISSIONERS v. [K.B.D.]	241
GATTI v. SHOOSMITH [C.A.]	916
GBEVLO AGAMA, ADABIA v. [P.C.]	381
GEORGE, HAMPTON & SONS, LTD. v. [K.B.D.]	627
GEORGI v. NAVANI, Re LANDI [C.A.]	569
GIBBONS v. WESTMINSTER BANK, LTD. [K.B.D.]	577
GOLDSBROUGH MORT & CO., LTD., MAURICE v. [P.C.]	63
GREEN v. GREEN (BY HIS GUARDIAN) [Div.]	89
GRIFFITHS v. HOWARD [CH.D.]	56
GUNTHER, ALEXANDER v., Re GUNTHER'S WILL TRUSTS [CH.D.]	291
GUNTHER'S WILL TRUSTS, Re, ALEXANDER v. GUNTHER [CH.D.]	291
HAIGH, UNDERWOOD AND (POCOCK SHOWING CAUSE), UNDERWOOD v. [Div.]	1001
HALFDAN, ANGFARTYGS A/B v. PRICE & PIERCE, LTD. [C.A.]	672
HAMPTON & SONS, LTD. v. GEORGE [K.B.D.]	627
HANSON v. WEARMOUTH COAL CO., LTD., AND SUNDERLAND GAS CO. [C.A.]	47
HARI CHAND v. SECRETARY OF STATE [P.C.]	707
HARRIS v. HOWDEN (JAMES) & CO. (LAND), LTD. [C.A.]	34
HARRIS, SMITH v. [C.A.]	960
HARRISON, WESTMINSTER BANK, LTD. v., Re RIAL [CH.D.]	657
HARTOG v. COLIN & SHIELDS [K.B.D.]	566

	PAGE
HEADLEY'S WHARF, LTD., AND ASHBY (WILLIAM) LTD., DOREY (ONESIMUS) & SONS, LTD. v. [C.A.]	23
HELY HUTCHINSON, BARNES (INSPECTOR OF TAXES) v. [H.L.]	803
HEMSLEY, JENNINGS v., Re LEWIS [CH.D.]	269
HENDERSON, PAPADIMITRIOU v. [K.B.D.]	908
HENDON BOROUGH COUNCIL, COWAN v. [CH.D.]	386
HERMAN, LANE v. [C.A.]	353
HICKMAN v. POTTS [C.A.]	794
HILL v. WOLVERHAMPTON CORRUGATED IRON CO., LTD. [C.A.]	72
HOIT v. DAWSON [C.A.]	635
HOWARD, GRIFFITHS v. [CH.D.]	56
HOWELLS v. INLAND REVENUE COMMISSIONERS [K.B.D.]	144
HOWDEN (JAMES) & CO. (LAND), LTD., HARRIS v. [C.A.]	34
HUCKS, CROMWELL PROPERTY INVESTMENT CO., LTD. v. [C.A.]	257
HUDSON, LONDON & PROVINCIAL LEATHER PROCESSES, LTD. v. [K.B.D.]	857
HUGHES AND FALCONER v. NEWTON [K.B.D.]	869
HUNGARIAN GENERAL CREDITBANK, UNGARISCHE BAUMWOLLE INDUSTRIE ACTIENGESellschaft AND, KLEINWORT, SONS & CO. v. [C.A.]	38
ILLINGWORTH, Ex parte, R. v. BRADFORD LICENSING JJ. [C.A.]	106
INCOME TAX COMMISSIONER, PUNJAB, LAHORE, TRIBUNE PRESS, LAHORE (TRUSTEES) v. [P.C.]	469
INDIAN CITY, THE, REARDON SMITH LINES, LTD. v. BLACK SEA & BALTO GENERAL INSURANCE CO., LTD. [H.L.]	444
INLAND REVENUE COMMISSIONERS, BARROWFORD HOLDINGS, LTD. v. [K.B.D.]	319
INLAND REVENUE COMMISSIONERS, CULL v. [H.L.]	761
INLAND REVENUE COMMISSIONERS v. DELAMERE (LORD) [K.B.D.]	336
INLAND REVENUE COMMISSIONERS v. FRED'S SECURITIES CO. [K.B.D.]	241
INLAND REVENUE COMMISSIONERS, HOWELLS v. [K.B.D.]	144
INLAND REVENUE COMMISSIONERS v. MARBOB, LTD. [K.B.D.]	309
INLAND REVENUE COMMISSIONERS, WATKINS v. [K.B.D.]	165
ITHAKA, THE, TURK GEMI KURTAMA v. ITHAKA (OWNERS) [C.A.]	630
ITHAKA (OWNERS), TURK GEMI KURTAMA v., THE ITHAKA [C.A.]	630
JACKSON, WOLSON v., Re WOLSON [CH.D.]	852
JAQUES (JOHN) & SON, LTD. v. CHESSE (A FIRM) [CH.D.]	227
JENNINGS v. HEMSLEY, Re LEWIS [CH.D.]	269
JOHNSON v. CARLEDGE AND MATTHEWS (MATTHEWS, THIRD PARTY) [K.B.D. NOTTINGHAM SUMMER ASSIZES]	654
JOHNSON'S SERVICE GARAGE, FAWCETT v. [C.A.]	377
JONES, DICKSON v. [CH.D.]	182
JONES, EGERTON v. [C.A.]	889
JOSEPH, Ex parte, R. v. TOYNBEE HALL JUVENILE COURT JJ. [K.B.D. DIVL. CT.]	16
JOYCE, A., & SON, LATHALL v. [K.B.D.]	854
KELLOCK v. KELLOCK (BY HER GUARDIAN) [Div.]	972
KELNER v. KELNER [Div.]	957
KLEINWORT, SONS & CO. v. UNGARISCHE BAUMWOLLE INDUSTRIE ACTIENGESellschaft AND HUNGARIAN GENERAL CREDITBANK [C.A.]	38
KNIGHT, IN THE GOODS OF [PROB.]	925
LADORE v. BENNETT [P.C.]	98
LANCASTER (DUCHY OF), WOLSTANTON, LTD., AND, NEWCASTLE-UNDER-LYME BOROUGH COUNCIL v. [CH.D.]	190
LANCASTER (DUCHY OF), WOLSTANTON, LTD., AND, NEWCASTLE-UNDER-LYME BOROUGH COUNCIL v. [C.A.]	597
LANDI, Re, GEORGI v. NAVANI [C.A.]	569
LANE v. HERMAN [C.A.]	353
LATHALL v. JOYCE (A.) & SON [K.B.D.]	854
LAWRENCE, MILK MARKETING BOARD v. [K.B.D.]	463
LEGGE v. FLETTONS, LTD. [K.B.D.]	229
LE NEVE FOSTER v. NATIONAL PROVINCIAL BANK, LTD., Re COOPER [C.A.]	536

	PAGE
LEONARD v. COMMISSIONER OF POLICE FOR CITY OF LONDON [H.L.]	399
LEWIS, <i>Re</i> , JENNINGS v. HEMSLEY [CH.D.]	269
LIVERPOOL CORPORATION, TAYLOR v. [K.B.D. LIVERPOOL SUMMER ASSIZES]	329
LLANISHEN, THE, RADCLIFFE (W.I.) S.S. CO., LTD., AND WYNNSTAY S.S. CO., LTD. v. EXPORT-KHLEB OF MOSCOW [K.B.D.]	528
LYODS BANK, LTD. v. MARSLAND, <i>Re</i> MARSLAND [C.A.]	148
LYODS BANK, LTD. v. SHARPE, <i>Re</i> DE CHASSIRON [CH.D.]	321
LYODS BANK, LTD. v. TILLARD, <i>Re</i> BROOKS' SETTLEMENT TRUSTS [CH.D.]	920
LOCK v. ABERCESTER, LTD. [CH.D.]	562
LONDON & PROVINCIAL LEATHER PROCESSES, LTD. v. HUDSON [K.B.D.]	857
LONDON EXPRESS NEWSPAPER, LTD., NEWSTEAD v. [K.B.D.]	263
LUCAS v. POSTMASTER-GENERAL [C.A.]	660
MCIE & SONS, LTD., CULKIN v. [K.B.D. LIVERPOOL SUMMER ASSIZES]	613
MACGREGOR, RUSSELL v., <i>Re</i> DARBY [C.A.]	6
MACLENNAN, <i>Re</i> , FEW v. BYRNE [C.A.]	81
MARBOR, LTD., INLAND REVENUE COMMISSIONERS v. [K.B.D.]	309
MARSHALL, CENTRAL ADVANCE & DISCOUNT CORPORATION, LTD. v. [C.A.]	695
MARSLAND, <i>Re</i> , LYODS BANK, LTD. v. MARSLAND [C.A.]	148
MARSLAND, LYODS BANK, LTD. v., <i>Re</i> MARSLAND [C.A.]	148
MARTIN (A.-G., AT THE RELATION OF) v. FINSBURY BOROUGH COUNCIL	995
MATTHEW v. TRIVANDRUM DISTRICT MAGISTRATE [P.C.]	356
MATTHEWS, CARTLEDGE AND, JOHNSON v. (MATTHEWS, THIRD PARTY) [K.B.D. NOTTINGHAM SUMMER ASSIZES]	654
MAURICE v. GOLDSBROUGH MORT & CO., LTD. [P.C.]	63
MAYER & SHERRATT v. CO-OPERATIVE INSURANCE SOCIETY, LTD. [C.A.]	158
MEYER (N. V. ARNOLD OTTO) v. AUNE [K.B.D.]	168
MILBANK v. MILBANK [DIV.]	946
MILK MARKETING BOARD v. LAWRENCE [K.B.D.]	483
MILNE v. COMMISSIONER OF POLICE FOR CITY OF LONDON [H.L.]	399
MONTREAL TRUST CO. v. CANADIAN NATIONAL RY. CO. [P.C.]	930
MOSS' EMPIRES, LTD. v. OLYMPIA (LIVERPOOL), LTD. [H.L.]	460
MULHOLLAND & TEDD, LTD. v. BAKER [K.B.D.]	253
NATIONAL PROVINCIAL BANK, LTD., LE NEVE FOSTER v., <i>Re</i> COOPER [C.A.]	586
NAVANI, GEORGI v., <i>Re</i> LANDI [C.A.]	569
NEWCASTLE-UNDER-LYME BOROUGH COUNCIL v. WOILSTANTON, LTD., AND DUCHY OF LANCASTER [CH.D. & C.A.]	190, 597
NEWSTEAD v. LONDON EXPRESS NEWSPAPER, LTD. [K.B.D.]	263
NEWTON, HUGHES AND FALCONER v. [K.B.D.]	869
NOTTINGHAM CORPORATION, BOND v. [CH.D.]	669
OLD GATE ESTATES, LTD. v. TOPPLIS & HARDING & RUSSELL [K.B.D.]	209
OLYMPIA (LIVERPOOL), LTD., MOSS' EMPIRES, LTD. v. [H.L.]	460
ONESIMUS DOREY & SONS, LTD. v. HEADLEY'S WHARF LTD., & ASHBY, (WM.), LTD. [C.A.]	23
OSBORNE, BOMFORD v. [K.B.D.]	259
OWENS v. SCOTT (THOMAS) & SONS (BAKERS), LTD., AND WASTALL [K.B.D. LIVERPOOL SUMMER ASSIZES]	663
OXFORD, THE MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF, & FOX (C. R.), URBAN HOUSING CO., LTD. v. [CH.D.]	839
PAINE & CO., LTD. v. ST. NEOTS GAS & COKE CO. [C.A.]	812
PAPADIMITRIOU v. HENDERSON [K.B.D.]	908
PARDESS CO-OPERATIVE SOCIETY OF ORANGE GROWERS (ESTABLISHED 1900), LTD., BROOME v. [K.B.D.]	978
PARDY v. PARDY [H.L.]	779
PARKINSON v. PARKINSON [DIV.]	108
PAYNE, <i>Re</i> , POPLLETT v. A.-G. [CH.D.]	875

	PAGE
PEARSON v. WANDSWORTH STADIUM, LTD. [K.B.D. DIVL CT.]	93
PEOPLE OF THE STATE OF NEW YORK v. PHILLIPS, HEIRS OF [P.C.]	952
PERKINS v. HUGH STEVENSON & SONS, LTD. [C.A.]	697
PERRY v. ST. HELENS LAND AND CONSTRUCTION CO., LTD. [C.A.]	113
PHILLIPS, HEIRS OF, PEOPLE OF THE STATE OF NEW YORK v. [P.C.]	952
PHILLIPS, RYNOLDS v. [C.A.]	678
PICKUP, TUNNICLIFFE v. [K.B.D. DIVL CT.]	297
POPLETT v. A.-G., <i>Re</i> PAYNE [CH.D.]	875
POSTMASTER-GENERAL, LUCAS v. [C.A.]	660
POTTS, HICKMAN v. [C.A.]	794
POWELL DUFFRYN ASSOCIATED COLLIERIES, LTD., CASWELL v. [H.L.]	722
PRATT v. PRATT [H.L.]	437
PRICE & PIERCE, LTD., ANGFAITYGS A/B	
HALEDAN v. [C.A.]	672
PROVENDER MILLERS (WINCHESTER), LTD. v. SOUTHAMPTON COUNTY COUNCIL [CH.D.]	882
PUBLIC TRUSTEE v. BROWN, <i>Re</i> BROWN'S SETTLEMENT [CH.D.]	391
PUBLIC TRUSTEE, WALKER v., <i>Re</i> WALKER [CH.D.]	902
R. v. BRADFORD LICENSING JJ., <i>Ex parte</i> ILLINGWORTH [C.A.]	106
R., BUTLER v. [P.C.]	121
R., CANADA RICE MILLS, LTD. v. [P.C.]	991
R. v. TOYNBEE HALL JUVENILE COURT JJ., <i>Ex parte</i> JOSEPH [K.B.D. DIVL CT.]	16
RADCLIFFE (W. I.) S.S. CO., LTD., AND WYNNSTAY S.S. CO., LTD. v. EXPORTKHEB OF MOSCOW, THE LLANISHEN [K.B.D.]	528
REARDON SMITH LINES, LTD. v. BLACK SEA AND BALTIC GENERAL INSURANCE CO., LTD., THE INDIAN CITY [H.L.]	444
REGIER v. CAMPBELL-STUART [CH.D.]	235
RIALL, <i>Re</i> , WESTMINSTER BANK, LTD. v. HARRISON [CH.D.]	657
RIPON (HIGHFIELD) HOUSING ORDER, 1938, <i>Re</i> , WHITE AND COLLINS, APPLICATIONS OF, [C.A.]	548
ROAD, BUSH, BEACH & GENT, LTD. v. [K.B.D.]	302
ROCHDALE CANAL CO., ATTORNEY-GENERAL (AT THE RELATION OF) v. ROCHDALE CORPORATION v. [C.A.]	57
ROCHDALE CORPORATION (ATTORNEY-GENERAL AT THE RELATION OF) v. ROCHDALE CANAL CO. [C.A.]	57
ROYAL EXCHANGE ASSURANCE, WELCH v. [K.B.D.]	305
RUSSELL v. MACGREGOR, <i>Re</i> DARBY [C.A.]	6
RYNOLDS v. PHILLIPS [C.A.]	678
ST. HELENS LAND AND CONSTRUCTION CO., LTD., PERRY v. [C.A.]	113
ST. LUKE, BROMLEY COMMON (VICAR AND CHURCHWARDENS) v. CAWSTON, <i>Re</i> CAWSTON'S CONVEYANCE [CH.D.]	1
ST. NEOTS GAS & COKE CO., PAINE & CO., LTD. v. [C.A.]	812
SCHRODER (BARON), BATTY v. [K.B.D.]	299
SCHUBERT, DAPONTE v. [CH.D.]	495
SCOTT (THOMAS) & SONS (BAKERS), LTD., AND WASTALL, OWENS v. [K.B.D. LIVERPOOL SUMMER ASSIZES]	663
SECRETARY OF STATE, HARI CHAND v. [P.C.]	707
SHACKLOCK v. ETHORPE, LTD. [H.L.]	372
SHARPE, LYODS BANK, LTD. v., <i>Re</i> DE CHASSIRON [CH.D.]	321
SHERRATT, MAYER & v. CO-OPERATIVE INSURANCE SOCIETY, LTD. [C.A.]	158
SHOOSMITH, GATTI v. [C.A.]	916
SKINNER v. ATTORNEY-GENERAL, <i>Re</i> WHITE [H.L.]	787
SMITH v. HARRIS [C.A.]	960
SMITHERS, <i>Re</i> , WATTS v. SMITHERS [CH.D.]	689
SMYTH (ROSS T.) & CO., LTD., BAILEY (T. D.), SON & CO. AND, <i>Re</i> AN ARBITRATION BETWEEN [C.A.]	175
SNELL, STEPHENS v. [CH.D.]	622
SOLOSIGNS, LTD., TWICKENHAM CORPORATION v. [K.B.D. DIVL CT.]	246
SOUTHAMPTON COUNTY COUNCIL, PROVENDER MILLERS (WINCHESTER), LTD. v. [CH.D.]	882
SPENCE v. CRAWFORD [H.L.]	271
SPIRA v. SPIRA [C.A.]	924
STEPHENS v. SNELL [CH.D.]	622

	PAGE
STEVENS v. TIRARD [K.B.D.] .. .	154
STEVENSON, HUGH, & SONS, LTD., PERKINS v. [C.A.] .. .	697
STONE (J. & F.), LTD., WHITE v. [C.A.] .. .	507
SUNDERLAND GAS CO., WEARMOUTH COAL CO., LTD. AND, HANSON v. [C.A.] .. .	47
SUNLEY (B.) & CO., LTD. v. CUNARD WHITE STAR, LTD. [K.B.D.] .. .	641
SWANWICK HOUSE, PRESTBURY, Re [CH.D.] .. .	531
SWETTENHAM v. SWETTENHAM [Div.] .. .	989
SWINDELL, VIGERS (A.) SONS & CO., LTD. v. [K.B.D.] .. .	590
TAYLOR v. LIVERPOOL CORPORATION [K.B.D. LIVERPOOL SUMMER ASSIZES] .. .	329
TERRY v. TERRY [Div.] .. .	546
TILLARD, LLOYDS BANK, LTD. v., Re BROOKS' SETTLEMENT TRUSTS [CH.D.] .. .	920
TILLEY v. WESTER WEMYSS, Re WESTER WEMYSS [C.A.] .. .	746
TIRARD, STEVENS v. [K.B.D.] .. .	154
TOPLIS & HARDING & RUSSELL, OLD GATE ESTATES, LTD. v. [K.B.D.] .. .	209
TOYNBEE HALL JUVENILE COURT JJ., R. v., Ex parte JOSEPH [K.B.D. DIVL. CT.] .. .	16
TRIBUNE PRESS, LAHORE (TRUSTEES) v. INCOME TAX COMMISSIONER, PUNJAB, LAHORE [P.C.] .. .	469
TRIST, DRAPER v. [C.A.] .. .	513
TRIVANDRUM DISTRICT MAGISTRATE, MATTHEN v. [P.C.] .. .	356
TUNNICLIFFE v. PICKUP [K.B.D. DIVL. CT.] .. .	297
TURK GEMI KURTAMA v. ITHAKA (OWNERS), THE ITHAKA [C.A.] .. .	630
TWICKENHAM CORPORATION v. SOLOSIGNS, LTD. [K.B.D. DIVL. CT.] .. .	246
UNDERWOOD v. UNDERWOOD AND HAIGH (POCOCK SHOWING CAUSE) [Div.] .. .	1001
UNGARISCHE BAUMWOLLE INDUSTRIE ACTIENGESellschaft AND HUNGARIAN GENERAL CREDIT-BANK, KLEINWORT, SONS & CO. v. [C.A.] .. .	38
UNION CINEMAS, LTD., ADAMS v. [C.A.] .. .	136
UNITED DAIRIES (LONDON), LTD., ALDHAM v. [K.B.D.] .. .	478
UNSWORTH, BURKE AND, v. ELDER DEMPSTER LINES, LTD. [K.B.D. LIVERPOOL SPRING ASSIZES] .. .	339
URBAN HOUSING CO., LTD. v. THE MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF OXFORD & FOX (C. R.) [CH.D.] .. .	839
VERRALL, WAY & WALLER, LTD. v. [K.B.D.] .. .	533

	PAGE
VIGERS (A.) SONS & CO., LTD. v. SWINDELL [K.B.D.] .. .	590
WALKER, Re, PUBLIC TRUSTEE v. WALKER [CH.D.] .. .	902
WALSALL WOOD COLLIERY CO., LTD.'S APPLICATION [R.Y. AND CAN. COM.] .. .	864
WANDSWORTH STADIUM, LTD., PEARSON v. [K.B.D. DIVL. CT.] .. .	93
WASTALL, SCOTT (THOMAS) & SONS (BAKERS), LTD. AND, OWENS v. [K.B.D. LIVERPOOL SUMMER ASSIZES] .. .	663
WATKINS v. INLAND REVENUE COMMISSIONERS [K.B.D.] .. .	165
WATTS v. SMITHERS, Re SMITHERS [CH.D.] .. .	689
WAY & WALLER, LTD. v. VERRALL [K.B.D.] .. .	533
WEARMOUTH COAL CO., LTD., AND SUNDERLAND GAS CO., HANSON v. [C.A.] .. .	47
WEIGEL LEYGONIE & CO., LTD., WIRTH v. [K.B.D.] .. .	712
WELCH v. ROYAL EXCHANGE ASSURANCE [K.B.D.] .. .	305
WEST HAM COUNTY BOROUGH COUNCIL, COMPTON v. [CH.D.] .. .	193
WESTER WEMYSS, Re, TILLEY v. WESTER WEMYSS [C.A.] .. .	746
WESTHOUGHTON COAL AND CANNEL CO., LTD. v. WIGAN COAL CORPORATION, LTD. [C.A.] .. .	579
WESTMINSTER BANK, LTD. v. FARLEY [H.L.] .. .	491
WESTMINSTER BANK, LTD., GIBBONS v. [K.B.D.] .. .	577
WESTMINSTER BANK, LTD., v. HARRISON, Re RIALI [CH.D.] .. .	657
WHITE AND COLLINS, APPLICATIONS OF, Re RIPON (HIGHFIELD) HOUSING ORDER, 1938 [C.A.] .. .	548
WHITE, Re, SKINNER v. ATTORNEY-GENERAL [H.L.] .. .	787
WHITE v. STONE (J. & F.), LTD. [C.A.] .. .	507
WHITTAKER v. WHITTAKER [Div. DIVL. CT.] .. .	833
WIGAN COAL CORPORATION, LTD., WESTHOUGHTON COAL AND CANNEL CO., LTD., v. [C.A.] .. .	579
WILLIAMS v. WILLIAMS [C.A.] .. .	825
WIRTH v. WEIGEL LEYGONIE & CO., LTD. [K.B.D.] .. .	712
WOLSON, Re, WOLSON v. JACKSON [CH.D.] .. .	852
WOLSTANTON, LTD., AND DUCHY OF LANCASTER, NEWCASTLE-UNDER-LYME BOROUGH COUNCIL v. [CH.D. & C.A.] .. .	190, 597
WOLVERHAMPTON CORRUGATED IRON CO., LTD., HILL v. [C.A.] .. .	72
WYNNSTAY S.S. CO., LTD., RADCLIFFE (W. I.) S.S. CO., LTD., AND, v. EXPORTKLEB OF MOSCOW, THE LLANISHEN [K.B.D.] .. .	528

CASES REFERRED TO

	PAGES
Abel v. Estler Brothers (1919), 89 L.J.K.B. 164; 34 Digest 374, 3034; 121 L.T. 299; 12 B.W.C.C. 184	35
Adam v. Newbigging (1888), 13 App. Cas. 308; 35 Digest 77, 754; 57 L.J.Ch. 1066; 59 L.T. 267; <i>affg.</i> (1886), 34 Ch.D. 582	272, 279, 289
Adam v. Ward, [1917] A.C. 309; 32 Digest 129, 1608; 86 L.J.K.B. 849; 117 L.T. 34; <i>affg.</i> (1915), 31 T.L.R. 299	507, 508, 509, 510
Addie (R.) & Sons (Collieries) v. Dumbreck, [1929] A.C. 358; Digest Supp.; 98 L.J.P.C. 119; 140 L.T. 650	614, 618, 620
Addis v. Gramophone Co., Ltd., [1909] A.C. 488; 17 Digest 78, 1; 78 L.J.K.B. 1122; 101 L.T. 466	578, 579
Admiralty Comrs. v. Chekiang (S.S.), [1926] A.C. 637; 41 Digest 805, 6663; 95 L.J.P. 119; <i>sub nom.</i> The Chekiang, 135 L.T. 450	641, 642, 643, 648, 653
Admiralty Comrs. v. S.S. Volute, [1922] 1 A.C. 129; 41 Digest 780, 6417; 91 L.J.P. 38; 126 L.T. 425	960, 965
Admiralty Comrs. v. Susquehanna (Owners), The Susquehanna, [1926] A.C. 655; 41 Digest 802, 6624; 95 L.J.P. 128; 135 L.T. 456	642, 643, 648, 649
Aldred's Case (1610), 9 Co. Rep. 57 b; 19 Digest 133, 904	813, 824
Alexander & Co. v. Henry & Co., Mitchell Henry & Waller & Co. (1895), 12 R.P.C. 360; 43 Digest 237, 826	514, 515
Allen v. Jackson (1875), 1 Ch.D. 399; 44 Digest 459, 2795; 45 L.J.Ch. 310; 33 L.T. 713	148, 149, 150, 151
Allen v. Quebec Warehouse Co. (1886), 12 App. Cas. 101; 16 Digest 163, 660; 56 L.J.P.C. 6; 56 L.T. 30	953, 954
Allhusen v. Whittell (1867), L.R. 4 Eq. 295; 40 Digest 657, 1958; 36 L.J.Ch. 929; 16 L.T. 695	6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16
Alpha Co., Ltd., <i>Re</i> , Ward v. Alpha Co., [1903] 1 Ch. 203; 10 Digest 809, 5162; 72 L.J.Ch. 91; 87 L.T. 646	747, 760
Altham's Case (1610), 8 Co. Rep. 150 b; 1 Digest 8, 50	795
Ancona v. Waddell (1878), 10 Ch.D. 157; 5 Digest 669, 5935; 48 L.J.Ch. 116; 40 L.T. 31	902, 906
Anderson v. Calvert (1908), 24 T.L.R. 399; 32 Digest 165, 2014	507, 508
Anderson v. Morice (1875), L.R. 10 C.P. 609; 29 Digest 98, 557; 44 L.J.C.P. 341; 33 L.T. 355; <i>affd.</i> (1876), 1 App. Cas. 713	64, 65
Anglo-Persian Oil Co., Ltd. v. Dale, [1932] 1 K.B. 124; Digest Supp.; 100 L.J.K.B. 504; 145 L.T. 629; 16 Tax Cas. 253	303, 304
Anslow v. Cannock Chase Colliery Co., Ltd., [1909] A.C. 435; 34 Digest 422, 3431; 73 L.J.K.B. 679; 100 L.T. 786; 2 B.W.C.C. 365	73
Armstrong v. Eldridge (1791), 3 Bro. C.C. 215; 44 Digest 1212, 10481	658
Ashton Gas Co. v. A.-G., [1906] A.C. 10; 10 Digest 1162, 8225; 75 L.J.Ch. 1; 93 L.T. 676; <i>affg.</i> S.C. <i>sub nom.</i> A.-G. v. Ashton Gas Co., [1904] 2 Ch. 621	762, 776, 777
Astrophe v. Astrophe (1859), 29 L.J.P. & M. 27; 27 Digest 319, 2974	826
Atthol Viscount, The (1934), 39 Com. Cas. 227	169, 170
A.-G. v. Horner (1884), 14 Q.B.D. 245; 42 Digest 743, 1679; 54 L.J.Q.B. 227; <i>on appeal</i> (1885), 11 App. Cas. 66	669, 671
A.-G. v. Jackson, [1932] A.C. 365; Digest Supp.; <i>sub nom.</i> <i>Re</i> Cockell, A.-G. v. Jackson, 101 L.J.Ch. 186; <i>sub nom.</i> <i>Re</i> Cockell, Jackson v. A.-G., 146 L.T. 450; 16 Tax Cas. 681	747, 750, 753, 756
A.-G. v. Liverpool Corpn., [1938] Ch. 76; [1937] 3 All E.R. 691; Digest Supp.; 106 L.J.Ch. 296; 157 L.T. 214	58, 59
A.-G. v. National Provincial & Union Bank of England, [1924] A.C. 262; Digest Supp.; <i>sub nom.</i> <i>Re</i> Tetley, A.-G. v. National Provincial & Union Bank of England, 93 L.J.Ch. 231; 131 L.T. 34; <i>affg.</i> S.C. <i>sub nom.</i> <i>Re</i> Tetley, National Provincial & Union Bank of England, Ltd. v. Tetley, [1923] 1 Ch. 258	471, 476, 477
A.-G. v. Shadwell, [1910] 1 Ch. 92; 8 Digest 334, 1204; 79 L.J.Ch. 113; 101 L.T. 630	1, 2
A.-G. v. Watson, [1917] 2 K.B. 427; 21 Digest 10, 37; 86 L.J.K.B. 1034; 117 L.T. 187	788, 789
A.-G. and General Council of Medical Education of United Kingdom Registration v. Barrett, Proprietaries, Ltd. (1932), 50 R.P.C. 45; Digest Supp.	228, 229
A.-G. for British Columbia v. A.-G. for Canada, <i>Re</i> Criminal Code, sect. 498A, [1937] A.C. 368; Digest Supp.; 106 L.J.P.C. 34; 156 L.T. 308	99, 100
A.-G. for Dominion of Canada v. A.-G. for Provinces of Ontario, Quebec and Nova Scotia, A.-G. for Province of Ontario v. A.-G. for Dominion of Canada, A.-G. for Provinces of Quebec and Nova Scotia v. A.-G. for Dominion of Canada, [1898] A.C. 700; 17 Digest 431, 119; 67 L.J.P.C. 90; 78 L.T. 697	99, 100
A.-G. for Ontario v. A.-G. for the Dominion, [1896] A.C. 348; 17 Digest 430, 106; 65 L.J.P.C. 26; 74 L.T. 533	99, 100
Attwood v. Gibbons (1927), Unreported	495, 496, 498, 499, 500
Bacon, <i>Re</i> , Grissel v. Leathes (1893), 62 L.J.Ch. 445; 40 Digest 693, 2292; 68 L.T. 522	7, 10
Bailey v. Williamson (1873), L.R. 8 Q.B. 118; 36 Digest 252, 43; 42 L.J.M.C. 49; 28 L.T. 28	246, 248
Baker, <i>Re</i> , Baker v. Baker, [1904] 1 Ch. 157; 44 Digest 1232, 10656; 73 L.J.Ch. 172; 89 L.T. 742	501, 502
Baker v. Faber, [1908] W.N. 9; Digest, Practice, 806, 3690	917, 918, 919
Baker v. Sutton (1836), 1 Keen, 224; 8 Digest 298, 750; 5 L.J.Ch. 264	491, 492
Baker v. White (1690), 2 Vern. 215; 12 Digest 249, 2030	148, 150, 151

	PAGES
Ballard v. Tomlinson (1885), 29 Ch.D. 115; 44 Digest 5, 7; 54 L.J.Ch. 454; 52 L.T. 942; <i>revg.</i> (1884), 26 Ch.D. 194	813, 816
Bampton (Ronald) & Partners v. Garner (D.) & Sons, Ltd., [1937] 3 All E.R. 438; Digest Supp.	628
Bank Line, Ltd. v. Capel (A.) & Co., [1919] A.C. 435; 12 Digest 391, 3198; 88 L.J.K.B. 211; 120 L.T. 129	314, 316, 317, 318
Bank of New South Wales v. Milvain (1884), 10 V.L.R. 3; 3 Digest 220, <i>case w</i>	578, 579
Barclay v. Cousins (1802), 2 East, 544; 29 Digest 102, 598	909, 910
Barnardo's Homes v. Income Tax Special Comrs., [1921] 2 A.C. 1; 28 Digest 84, 483; 90 L.J.K.B. 545; 125 L.T. 250; <i>sub nom.</i> R. v. Income Tax Asses. Special Purposes Comrs., <i>Ex p.</i> Dr. Barnardo's Homes National Incorporated Asscn., 7 Tax Cas. 646	291, 295
Barton v. Fincham, [1921] 2 K.B. 291; 31 Digest 579, 7280; 90 L.J.K.B. 451; 124 L.T. 495	636, 637
Bassett, <i>Re</i> , <i>Ex p.</i> Lewis, [1896] 1 Q.B. 219; 4 Digest 524, 4790; 65 L.J.Q.B. 144; 73 L.T. 736	306, 307
Bateson v. Green (1793), 5 Term Rep. 411; 11 Digest 42, 581	598, 600
Batting v. Bristol & Exeter Ry. Co. (1860), 3 L.T. 665; 14 Digest 51, 176	297, 298
Beale v. Macgregor (1886), 2 T.L.R. 311; Digest, Pleading, 160, 1424	113, 114
Bearn, The, [1906] P. 48; 41 Digest 980, 8690; 75 L.J.P. 94; 94 L.T. 265	24, 28, 29
Beauharnois Light, Heat & Power Co. v. Hydro-Electric Power Commission, [1937] 3 D.L.R. 458; Digest Supp.	99, 100
Bier v. Walker (1877), 46 L.J.Q.B. 677; 39 Digest 442, 714; 37 L.T. 278	979, 984, 985
Bell v. Carstairs (1811), 14 East, 374; 29 Digest 196, 1561	909
Bennett v. Bennett, [1939] 2 All E.R. 387; Digest Supp.	825, 826, 830, 831
Bennett v. Whitehead (L. & W.), Ltd., [1926] 2 K.B. 380; 34 Digest 492, 4068; 135 L.T. 329; 19 B.W.C.C. 133	340, 343, 689, 700, 701, 702, 705
Bird v. Holbrook (1828), 4 Bing. 628; 36 Digest 94, 629; 6 L.J.O.S.C.P. 146	614, 620
Blackett v. Bradley (1862), 1 B. & S. 940; 34 Digest 711, 963; 31 L.J.Q.B. 65; 5 L.T. 832	191, 192, 193, 598, 600, 601
Blackmore v. White, [1899] 1 Q.B. 293; 44 Digest 286, 1187; 68 L.J.Q.B. 180; 80 L.T. 79	7, 8
Blackpool Corp'n. v. Starr Estate Co., [1922] 1 A.C. 27; 42 Digest 770, 1974; 91 L.J.K.B. 202; 126 L.T. 258	864, 868
Blackwell v. Blackwell, [1929] A.C. 318; Digest Supp.; 98 L.J.Ch. 251; 140 L.T. 444	580, 587, 588
Blake, Jones v. Blake, <i>Re</i> , (1885), 29 Ch.D. 913; 24 Digest 782, 8135; 54 L.J.Ch. 880; 53 L.T. 302	747, 749, 750
Blatchford v. Staddon & Founds, [1927] A.C. 461; 34 Digest 465, 3810; 96 L.J.K.B. 608; 137 L.T. 257; 20 B.W.C.C. 391	159
Blow, <i>Re</i> , St. Bartholomew's Hospital (Governors) v. Cambden, [1914] 1 Ch. 233; 24 Digest 672, 6988; 83 L.J.Ch. 185; 109 L.T. 913	269, 271
Boake (A.), Roberts & Co., Ltd. v. Wayland (W. A.) & Co., <i>Re</i> Boake (A.), Roberts & Co., Ltd.'s, Trade Marks (1909), 26 R.P.C. 251; 43 Digest 227, 713	228, 229
Bonanza Creek Gold Mining Co., Ltd. v. R., [1916] 1 A.C. 566; 17 Digest 441, 171; 85 L.J.P.C. 114; 114 L.T. 765	99, 100
Bonar Law Memorial Trust v. Inland Revenue Comrs. (1933), 49 T.L.R. 220; Digest Supp.; 17 Tax Cas. 508	471, 476, 477
Borthwick v. Evening Post (1888), 37 Ch.D. 449; 13 Digest 223, 616; 57 L.J.Ch. 406; 58 L.T. 252	228, 229
Bouch v. Sproule (1887), 12 App. Cas. 385; 9 Digest 176, 1124; 56 L.J.Ch. 1037; 57 L.T. 345; <i>revg.</i> S.C. <i>sub nom.</i> <i>Re</i> Bouch, Sproule v. Bouch (1885), 29 Ch.D. 635	310, 312
Boulton v. Crowther (1824), 2 B. & C. 703; 38 Digest 28, 157; 2 L.J.O.S.K.B. 139	883, 886
Bourke v. Butterfield & Lewis, Ltd. (1927) 38 C.L.R. 354; Digest Supp. 724, 729, 738, 743, 745	621
Bowman, <i>Re</i> , South Shields (Thames Street) Clearance Order, 1931, [1932] 2 T.B. 621; Digest Supp.; 101 L.J.K.B. 798; 147 L.T. 150	549, 550, 554, 560, 561
Bowman v. Secular Society, Ltd., [1917] A.C. 406; 8 Digest 265, 270; 86 L.J.Ch. 568; 117 L.T. 161	470, 476
Bowron v. Bowron, [1925] P. 187; 27 Digest 561, 6168; 94 L.J.P. 33; 132 L.T. 773	825, 828
Boyd & Forrest v. Glasgow & South Western Ry. Co., [1915] S.C. (H.L.) 20; 35 Digest 53, <i>case 473 iii</i>	272, 283
Brackenborough v. Thorsby (1869), 19 L.T. 692; 26 Digest 416, 1356	297, 298
Bradbury v. English Sewing Cotton Co., [1923] A.C. 744; 28 Digest 81, 445; 92 L.J.K.B. 736; 129 L.T. 546; 8 Tax Cas. 481	762, 777, 803, 808
Bradford v. Dawson, [1897] 1 Q.B. 307; 25 Digest 445, 386; 66 L.J.Q.B. 191; 76 L.T. 54	400, 425
Bradford Corp'n. v. Myers, [1916] 1 A.C. 242; 38 Digest 110, 784; 85 L.J.K.B. 146; 114 L.T. 83; <i>affg.</i> [1915] 1 K.B. 417	194, 195, 199
Bradley v. Wallaces, Ltd., [1913] 3 K.B. 629; 2 Digest 236, 236; 82 L.J.K.B. 1074; 109 L.T. 281; 6 B.W.C.C. 706	479, 482
Branding v. Barrington (1827), 6 B. & C. 467; 18 Digest 344, 502	795, 796, 801
Brammigan v. Robinson, [1892] 1 Q.B. 344; 34 Digest 224, 1880; 61 L.J.Q.B. 202; 66 L.T. 647	58, 59
Briggs v. Dryden (T.) & Sons, Talbot v. Vickers, Ltd., [1925] 2 K.B. 667; 34 Digest 458, 3752; 95 L.J.K.B. 275; 133 L.T. 439; 18 B.W.C.C. 163	73
Brighton College v. Marriott, [1926] A.C. 192; 28 Digest 24, 127; 134 L.T. 417	470, 473
Brighton Marine Palace & Pier, Ltd. v. Woodhouse, [1893] 2 Ch. 486; Digest, Pleading, 151, 1342; 63 L.J.Ch. 697; 68 L.T. 669	854
British Cast Plate Manufacturers (Governor & Co.) v. Meredith (1792), 4 Term Rep. 794; 38 Digest 10, 43	883, 886
British & Foreign Marine Insurance Co. v. Gaunt, [1921] 2 A.C. 41; 29 Digest 95, 527; 90 L.J.K.B. 801; 125 L.T. 491	858, 861
British Insulated & Helsby Cables v. Atherton, [1926] A.C. 205; 28 Digest 52, 264; 95 L.J.K.B. 336; 134 L.T. 289; <i>affg.</i> S.C. <i>sub nom.</i> Atherton v. British Insulated & Helsby Cables, Ltd., [1925] 1 K.B. 421	303, 304
Britton v. Great Western Cotton Co. (1872), L.R. 7 Exch. 130; 36 Digest 98, 651; 41 L.J.Ex. 99; 27 L.T. 125	724, 744
Broadbent v. Wilks (1742), Willes, 360; 17 Digest 14, 117; <i>affd. sub nom.</i> Wilkes v. Broadbent (1745), 2 Stra. 1224	598, 600
Brooks v. Brimcome, [1937] 2 K.B. 675; [1937] 2 All E.R. 637; Digest Supp.; 157 L.T. 417	679

	PAGES
Brookes v. Brookes (1858), 1 Sw. & Tr. 326; 27 Digest 315, 2929; 28 L.J.P. & M. 38; 32 L.T.O.S. 228	826
Brown v. Smith (1878), 10 Ch.D. 377; 28 Digest 255, 1107; 40 L.T. 374	154, 157
Buclench (Duke) v. Wakefield (1870), L.R. 4 H.L. 377; 34 Digest 704, 927; 39 L.J.Ch. 441; 23 L.T. 102	598, 600
Buckingham v. Surrey & Hants Canal Co. (1882), 46 L.T. 885; 34 Digest 64, 392	137, 142
Bunbury v. Fuller (1853), 9 Exch. 111; 19 Digest 482, 3416; 23 L.J.Ex. 29; 23 L.T.O.S. 131	549, 550, 559, 560, 561
Burgess v. Burgess (1853), 3 De G.M. & G. 896; 43 Digest 286, 1155; 22 L.J.Ch. 675; 21 L.T.O.S. 53	228, 233, 513, 517
Burke & Unsworth v. Elder Dempster Lines, Ltd., [1939] 3 All E.R. 339; Digest Supp.	698, 699, 700
Butler, Re, Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936, [1938] 2 K.B. 210; [1938] 2 All E.R. 279; Digest Supp.; 107 L.J.K.B. 419; sub nom. Butler v. Minister of Health, 159 L.T. 47	549, 550
Butterfield v. Forrester (1809), 11 East, 60; 36 Digest 112, 745	724, 730
C. L. v. C. F. W., [1928] P. 223; Digest Supp.; 97 L.J.P. 138	989, 990
Caledonian Heritable Estates, Ltd. v. Methven, [1927] S.C. 39; Digest Supp.	636, 637, 639
Calico Printers' Assn., Ltd. v. Barclays Bank (1931), 145 L.T. 51; Digest Supp.	127, 129, 132, 136
Calye's Case (1584), 8 Co. Rep. 32 a; 29 Digest 2, 1	372, 375
Carlyon v. Lovering (1857), 1 H. & N. 784; 17 Digest 15, 126; 26 L.J.Ex. 251; 28 L.T.O.S. 356	598, 600
Cashill v. Wright (1856), 6 E. & B. 891; 29 Digest 14, 178; 27 L.T.O.S. 283	372, 374
Cassidy v. Daily Mirror Newspapers, [1929] 2 K.B. 331; Digest Supp.; 98 L.J.K.B. 595; 141 L.T. 404	264, 263
Caswell v. Worth (1856), 5 E. & B. 849; 36 Digest 111, 735; 25 L.J.Q.B. 121; 26 L.T.O.S. 216	724, 738, 743
Cato v. Thompson (1882), 9 Q.B.D. 616; 40 Digest 138, 1090; 47 L.T. 491	864, 868
Cavalier v. Pope, [1906] A.C. 428; 31 Digest 348, 4900; 75 L.J.K.B. 609; 95 L.T. 65	329, 330, 334, 335, 337, 333
Chambers, Re (1847), 11 I.Eq.R. 518; 37 Digest 517, case n	392, 397
Chambers v. Donaldson (1809), 11 East 65; 43 Digest 408, 303	813, 814
Chapman v. Chapman & Thomas, [1938] P. 93; [1938] 1 All E.R. 635; Digest Supp.; 107 L.J.P. 30; 158 L.T. 424	947, 951
Chapman v. Gibson (1791), 3 Bro.C.C. 229; 37 Digest 501, 947	1, 2
Charing Cross, West End & City Electricity Supply Co. v. London Hydraulic Power Co., [1913] 3 K.B. 442; 38 Digest 50, 289; 83 L.J.K.B. 116; 109 L.T. 635; affd., [1914] 3 K.B. 772	48, 49, 55
Chasemore v. Richards (1859), 7 H.L.Cas. 349; 44 Digest 34, 252; 29 L.J.Ex. 81; 33 L.T.O.S. 350	813, 816
Cheater v. Cater, [1918] 1 K.B. 247; 2 Digest 65, 413; 87 L.J.K.B. 449; 118 L.T. 203	329, 330, 334, 337, 338
Chibbett v. Robinson (J.) & Sons (1924), 132 L.T. 26; 28 Digest 19, 98; 9 Tax Cas. 48	303, 304, 305
Chisholm v. Doukton (1889), 22 Q.B.D. 736; 14 Digest 32, 32; 58 L.J.M.C. 133; 60 L.T. 966	297, 298
Chisum v. Dewes (1828), 5 Russ. 29; 23 Digest 373, 4426	747, 748
Cholmeley School, Highgate (Wardens, Etc.) v. Sewell, [1894] 2 Q.B. 906; 31 Digest 495, 6420; 63 L.J.Q.B. 820; 71 L.T. 88	889, 890
Churcher v. Martin (1889), 42 Ch.D. 312; 8 Digest 354, 1510; 58 L.J.Ch. 586; 61 L.T. 113	2
City of Peking (The) v. Compagnie des Messageries Maritimes, The City of Peking (1888), 14 App. Cas. 40; 41 Digest 702, 5373; 58 L.J.P.C. 64; 61 L.T. 136; subsequent proceedings (1890), 15 App. Cas. 438	641, 648
Clack v. Clack, [1935] 2 K.B. 109; Digest Supp.; 104 L.J.K.B. 271; 152 L.T. 588	166, 167
Clapp v. Carter (1914), 110 L.T. 491; 34 Digest 363, 2941; 7 B.W.C.C. 28	35
Clark v. Chambers (1878), 3 Q.B.D. 327; 36 Digest 22, 103; 47 L.J.Q.B. 427; 38 L.T. 454	614, 621
Clark v. Clark (No. 2), [1939] P. 257; [1939] 2 All E.R. 392; Digest Supp.	780, 781
Clarke v. Lewisham Borough Council (1902), 67 J.P. 195; 38 Digest 109, 781	194, 195, 199
Clore v. Theatrical Properties, Ltd., & Westby & Co., Ltd., [1936] 3 All E.R. 483; Digest Supp.	813, 814
Clydebank Engineering & Shipbuilding Co. v. Yzquierdo y Castaneda (Don Jose Ramos), [1905] A.C. 6; 12 Digest 434, 3514; 74 L.J.P.C. 1; 91 L.T. 666	641, 648, 650, 651
Cochran & Son v. Leckie's Trustee (1906), 8 F. (Ct. of Sess.) 975; 3 Digest 105, case 311 ii	64, 65
Codling v. Mowlem (J.) & Co., Ltd., [1914] 3 K.B. 1055; 34 Digest 491, 4067; 83 L.J.K.B. 1727; 111 L.T. 1086; 7 B.W.C.C. 786; affd., [1914] 2 K.B. 61	340, 343, 352, 698, 699, 701
Cohen v. Cohen, [1939] 2 All E.R. 596; Digest Supp.	947, 951
Cole v. Meek (1864), 15 C.B.N.S. 795; 41 Digest 343, 1942; 33 L.J.C.P. 183	673, 674
Coles v. Ravenshear, Re, [1907] 1 K.B. 1; Digest, Practice, 806, 3688; 76 L.J.K.B. 27; 95 L.T. 750	917, 918, 919
Coltress Iron Co., Ltd. v. Sharp, [1938] A.C. 90; [1937] 3 All E.R. 593; 106 L.J.P.C. 142; 157 L.T. 394	724, 745
Comptoir Commercial Anversois & Power, Son & Co., Re, [1920] 1 K.B. 868; 12 Digest 396, 3278; 89 L.J.K.B. 849; 122 L.T. 567	314, 316, 979, 981, 982
Consett Industrial & Provident Society, Ltd. v. Consett Iron Co., [1922] 2 Ch. 135; Digest Supp.; 91 L.J.Ch. 630; 127 L.T. 383	191, 192, 598, 600
Cooke v. Midland Great Western Ry. of Ireland, [1909] A.C. 229; 36 Digest 70, 450; 78 L.J.P.C. 76; 100 L.T. 626	614, 617, 619, 620
Cooper v. Wandsworth Board of Works (1863), 14 C.B.N.S. 180; 26 Digest 518, 2202; 32 L.J.C.P. 185; 8 L.T. 278	840, 850
Cotter v. Lyster (1731), 2 P. Wms. 623; 37 Digest 500, 928	1, 2
Cottrell, Re, Buckland v. Beddingfield, [1910] 1 Ch. 402; 39 Digest 126, 195; 79 L.J.Ch. 189; 102 L.T. 157	322, 324, 325, 326
Cox, Re, Public Trustee v. Eve, [1938] Ch. 556; [1938] 1 All E.R. 661; Digest Supp.; 159 L.T. 13	322, 324, 325, 326

	PAGES
Cox v. Burbidge (1863), 13 C.B.N.S. 430; 2 Digest 233, 218; 32 L.J.C.P. 89	478, 482
Cox, McEuen & Co. v. Malcolm & Co., Unreported	169, 173, 174
Crabb v. Crabb (1868), L.R. 1 P. & D. 601; 27 Digest 228, 1992; 37 L.J.P. & M. 42; 18 L.T. 153	780, 781
Craze v. Meyer-Dumore Bottlers Equipment Co., Ltd., [1936] 2 All E.R. 1150; Digest Supp.	724, 744
Crédit Foncier Franco-Canadien v. Ross & A.-G. for Alberta, Netherlands Investment Co. of Canada, Ltd. v. Fife & A.-G. for Alberta, [1937] 2 W.W.R. 353; Digest Supp.; affy. S.C. sub nom. Royal Trust Co. v. A.-G. for Alberta, [1937] 1 D.L.R. 709	99, 100
Crewe v. Crewe (1800), 3 Hag. Ecc. 123; 27 Digest 333, 3133	947, 950
Croft v. London & County Banking Co. (1885), 14 Q.B.D. 347; 31 Digest 483, 6320; 54 L.J.Q.B. 277; 52 L.T. 374	890
Croft v. Lumley (1858), 6 H.L. Cas. 672; 31 Digest 376, 5229; 27 L.J.Q.B. 321; 31 L.T.O.S. 332; affy. (1856), 5 E. & B. 682	340, 349
Crowley v. Cohen (1832), 3 B. & Ad. 478; 29 Digest 103, 609; 1 L.J.K.B. 158	64, 65
Cuckson v. Stones (1858), 1 E. & E. 248; 34 Digest 71, 483; 28 L.J.Q.B. 25; 32 L.T.O.S. 242	194
Cull v. Inland Revenue Comrs., [1939] 3 All E.R. 761; Digest Supp.	803, 805, 806
Cunard v. Antifire, Ltd., [1933] 1 K.B. 551; Digest Supp.; 103 L.J.K.B. 321; 148 L.T. 287	329, 330, 335, 337, 338
Cundy v. Le Cocq (1884), 13 Q.B.D. 207; 30 Digest 86, 667; 53 L.J.M.C. 125; 51 L.T. 265	297, 298
Cuthbert v. Cumming (1885), 11 Exch. 405; 17 Digest 66, 700; 24 L.J. Ex. 310; 25 L.T.O.S. 234	673, 674, 677
Daintrey, Re, Ez p. Holt, [1893] 2 Q.B. 116; 116; 4 Digest 105, 946; 62 L.J.Q.B. 511; 69 L.T. 257	340, 349
D'Auvergne v. Cooper, [1899] W.N. 256; 35 Digest 551, 2805	495, 496, 497, 498, 499
Davenport v. R. (1877), 3 App. Cas. 115; 31 Digest 472, 6195; 47 L.J.P.C. 8; 37 L.T. 727	340, 349, 698, 700
Davenport v. Rylands (1865), L.R. 1 Eq. 302; 43 Digest 237, 829; 35 L.J.Ch. 204; 14 L.T. 53	514, 515
David v. Rees, [1904] 2 K.B. 435; 13 Digest 524, 745; 73 L.J.K.B. 729; 91 L.T. 244	306, 307
Davies v. Huguenin (1863), 1 Hem. & M. 730; 32 Digest 520, 1113; 32 L.J.Ch. 417; 8 L.T. 443	392, 396, 398
Davies v. Mann (1842), 10 M. & W. 546; 36 Digest 113, 751; 12 L.J. Ex. 10	724, 740
De Beeche v. South American Stores, Ltd., and Chilean Stores, Ltd., [1935] A.C. 148; Digest Supp.; 104 L.J.K.B. 101; 152 L.T. 309	39, 40, 42, 44
Deen v. Davies, [1935] 2 K.B. 282; Digest Supp.; 104 L.J.K.B. 540; 153 L.T. 90 478, 481, 854, 856	
Deere (John) Plow Co., Ltd. v. Wharton, [1915] A.C. 330; 17 Digest 431, 117; 84 L.J.P.C. 64; 112 L.T. 183	99, 100
De Forest v. Fulton Fire Insurance Co. (1825), 1 Hall, 84	64, 65, 70
Dennis v. Hick (1935), 19 Tax Cas. 219; Digest Supp.	259, 260, 262, 263
Dennis v. Malcolm, [1934] Ch. 244; Digest Supp.; 103 L.J.Ch. 140; sub nom. Re Cheam Common School, Dennis v. Malcolm, 150 L.T. 394	1, 2, 4
Dennis & Sons, Ltd. v. Good (1918), 88 L.J.K.B. 388; 26 Digest 417, 1361; 120 L.T. 88	297, 298
De Stempel v. Dunkels, [1937] 2 All E.R. 215; Digest Supp.; 156 L.T. 418; varied on appeal, [1938] 1 All E.R. 238; 158 L.T. 85	137, 142
Dew v. United British S.S. Co., Ltd. (1928), 98 L.J.K.B. 88; Digest Supp.; 139 L.T. 628	724, 738, 739, 744
Dickinson v. Shepley, etc., Soverage Board (1904), 68 J.P. 363; 44 Digest 16, 78	813, 814
Dickinson & Son v. Vickers (1931), Estates Gazette, p. 16	534, 543
Digges's Case (1600), 1 Co. Rep. 156 b	392, 397
Dillon, Re, Duffin v. Duffin (1890), 44 Ch.D. 76; 25 Digest 543, 298; 59 L.J.Ch. 420; 62 L.T. 614	682, 685, 687
Dixon v. Rackham (1913), Unreported	1, 2
Dixon v. Smith (1818), 1 Swan. 457; 18 Digest 343, 792	795, 796
Dodworth v. Dale, [1936] 2 K.B. 503; [1936] 2 All E.R. 440; Digest Supp.; 105 L.J.K.B. 586; 155 L.T. 290; 20 Tax Cas. 285	501, 502
Doe d. Goodbehere v. Bevan (1815), 3 M. & S. 353; 5 Digest 953, 7811	148, 153
Donovan v. Union Cartage Co., Ltd., [1933] 2 K.B. 71; Digest Supp.; 102 L.J.K.B. 270; 148 L.T. 333	614, 621
Dower (E. M.) & Co. v. Corrie Maccoll & Sons, Ltd. (1925), 42 T.L.R. 43; 39 Digest 462, 886	169, 170
Drew v. Drew (1888), 13 P.D. 97; 27 Digest 319, 2975; 57 L.J.P. 64; 58 L.T. 923	825, 826, 827, 828, 830, 832
Drummond v. Collins, [1915] A.C. 1011; 28 Digest 80, 441; 84 L.J.K.B. 1690; 113 L.T. 665; 6 Tax Cas. 525	144, 147, 154, 155, 156
Dudley Bros. v. Barnett, [1937] S.C. (Ct. of Sess.) 632	534, 545
Dunne v. Byrne, [1912] A.C. 407; 8 Digest 294, 718; 81 L.J.P.C. 202; 106 L.T. 394	491, 492
Duckworth v. Lee, [1899] 1 I.R. 405; 25 Digest 547, case e	682, 686, 687
Duffield v. Elwes (1827), 1 Bli. N.S. 497; 25 Digest 549, 351	682, 685, 686
Dyson v. Collick (1822), 5 B. & Ald. 600; 43 Digest 388, 132	813, 814
Earl v. Lubbock, [1905] 1 K.B. 253; 36 Digest 63, 403; 74 L.J.K.B. 121; 91 L.T. 830	209, 216
East Freemantle Corpn. v. Annois, [1902] A.C. 213; 38 Digest 28, 158; 71 L.J.P.C. 39; 85 L.T. 732	883, 886
Eaves v. Eaves, [1939] 2 All E.R. 789; Digest Supp.; 161 L.T. 119	780, 781
Ebsworth v. Alliance Marine Insurance Co. (1873), L.R. & C.P. 596; 29 Digest 113, 676; 42 L.J.C.P. 305; 29 L.T. 479; revsd. by consent (1874), 43 L.J.C.P. 394, n.	64, 65, 70
Edelsten v. Edelsten (1863), 1 De G. J. & Sm. 185; 43 Digest 217, 614; 7 L.T. 768	228, 233
Eldridge & Morris v. Taylor, [1931] 2 K.B. 416; Digest Supp.; 100 L.J.K.B. 689; 145 L.T. 499	695, 696
Ellenborough, Re, Towry Law v. Burne, [1903] 1 Ch. 697; 8 Digest 497, 619; 72 L.J.Ch. 218; 87 L.T. 714	921, 923
Ellerbeck Collieries, Ltd. v. Cornhill Insurance Co., Ltd., [1932] 1 K.B. 401; Digest Supp.; 101 L.J.K.B. 117; 146 L.T. 153; 24 B.W.C.C. 376	159
Ellis v. Lottus Iron Co. (1874), L.R. 10 C.P. 10; 2 Digest 227, 183; 44 L.J.C.P. 24; 31 L.T. 483	479, 483

	PAGES
Emery v. Nolloth, [1903] 2 K.B. 264; 14 Digest 31, 31; 72 L.J.K.B. 620; 89 L.T. 100	297, 298
Emerson, Re, Morrill v. Nutty, [1929] 1 Ch. 128; 44 Digest 720, 5696; 98 L.J.Ch. 145; 140 L.T. 217	689, 694
Erlanger v. New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218; 35 Digest 77, 748; 48 L.J.Ch. 73; 39 L.T. 269; affg. (1877), 5 Ch.D. 73	272, 279, 280, 288
Erskine v. Adeane, Bennett's Claim (1873), 8 Ch. App. 756; 2 Digest 66, 416; 42 L.J.Ch. 835; 29 L.T. 234	329, 330, 334
Erving v. Peter (1790), 3 Term Rep. 685; 24 Digest 745, 7738	606, 609
Euryedon (The), [1938] P. 41; [1938] 1 All E.R. 122; Digest Supp.; 107 L.J.P. 81; 158 L.T. 455	960, 964
Evans v. Bartlam, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; 157 L.T. 311	925, 927
Evans, Re, Public Trustee v. Evans, [1920] 2 Ch. 304; Digest Supp.; 89 L.J.Ch. 525; 123 L.T. 735	902, 907
Evans, Sons & Co. v. Cunard S.S. Co., Ltd. (1902), 18 T.L.R. 374; 41 Digest 486, 3175	444, 448, 457, 458
Evered, Re, Molineux v. Evered, [1910] 2 Ch. 147; 37 Digest 520, 1115; 79 L.J.Ch. 465; 102 L.T. 694	391, 395, 396, 397
Excelsior Wire Rope Co., Ltd. v. Callan, [1930] A.C. 404; Digest Supp.; 99 L.J.K.B. 380; 142 L.T. 531	614, 618, 620
Express Engineering Works, Ltd., Re, [1920] 1 Ch. 466; 9 Digest 521, 3423; 89 L.J.Ch. 379; 122 L.T. 790	931, 932
Fairman v. Perpetual Investment Building Society, [1923] A.C. 74; 31 Digest 99, 2381; 92 L.J.K.B. 50; 128 L.T. 386	329, 336
Fanshaw & Yorton, Re, Ex p. Birmingham & Staffordshire Gas Light Co. (1871), L.R. 11 Eq. 615; 5 Digest 957, 7844	795, 799
Farmer, Re, Nightingale v. Whybrow, [1939] 1 All E.R. 319; Digest Supp.; 160 L.T. 59	201, 203, 322, 326
Farr v. Butters Bros. & Co., [1932] 2 K.B. 606; Digest Supp.; 101 L.J.K.B. 768; 147 L.T. 427	49, 50
Fatmabibi v. Advocate-General (1881), I.L.R. 6 Bom. 42	470, 475
Fearnley v. Ormsby (1879), 4 C.P.D. 136; 26 Digest 416, 1345	297, 298
Fender v. St. John-Mildmay, [1938] A.C. 1; Digest Supp.; sub nom. Fender v. Mildmay, [1937] 3 All E.R. 402; 106 L.J.K.B. 641; 157 L.T. 340	148, 150
Ferris v. Emperor (1928), I.L.R. 53 Bom. 149	357, 358
Field, Re, Sanderson v. Young, [1925] Ch. 636; 40 Digest 652, 1911; 94 L.J.Ch. 322; 133 L.T. 463	7, 8
Fisher v. Dick & Co., Ltd., [1938] 4 All E.R. 467; Digest Supp.	137, 143
Fitch v. Dewes, [1921] 2 A.C. 158; 43 Digest 34, 276; 90 L.J.Ch. 436; 125 L.T. 744; affg. [1920] 2 Ch. 159	183, 190
Fitzgerald v. Firbank, [1897] 2 Ch. 96; 19 Digest 196, 1497; 66 L.J.Ch. 529; 76 L.T. 584	813, 823
Fitzgerald v. Fitzgerald (1869) L.R. 1 P. & D. 694; 27 Digest 307, 2845; 38 L.J.P. & M. 14; 19 L.T. 675; subsequent proceedings (1874) L.R. 3 P. & D. 136	780, 785
Fleming v. Hector (1836), 2 M. & W. 172; 8 Digest 515, 65; 6 L.J.Ex. 43	591, 592
Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd., [1934] 2 K.B. 132; Digest Supp.; 103 L.J.K.B. 465; 151 L.T. 87; on appeal, [1936] A.C. 206	724, 731, 736, 738, 743, 745
Footner v. Sturges (1852), 5 De G. & Sm. 736; 35 Digest 551, 2804; 21 L.J.Ch. 741; 19 L.T.O.S. 324	495, 499
Ford v. Foster (1872), 7 Ch. App. 611; 43 Digest 231, 747; 41 L.J.Ch. 682; 27 L.T. 219; revsg. S.C. sub nom. Re Ford's Eureka Shirt, Ford v. Foster, 20 W.R. 311	228, 229
Ford v. Wastell (1848), 2 Ph. 591; 35 Digest 587, 3240; 17 L.J.Ch. 368; 13 L.T.O.S. 461	495, 499
Forder, Re, Forder v. Forder, [1927] 2 Ch. 291; Digest Supp.; 96 L.J.Ch. 314; 137 L.T. 538	902, 905
Forder v. Great Western Ry. Co., [1905] 2 K.B. 532; 8 Digest 65, 442; 74 L.J.K.B. 87 i; 93 L.T. 344	909
Ford's Hotel Co., Ltd. v. Bartlett, [1896] A.C. 1; Digest, Pleading, 151, 1343; 65 L.J.Q.B. 166; 73 L.T. 665	354
Foster v. Oxford, etc., Ry. Co. (1853), 13 C.B. 200; 10 Digest 1148, 8125; 22 L.J.C.P. 99; 20 L.T.O.S. 224	931, 936
Foster v. Warblington Urban Council, [1906] 1 K.B. 648; 19 Digest 57, 323; 75 L.J.K.B. 514; 94 L.T. 876	813, 814
Foveaux, Re, Cross v. London Anti-Vivisection Society, [1895] 2 Ch. 501; 8 Digest 259, 206; 64 L.J.Ch. 856; 73 L.T. 202	470, 474
Fowke v. Fowke, [1938] Ch. 774; [1938] 2 All E.R. 638; Digest Supp.; 107 L.J.Ch. 350; 159 L.T. 8	501, 502, 504
Fox v. Marshall, [1938] 4 All E.R. 773; Digest Supp.	678, 679, 681
France, Fenwick & Co., Ltd. v. Spackman (Phillip) & Sons (1912), 108 L.T. 371; 41 Digest 452, 2836	128, 133
French v. Russell (Archibald), Ltd. (1934), 104 L.J.P.C. 17; Digest Supp.; 152 L.T. 1; 27 B.W.C.C. 338	150, 163
French (L.) & Co. v. Leeston Shipping Co., [1922] 1 A.C. 451; 12 Digest 612, 5054; 91 L.J.K.B. 655; 127 L.T. 169	534, 545
Frenkel v. MacAndrews & Co., Ltd. (1928), 139 L.T. 327; 41 Digest 486, 3177; affd., [1929] A.C. 545; 98 L.J.K.B. 389; 141 L.T. 33	444, 448, 449, 452, 453, 457, 458, 459
Frowd v. Frowd, [1904] P. 177; 27 Digest 556, 6106; 73 L.J.P. 60; 90 L.T. 175	826
Fry v. Salisbury House Estates, Ltd.; Jones v. City of London Real Property Co., Ltd., [1930] A.C. 432; Digest Supp.; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; affg. [1930] 1 K.B. 304	762, 764, 771
Fuller v. Green (1857), 24 Beav. 217; 24 Digest 840, 8728	748, 749
Galloway v. London Corpn. (1864), 2 De G. J. & Sm. 213; 42 Digest 722, 1415; 10 L.T. 439; on appeal (1866), L.R. 1 H.L. 34	883, 886
Ganesh Narayan Sathe, Re (1889), I.L.R. 13 Bom. 600; 14 Digest 169, case t	357, 358
Geddis v. Bann Reservoir Proprietors (1878), 3 App. Cas. 430; 38 Digest 25, 137	669, 671
Gelen v. Hall (1857), 2 H. & N. 379; 33 Digest 845, 555; 27 L.J.M.C. 78; 29 L.T.O.S. 183	17, 19

	PAGES
Gibbs-Smith v. Gibbs-Smith, [1939] P. 170; [1939] 1 All E.R. 332; Digest Supp.; 160 L.T. 364	546, 547
Gilbertson v. Fergusson (1881), 7 Q.B.D. 562; 28 Digest 79, 431; 46 L.T. 10; 1 Tax Cas. 501	803, 805, 806, 808, 810, 811
Girindra Nath Banerjee v. Birendra Nath Pal (1927), I.L.R. 54 Cal. 727	357, 358, 363
Glenboig Union Fireclay Co., Ltd. v. Inland Revenue Comrs. (1922), 12 Tax Cas. 427	303, 304
Glynn v. Margetson & Co., [1893] A.C. 351; 41 Digest 311, 1715; 62 L.J.Q.B. 466; 69 L.T. 1; <i>affg.</i> , [1892] 1 Q.B. 337	444, 448, 449, 458
Govindan Nair, <i>Re</i> (1922), I.L.R. 45 Mad. 922	357, 360, 361
Graham v. Peat (1801), 1 East, 244; 19 Digest 505, 3635	813, 814
Gramophone Co.'s Application, <i>Re</i> , [1910] 2 Ch. 423	228, 229
Gramophone & Typewriter, Ltd. v. Stanley, [1908] 2 K.B. 89; 9 Digest 35, 14; 77 L.J.K.B. 834; 99 L.T. 39	992
Grant v. Grant (1870), L.R. 5 C.P. 727; 17 Digest 249, 629; 39 L.J.C.P. 272; 22 L.T. 829	444, 448
Gray v. Sopwith Aviation Co., Ltd. (1918), 88 L.J.K.B. 329; 34 Digest 325, 2659; 119 L.T. 194; 11 B.W.C.C. 83	205
Greaves v. D'Acastro (1725), Bumb. 194; 18 Digest 347, 840	795, 796
Green v. Green (1845), 2 Jo. & Lat. 529; 44 Digest 486, case 7	392, 397
Greyhound Racing Assocn. (Liverpool), Ltd. v. Cooper, [1936] 2 All E.R. 742; Digest Supp.; 20 Tax Cas. 373	303, 304
Grit, The, [1924] P. 246; 44 Digest 104, 831; 94 L.J.P. 6; 132 L.T. 638	24
Groves v. Wimborne (Lord), [1898] 2 Q.B. 402; 24 Digest 911, 80; 67 L.J.Q.B. 862; 79 L.T. 284	724, 744
Guaranty Trust Co. of New York v. Hannay & Co., [1918] 1 K.B. 43; 6 Digest 428, 2775; 117 L.T. 754; <i>reversd.</i> on another ground, [1918] 2 K.B. 623	712, 721
Hadley v. Baxendale (1854), 9 Exch. 341; 17 Digest 93, 101; 23 L.J.Ex. 179; 23 L.T.O.S. 69	642
Haigh v. Haigh (1885), 32 Ch.D. 478; 18 Digest 250, 1939; 55 L.J. Ch. 190; 53 L.T. 863	925
Haig v. Royal Mail Steam Packet Co., Ltd. (1883), 52 L.J.Q.B. 641; 8 Digest 103, 664; 49 L.T. 802	128
Hain S.S. Co., Ltd. v. Tate & Lyle, Ltd., [1936] 2 All E.R. 597; Digest Supp.; 155 L.T. 177	444, 450
Hall v. Hall (1864), 3 Sw. & Tr. 347; 27 Digest 323, 3022; 33 L.J.P.M. & A. 65; 9 L.T. 810	968, 970
Hall v. Rogers (1925), 133 L.T. 44; 31 Digest 558, 7049	636, 638
Hamlyn & Co. v. Wood & Co., [1891] 2 Q.B. 488; 12 Digest 610, 5042; 60 L.J.Q.B. 734; 65 L.T. 286	137, 142, 534, 540, 541, 979, 981
Hampton v. Glamorgan County Council, [1917] A.C. 13; 7 Digest 427, 376; 86 L.J.K.B. 106; 115 L.T. 726; <i>affg.</i> (1915), 84 L.J.K.B. 1506	591, 592
Hanau v. Ehrlich, [1912] A.C. 39; 12 Digest 124, 818; 81 L.J.K.B. 397; 106 L.T. 1	137, 140
Hanbury v. Hanbury (1892), 8 T.L.R. 559; Digest Supp.; <i>previous p.ceedings</i> , [1892] P. 222	968, 969, 970
Hanson v. Wearmouth Coal Co., Ltd., & Sunderland Gas Co., [1939] 3 All E.R. 47; Digest Supp.	580, 581
Hansson v. Hamel & Horley, Ltd., [1922] 2 A.C. 36; 39 Digest 577, 1812; 91 L.J.K.B. 433; 127 L.T. 74	169, 172, 173, 174
Hardaker v. Idle District Council, [1896] 1 Q.B. 335; 25 Digest 480, 62; 65 L.J.Q.B. 363; 74 L.T. 69	48, 49, 54
Hardy v. Central London Ry. Co., [1920] 3 K.B. 459; 36 Digest 71, 457; 89 L.J.K.B. 1187; 124 L.T. 136	614, 618, 620
Harloe v. Harloe (1875), L.R. 20 Eq. 471; 24 Digest 848, 8817; 44 L.J. Ch. 512; 33 L.T. 247	748, 750
Harmony & Montague Tin & Copper Mining Co., <i>Re</i> , Spargo's Case (1873), 8 Ch. App. 407; 9 Digest 92, 379; 42 L.J.Ch. 488; 28 L.T. 153	144, 145
Harper v. Carr (1797), 7 Term Rep. 270; 18 Digest 398, 1390	795, 800
Harriman v. Harriman, [1909] P. 123; 27 Digest 321, 2995; 78 L.J.P. 62; 100 L.T. 557	833, 838
Harris v. Associated Portland Cement Manufacturers, Ltd., [1939] A.C. 71; [1938] 4 All E.R. 831; Digest Supp.; 108 L.J.K.B. 145; 160 L.T. 187; 31 B.W.C.C. 434	73, 79
Harris, <i>Re</i> , Davis v. Harris, [1914] 2 Ch. 395; 23 Digest 381, 4511; 83 L.J. Ch. 841; 111 L.T. 666	748, 749
Harris v. Pepperell (1867), L.R. 5 Eq. 1; 35 Digest 111, 164; 17 L.T. 191	566, 567
Harrison, <i>Re</i> , Townson v. Harrison (1889), 43 Ch. D. 55; 40 Digest 691, 2264; 59 L.J.Ch. 169; 61 L.T. 762	7, 8
Harrison v. Bush (1856), 5 E. & B. 344; 32 Digest 123, 1550; 25 L.J.Q.B. 25, 99; 25 L.T.O.S. 194; 26 L.T.O.S. 196	507, 508
Harrison v. Leaper (1862), 5 L.T. 640; 26 Digest 427, 1542	297, 298
Harrison v. Rutland (Duke), [1893] 1 Q.B. 142; 26 Digest 317, 491; 62 L.J.Q.B. 117; 68 L.T. 35	614, 620
Harrold v. Watney, [1898] 2 Q.B. 320; 7 Digest 286, 155; 67 L.J.Q.B. 771; 78 L.T. 788	663, 664, 668
Hartley v. Rice (1808), 10 East, 22; 12 Digest 249, 2034	148, 150, 151
Hassell v. Stanley, [1896] 1 Ch. 607; 13 Digest 524, 744; 65 L.J.Ch. 494; 74 L.T. 375	306, 307, 308
Hastings Corpn. v. Ivall (1874), L.R. 10 Eq. 558; 44 Digest 72, 532	813, 814
Havana Cigar & Tobacco Factories, Ltd. v. Oddenino, [1924] 1 Ch. 179; 43 Digest 279, 1106; 93 L.J.Ch. 81; 130 L.T. 428	228, 229, 233, 234
Hawke v. Dunn, [1897] 1 Q.B. 579; 25 Digest 437, 339; 66 L.J.Q.B. 364; 76 L.T. 355	400, 404, 428
Hawkins v. Robinson (1872), 37 J.P. 662; 26 Digest 420, 1396	297, 298
Hay v. Rafferty (1899), 2 F. (Ct. of Sess.) 302	272, 280
Hayes and Harrington Urban District Council v. Williams' Trustee, [1936] Ch. 315; Digest Supp.; 105 L.J.Ch. 312; 154 L.T. 695	113, 114
Haynes v. Harwood, [1935] 1 K.B. 146; Digest Supp.; 104 L.J.K.B. 63; 152 L.T. 121	478, 481, 854, 856
Heath v. Nugent (1860), 20 Beav. 226; 39 Digest 161, 528	322, 325

	PAGE
Heddlitch v. MacIlwaine, [1894] 2 Q.B. 54; 32 Digest 114, 1460; 63 L.J.Q.B. 587; 70 L.T. 826	507, 508
Henchett v. Kimpson (1762), 2 Wils. 140; 21 Digest 522, 965	735
Henderson v. Eason (1851), 17 Q.B. 701; 20 Digest 269, 293; 21 L.J.Q.B. 82; 18 L.T.O.S. 142; <i>revog.</i> (1848), 12 Q.B. 986; <i>previous proceedings</i> (1847), 2 Ph. 308	569, 570
Henderson v. Meade King, Unreported	303, 305
Hendry v. M'Dougall, [1923] S.C. 378; 36 Digest 64, case <i>h.</i>	478, 481
Henry v. Foster (A.), Henry v. Foster (J.), Hunter v. Dewhurst (1932), 16 Tax Cas. 605; Digest Supp.; <i>sub nom.</i> Dewhurst v. Hunter, 146 L.T. 510	303, 305
Heranger (The), [1939] A.C. 94; Digest Supp.; 108 L.J.P. 12; 160 L.T. 231	960, 964
Herod v. Herod, [1939] P. 11; [1938] 3 All E.R. 722; Digest Supp.; 108 L.J. P. 27; 159 L.T. 530	780, 781, 825, 830
Hewett, <i>Re</i> , Eldridge v. Iles, [1918] 1 Ch. 458; 44 Digest 455, 2773; 118 L.T. 524; <i>sub nom.</i> <i>Re</i> Hewett, Eldridge v. Iles, 87 L.J.Ch. 209	148, 151
Higgins v. Batts, [1905] 2 Ch. 210; 19 Digest 123, 329; 74 L.J. Ch. 621; 92 L.T. 850	813, 824
Hill v. Tupper (1863), 2 H. & C. 121; 19 Digest 23, 91; 32 L.J. Ex. 217; 8 L.T. 792	813, 814
Hilton v. Granville (Lord) (1841), 4 Beav. 130; 34 Digest 714, 987; 10 L.J.Ch. 398	598, 601
Hilton v. Granville (Lord) (1844), 5 Q.B. 701; 34 Digest 703, 923; 13 L.J.Q.B. 193; 2 L.T.O.S. 419; <i>subsequent proceedings</i> (1848), 12 Q.B. 737, <i>n.</i> 191, 192, 598, 599, 600, 601, 602	35
Hoare v. Arding & Hobbs (1911), 5 B.W.C.C. 36; 34 Digest 362, 2932	35
Hobbs v. Tinsling, Hobbs v. Nottingham Journal, [1929] 2 K.B.1; Digest Supp.; 98 L.J.K.B. 421; 141 L.T. 121	507, 509
Hobson, <i>Re</i> , Barwick v. Holt, [1912] 1 Ch. 626; 44 Digest 1205, 10426; 106 L.T. 507	658
Hodson's Settlement, <i>Re</i> , Brooks v. A.-G., [1939] Ch. 343; [1939] 1 All E.R. 196; Digest Supp.; 108 L.J. Ch. 200; 160 L.T. 193	876, 881
Hogarth v. Miller, Brother & Co., [1891] A.C. 48; 41 Digest 360, 2091; 60 L.J.P.C. 1; 64 L.T. 205	815, 818
Holford v. Bailey (1849), 13 Q.B. 426; 19 Digest 208, 1592; 18 L.J.Q.B. 109; 13 L.T.O.S. 261	813, 823
Holywell Union & Halkyn Parish v. Halkyn Drainage Co., [1895] A.C. 117; 19 Digest 17, 48; 64 L.J.M.C. 113; 71 L.T. 818	813, 814
Hood, <i>Re</i> , Public Trustee v. Hood, [1931] 1 Ch. 240; Digest Supp.; 100 L.J.Ch. 115; 143 L.T. 691	471, 476
Hopton v. Robertson (1884), 23 Q.B.D. 126, <i>n.</i> ; 21 Digest 418, 15	925
Hopkins v. Smethwick Local Board of Health (1890), 24 Q.B.D. 712; 26 Digest 564, 2584; 59 L.J.Q.B. 250; 62 L.T. 783	840, 850
Hosack v. Robins, [1917] 1 Ch. 332; 35 Digest 552, 2808; 86 L.J.Ch. 282; 115 L.T. 879	495, 496, 498, 499
Howard v. Fanshawe, [1895] 2 Ch. 581; 31 Digest 432, 6311; 64 L.J.Ch. 666; 73 L.T. 77	889, 890
Howe (Earl) v. Inland Revenue Comrs., [1919] 2 K.B. 336; 28 Digest 111, 683; 88 L.J.K.B. 821; 121 L.T. 161; 7 Tax Cas. 289	166, 167
Huckle v. London County Council (1910), 27 T.L.R. 112; 34 Digest 495, 4090; 4 B.W.C.C. 113; <i>affg.</i> , 26 T.L.R. 580	340, 350, 351, 353
Hulton (E.) & Co. v. Jones, [1910] A.C. 20; 32 Digest 17, 77; 79 L.J.K.B. 198; 101 L.T. 831; <i>affg.</i> , [1909] 2 K.B. 444	264, 266, 267, 268
Hummeltenberg, <i>Re</i> , Beatty v. London Spiritualistic Alliance, [1923] 1 Ch. 237; Digest Supp.; 92 L.J.Ch. 326; 129 L.T. 124	470, 474
Hunt v. Silk (1804), 5 East, 449; 12 Digest 553, 4597	272, 284, 290
Hunter v. Fry (1819), 2 B. & Ald. 421; 41 Digest 323, 1818	673, 674
Hurdman v. North Eastern Ry. Co. (1878), 3 C.P.D. 168; 36 Digest 191, 325; 47 L.J.Q.B. 368; 38 L.T. 339	49, 50
Hurst v. Hurst (1852), 16 Beav. 372; 37 Digest 520, 1112; 22 L.J.Ch. 538	392, 398
Hussey v. Hussey (1913), 109 L.T. 192; 27 Digest 317, 2948	780, 781
Hutchins v. Chambers (1758), 1 Burr. 579; 18 Digest 358, 956; <i>sub nom.</i> Hutchins v. Whitaker, 2 Keny. 204	795, 800, 802
Hutchinson, <i>Re</i> , Crispin v. Hadden (1919), 88 L.J.Ch. 352; 44 Digest 707, 5509; 121 L.T. 239	689, 691
Hyman v. Rose, [1912] A.C. 623; 31 Digest 488, 6356; 81 L.J.K.B. 1062; 106 L.T. 907	890
Income Tax Special Purposes Comrs. v. Pemsel, [1891] A.C. 531; 28 Digest 10, 51; 61 L.J.Q.B. 265; 65 L.T. 621; 3 Tax Cas. 53; <i>affg.</i> S.C. <i>sub nom.</i> R. v. Income Tax Comrs. (1888), 22 Q.B.D. 296	470, 473
Independent Order of Foresters v. R., [1939] 1 W.W.R. 275	99, 100
Indermaur v. Dames (1866), L.R. 1 C.P. 274; 36 Digest 35, 208; 35 L.J.Ch. 184; 14 L.T. 484; <i>affd.</i> (1867), L.R. 2 C.P. 311	24, 128
Inland Revenue Comrs. v. Gliksten (J.) & Son, Ltd. (1929), 14 Tax Cas. 364; Digest Supp.	303, 304
Inland Revenue Comrs. v. Morgan-Grenville-Gavin, [1936] 1 All E.R. 895; Digest Supp.; 20 Tax Cas. 529	310, 312
Inland Revenue Comrs. v. Northfleet Coal & Ballast Co., Ltd. (1927), 12 Tax Cas. 1102	303, 304, 305
Inland Revenue Comrs. v. Pearson, Inland Revenue Comrs. v. Pratt, [1936] 2 K.B. 533; [1936] 2 All E.R. 731; Digest Supp.; 105 L.J.K.B. 639; 155 L.T. 351; 20 Tax Cas. 433	762, 766, 767, 775, 777
Inland Revenue Comrs. v. Ramsay (1935), 154 L.T. 141; Digest Supp.; 20 Tax Cas. 79	221, 222, 223
Inland Revenue Comrs. v. Temperance Council of Christian Churches of England & Wales (1926), 136 L.T. 27; Digest Supp.; 10 Tax Cas. 748	470, 474, 476
Inverclyde (otherwise Tripp) v. Inverclyde, [1931] P. 29; Digest Supp.; 100 L.J.P. 16; 144 L.T. 212	501, 502
Iron-Or Remedy Co., Ltd. v. Co-operative Wholesale Society, Ltd. (1907), 24 R.P.C. 425; 43 Digest 300, 1248	228, 233
Isherwood v. Oldknow (1815), 3 M. & S. 382; 31 Digest 422, 5681	795, 802
Islington Union v. Brentnall & Cleland (1907), 71 J.P. 407; 35 Digest 108, 137	566, 567
Ives & Barker v. Willans, [1894] 2 Ch. 478; Digest, Pleading, 131, 1198; 63 L.J.Ch. 521; 70 L.T. 674	354, 355, 356
Jackson v. Anglo-American Oil Co., [1923] 2 K.B. 601; Digest Supp.; 92 L.J.K.B. 1000; 129 L.T. 742	813, 814
Jackson v. Hayes Candy & Co., Ltd., [1938] 4 All E.R. 587; Digest Supp.; 160 L.T. 112	137, 140
James v. Allen (1817), 3 Mer. 17; 8 Digest 293, 703	491, 492

	PAGES
Jay v. Jay, [1924] 1 K.B. 826; 40 Digest 648, 1880; 93 L.J.K.B. 280; 130 L.T. 667	7, 8
Jodrell v. Jodrell (1851), 14 Beav. 397; 28 Digest 242, 1003	154, 155, 157
Johnson v. Clark, [1908] 1 Ch. 303; 17 Digest 13, 107; 77 L.J.Ch. 127; 98 L.T. 129	598, 599
Johnstone v. Chamberlain (1933), 17 Tax Cas. 706	154, 155, 156
Jolly, Re, Gathercole v. Norfolk, [1900] 2 Ch. 616; 32 Digest 484, 1467; 69 L.J.Ch. 661; 83 L.T. 118	569, 570, 571
Jones, Re, Jones v. Jones, [1933] Ch. 842; Digest Supp.; 102 L.J.Ch. 303; 149 L.T. 417	82, 83, 88, 89
Jones v. Bailey (1853), 17 Beav. 582; 35 Digest 651, 2806	495, 499
Jones v. International Anthracite Collieries Co., [1919] 1 K.B. 156; 34 Digest 422, 3427; 88 L.J.K.B. 361; 120 L.T. 165; 11 B.W.C.C. 274	73
Jones v. Jones (1938), November Unreported	109, 111
Jones v. Meiros Collieries, Ltd. (1926), 95 L.J.K.B. 754; 34 Digest 458, 3753; 135 L.T. 469; 19 B.W.C.C. 182	431, 433
Jones v. Newtown & Llanidloes Guardians, [1920] 3 K.B. 381; 27 Digest 202, 1735; 89 L.J.K.B. 1161; 124 L.T. 23	826, 827, 831
Jones v. Thomas (1885), 53 L.T. 678; 32 Digest 116, 1479	507, 508
Jordan v. Jordan, [1939] P. 239; [1939] 2 All E.R. 29; Digest Supp.; 160 L.T. 368	780, 781, 826, 827
Joseph v. Joseph, [1909] P. 217; 27 Digest 260, 2298; 78 L.J.P. 51; 100 L.T. 864	957, 958, 959
Judgment Debt (No. 1539 of 1936), Re, [1937] Ch. 137; Digest Supp.; 106 L.J.Ch. 133; sub nom. Re Judgment Debtor (No. 1539 of 1936), Judgment Debtor v. Judgment Creditor, [1936] 3 All E.R. 767; 156 L.T. 16	430
Kahn v. Aircraft Industries Corp'n., Ltd., [1937] 3 All E.R. 476; Digest Supp.; affg., [1937] 1 All E.R. 757	534, 542
Kelly v. North British Ry. Co., [1916] S.C. 19; 34 Digest 496, case m 340, 353, 698, 700, 705, 706	705, 706
Kelner v. Baxter (1866), L.R. 2 C.P. 174; 9 Digest 637, 4209; 36 L.J.C.P. 94; 15 L.T. 213	209, 214
Kelsall Parsons & Co. v. Inland Revenue, [1938] S.C. 238; Digest Supp.	303, 304
Kendall v. Hamilton (1879), 4 App. Cas. 504; 21 Digest 218, 540; 48 L.J.Q.B. 705; 41 L.T. 418	340, 343, 344, 698, 699
Kennard v. Futvoye (1860), 2 Giff. 81; 42 Digest 728, 1494; 29 L.J.Ch. 553; 2 L.T. 30	495, 499
Kennedy v. De Trafford, [1897] A.C. 180; 38 Digest 694, 389; 66 L.J.Ch. 413; 76 L.T. 427; affg., [1896] 1 Ch. 762	569, 570
Keppell v. Wheeler, [1927] 1 K.B. 577; Digest Supp.; 96 L.J.K.B. 433; 136 L.T. 203	534, 543, 544
Keppell v. Bailey (1834), 2 My. & K. 517; 19 Digest 22, 89	813, 814
Kevorkian v. Burney, [1937] W.N. 345; [1937] 4 All E.R. 97; Digest Supp.; 157 L.T. 492	917, 919
King v. Bryant (1841), 4 Beav. 460; 24 Digest 840, 8726; sub nom. King v. Hammett, 11 L.J.Ch. 14	748, 749
King, Re, Mellor v. South Australian Land Mortgage & Agency Co., [1907] 1 Ch. 72; 24 Digest 608, 6386; 76 L.J.Ch. 44; 95 L.T. 724	269, 270, 271
King v. Port of London Authority, [1920] A.C. 1; 34 Digest 434, 3548; 88 L.J.K.B. 889; 121 L.T. 587; 12 B.W.C.C. 260	35
King Line, Ltd. v. Moxey, Savon & Co., Ltd. (1939), 62 Lloyd. L.R. 252	528, 530
Kingston's (Duchess) Case (1776), 1 Leach 146; 27 Digest 554, 6080	833, 837
Kinlan v. Ulster Bank, Ltd., [1928] I.R. 171; Digest Supp.	578, 579
Kinneil Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell), [1931] A.C. 575; Digest Supp.; 100 L.J.P.C. 113; 145 L.T. 289; 24 B.W.C.C. 181; affg. S.C. sub nom. Waddell v. Kinneil Cannel & Coking Coal Co., Ltd. (1930), 23 B.W.C.C. 567	340, 352, 698, 699, 700, 702, 703
Kirkman v. Kirkman (1807), 1 Hag. Con. 409; 27 Digest 286, 2579	968, 970, 972, 974
Kruse v. Johnson, [1898] 2 Q.B. 91; 13 Digest 326, 631; 67 L.J.Q.B. 782; 78 L.T. 647	246, 248, 251
Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392; 35 Digest 77, 750; 68 L.J.Ch. 699; 81 L.T. 334	272, 279, 280, 288, 289
Lancaster v. Blackwell Colliery Co., Ltd. (1919), 89 L.J.K.B. 609; 34 Digest 324, 2647; 122 L.T. 162; 12 B.W.C.C. 400	204, 205, 207
Landauer & Co. v. Craven & Speeding Brothers, [1912] 2 K.B. 94; 39 Digest 577, 1811; 81 L.J.K.B. 650; 106 L.T. 298	169, 172, 173, 174
Lanyon, Re, Lanyon v. Lanyon, [1927] 2 Ch. 264; 44 Digest 456, 2782; 96 L.J.Ch. 487; 137 L.T. 806	148, 150
Lapointe v. J. T. Wait & Co. & Crystal Products Co., [1938] 4 D.L.R. 418	992
Larkins v. Paxton (1835), 2 My. & K. 320; 24 Digest 855, 8905	747, 749, 750
Larsen v. Sylvestre & Co., [1908] A.C. 295; 41 Digest 306, 1682; 77 L.J.K.B. 993; 99 L.T. 94	127, 128, 133
Latham v. Johnson (R.) & Nephew, Ltd., [1913] 1 K.B. 398; 36 Digest 38, 223; 82 L.J.K.B. 258; 108 L.T. 4	24, 614, 617, 618, 620
Lawrence v. Matthews (George) (1924), Ltd., [1929] 1 K.B. 1; Digest Supp.; 97 L.J.K.B. 758; 140 L.T. 25; 21 B.W.C.C. 345	205
Lazarus v. Cairn Line of Steamships, Ltd. (1912), 106 L.T. 378; 12 Digest 611, 5051	534, 540
Leahy, Kelly & Leahy v. Glover (1893), 10 R.P.C. 141; 43 Digest 169, 253	228, 229, 233
Leather Cloth Co. v. Hirschfeld (1865), L.R. 1 Eq. 299; 43 Digest 237, 825; 13 L.T. 427	514, 515, 527
Ledger, Sons & Co. v. Munro (James) & Son, Ltd. (1916), 33 R.P.C. 53	514, 515
Leduc v. Ward (1888), 20 Q.B.D. 475; 41 Digest 485, 3172; 57 L.J.Q.B. 379; 58 L.T. 908	444, 448, 449, 453, 458
Lee v. Lopes (1812), 15 East. 230; 5 Digest 829, 7041	795, 796
Lee v. Riley (1865), 18 C.B.N.S. 722; 2 Digest 228, 194; 34 L.J.C.P. 212; 12 L.T. 388	479, 483
Leggott v. Western (1884), 12 Q.B.D. 287; 21 Digest 658, 2363; 53 L.J.Q.B. 316	495, 499
Le Lievre v. Gould, [1893] 1 Q.B. 491; 36 Digest 10, 26; 62 L.J.Q.B. 353; 68 L.T. 626	209, 216
Leonard v. Simpson (1835), 2 Bing.N.C. 176; 24 Digest 744, 7734; 4 L.J.C.P. 302	606, 608
Lever v. Goodwin (1877), 36 Ch.D. 1; 43 Digest 334, 1562; 57 L.T. 583	513, 514, 522
Lewis v. Deny�, [1939] 1 All E.R. 310; Digest Supp.	724, 744
Liddle v. North Riding of Yorkshire County Council, [1934] 2 K.B. 101; Digest Supp.; 103 L.J.K.B. 527; 151 L.T. 202	614, 617, 620

Liesbosch (Dredger) v. Edison (S.S.), [1933] A.C. 449; Digest Supp.; 102 L.J.P. 73; <i>sub nom.</i> The Edison, 149 L.T. 49	642, 643, 648, 651, 652, 653
Lingley v. Firth (Thomas) & Sons, [1921] 1 K.B. 655; 34 Digest 374, 3035; 90 L.J.K.B. 290; 124 L.T. 442; 13 B.W.C.C. 367	35
Lister v. Pickford (1865), 34 Beav. 576; 17 Digest 377, 1867; 34 L.J.Ch. 582; 12 L.T. 587	663, 664, 665
Little, Re, Harrison v. Harrison (1889), 40 Ch.D. 418; 37 Digest 519, 1708; 58 L.J.Ch. 233; 60 L.T. 246	391, 395 698, 700
Little v. MacLellan (1900), 2 F. (Ct. of Sess.) 387; 34 Digest 491, case <i>h</i> ..	194, 198
Littlejohn v. London County Council, [1938] 1 K.B. 78; [1937] 3 All E.R. 43; Digest Supp.; 106 L.J.K.B. 488; 157 L.T. 128	979, 981 679
Livock v. Pearson Bros. (1928), 33 Com. Cas. 188; Digest Supp. ..	724, 739, 744
Lloyd v. Cook, [1929] 1 K.B. 103; Digest Supp.; 97 L.J.K.B. 657; 139 L.T. 452 ..	631, 635
Lochgelly Iron & Coal Co., Ltd. v. M'Mullan, [1934] A.C. 1; Digest Supp.; 102 L.J.P.C. 123; 149 L.T. 526; 26 B.W.C.C. 463	803, 811
Logan v. Bank of Scotland (No. 2), [1906] 1 K.B. 141; 11 Digest 477, 1310; 75 L.J.K.B. 218; 94 L.T. 153	661, 662
London County Council v. A.-G., [1901] A.C. 26; 28 Digest 73, 392; 70 L.J.Q.B. 77; 83 L.T. 605; 4 Tax Cas. 265; <i>reuss</i> S.C. <i>sub nom.</i> A.-G. v. London County Council, [1900] 1 Q.B. 192	64, 65, 68
London & North Eastern Ry. Co. v. Brentnall, [1933] A.C. 489; Digest Supp.; 102 L.J.K.B. 438; 148 L.T. 530; 26 B.W.C.C. 225	549, 551 780, 781 748, 749
London & North Western Ry. Co. v. Glyn (1859), 1 E. & E. 652; 29 Digest 336, 2718; 28 L.J.Q.B. 188; 33 L.T.O.S. 199	601, 604
London General Omnibus Co., Ltd. v. Lavell, [1901] 1 Ch. 135; 22 Digest 188, 1585; 70 L.J.Ch. 17; 83 L.T. 453	921, 924
Looker v. Looker, [1918] P. 132; 27 Digest 317, 2951; 87 L.J.P. 72; 118 L.T. 654 ..	148, 150, 151
Loomes v. Stotherd (1823), 1 Sim. & St. 458; 23 Digest 371, 4401; 1 L.J.O.S.Ch. 220	259, 260, 262
Love v. Bell (1884), 9 App. Cas. 286; 34 Digest 708, 947; 53 L.J.Q.B. 257; 51 L.T. 1; <i>aff.</i> S.C. <i>sub nom.</i> Bell v. Love (1883), 10 Q.B.D. 547	64, 65, 67
Lovett v. Lovett, [1898] 1 Ch. 82; 37 Digest 478, 760; 67 L.J.Ch. 20; 77 L.T. 650 ..	470, 473 478, 481 698, 699
Low v. Peers (1768), 4 Burr. 2225; 17 Digest 131, 388; <i>aff.</i> on other grounds (1770), Wilm. 364	64, 65, 67
Lowe (David) & Sons, Ltd. v. Inland Revenue Comrs. (1938), 21 Tax Cas. 597	960, 964
Lucena v. Crauford (1806), 2 Bos. & P.N.R. 269; 29 Digest 97, 555; <i>subsequent pro-</i> <i>ceedings</i> (1808), 1 Taunt. 325	194, 195, 199
Lynch v. Nurdin (1841), 1 Q.B. 29; 36 Digest 24, 118; 10 L.J.Q.B. 73 ..	968, 970 159, 164
M'Allister (or Donoghue) v. Stevenson, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281	470, 473 478, 481 698, 699
Macaskill v. Macaskill, [1939] S.C. 187 ..	64, 65, 67
McCraigh v. Cox & Ford (1923), 92 L.J.K.B. 855; 18 Digest 397, 1384; 129 L.T. 567	960, 964
Macdonald v. Riordan (1899), 30 S.C.R. 619; 17 Digest 432, case <i>c</i> , <i>aff.</i> Q.R. 8 Q.B. 555	194, 195, 199
M'Dougall v. Summerlee Iron Co., Ltd. (1927), 20 B.W.C.C. 419; Digest Supp. ..	968, 970 159, 164
Macduff, Re, Macduff v. Macduff, [1896] 2 Ch. 451; 8 Digest 296, 731; 65 L.J.Ch. 700; 74 L.T. 706	297, 298 209, 215 169, 174
M'Ewan v. Cuthill (1897), 25 R. (Ct. of Sess.) 57; 36 Digest 64, case <i>f</i> ..	194, 195
M'Ginty v. Kyle, [1911] S.C. 589; 34 Digest 493, case <i>d</i> ..	968, 970
Mackenzie v. Whitworth (1875), 1 Ex.D. 36; 29 Digest 93, 506; 45 L.J.Q.B. 233; 33 L.T. 655	64, 65, 67
McLean v. Bell (1932), 147 L.T. 262; Digest Supp. ..	960, 964
McManus v. Bowes, [1938] 1 K.B. 98; [1937] 3 All E.R. 227; Digest Supp.; 107 L.J.K.B. 51; 157 L.T. 385	194, 195, 199
M'Naughten's Case (1843), 10 Ct. & Fin. 200; 14 Digest 56, 229; <i>sub nom.</i> McNaughton's Case, 4 State Tr. N.S. 847	968, 970 159, 164
McNicholas v. West Leigh Colliery Co., Ltd. (1933), 26 B.W.C.C. 29; Digest Supp. ..	297, 298 209, 215 169, 174
Mahmoud & Isphahani, Re, [1921] 2 K.B. 716; 14 Digest 32, 37; 125 L.T. 161; <i>sub nom.</i> Mahmoud v. Isphahani, 90 L.J.K.B. 821	194, 195
Malfroot v. Noxal, Ltd. (1935), 51 T.L.R. 551; Digest Supp. ..	968, 970 159, 164
Malmberg v. Evans (H. J.) & Co. (1924), 41 T.L.R. 38; 39 Digest 579, 1821 ..	968, 970
Maloney v. St. Helens Industrial Co-operative Society, Ltd., [1933] 1 K.B. 293; Digest Supp.; 102 L.J.K.B. 85; 148 L.T. 196	194, 195
Manchester Corp'n. v. Farnworth, [1930] A.C. 171; Digest Supp.; 99 L.J.K.B. 83; 142 L.T. 145	883, 885 795, 796
Manchester Corp'n. v. Lyons (1882), 22 Ch.D. 287; 33 Digest 551, 342; 47 L.T. 677	614, 618, 620
Mangan v. Atterton (1866), L.R. 1 Exch. 239; 36 Digest 71, 464; 35 L.J.Ex. 161; 14 L.T. 411	813, 814
Manning v. Wasdale (1836), 5 Ad. & El. 758; 19 Digest 162, 1131; 6 L.J.K.B. 59	855, 857
Manton v. Brocklebank, [1923] 2 K.B. 212; Digest Supp.; 92 L.J.K.B. 624; 129 L.T. 135	655, 656 194, 197
Marginson v. Blackburn Borough Council, [1939] 1 All E.R. 273; Digest Supp.; 160 L.T. 234	58, 59
Marrison v. Bell, [1939] 1 All E.R. 745; Digest Supp.; 160 L.T. 276 ..	513, 526, 577, 579 30
Martyn v. Williams (1857), 1 H. & N. 817; 34 Digest 695, 869; 26 L.J.Ex. 117; 28 L.T.O.S. 321 ..	651, 653 921, 924
Marzetti v. Williams (1830), 1 B. & Ad. 415; 17 Digest 81, 21; 9 L.J.O.S.K.B. 42	689, 694
Maxwell v. Keun, [1928] 1 K.B. 645; Digest Supp.; 97 L.J.K.B. 305; 138 L.T. 310	306, 309
Mediana (Owners) v. Comet (Owners, etc.), The Mediana, [1900] A.C. 113; 17 Digest 79, 9; 69 L.J.P. 35; 82 L.T. 95	598, 601
Meek v. Kettlewell (1843), 1 Ph. 342; 8 Digest 496, 617; 13 L.J.Ch. 28; 2 L.T.O.S. 205	
Mellor, Re, Porter v. Hindley, [1929] 1 Ch. 446; Digest Supp.; 98 L.J.Ch. 209; 140 L.T. 469	
Mercer v. Graves (1872), L.R. 7 Q.B. 499; 42 Digest 286, 3213; 41 L.J.Q.B. 212; 26 L.T. 551	
Mersey Docks & Harbour Board v. Cameron, Jones v. Mersey Docks & Harbour Board (1865), 11 H.L. Cas. 443; 42 Digest 745, 1706; 35 L.J.M.C. 1; 12 L.T. 643; <i>on</i> <i>appeal from S.C. sub nom.</i> Mersey Docks & Harbour Board v. Jones, Same v. Cameron (1861), 30 L.J.M.C. 185, 239	

	PAGES
Mersey Docks & Harbour Board v. Marpessa (Owners), [1907] A.C. 241; 17 Digest 86, 54; 97 L.T. 1, <i>sub nom.</i> The Marpessa, 76 L.J.P. 128; <i>affg.</i> S.C. <i>sub nom.</i> The Marpessa, [1906] P. 95	641, 648, 650
Messer v. Boyle (1856), 21 Beav. 559; 35 Digest 552, 2807	495, 493
Metropolitan Properties, Ltd. v. Jones, [1939] 2 All E.R. 202; Digest Supp.	49, 59
Midgley (falsely called Wood) v. Wood (1859), 4 Sw. & Tr. 267; 27 Digest 48, 269; 80 L.J.P.M. & A. 57	896, 899
Mikkelsen v. Arcos, Ltd. (1925), 134 L.T. 92; 41 Digest 340, 1920	673, 674
Milford Docks Co. v. Milford Haven Urban District Council (1901), 65 J.P. 483; 38 Digest 109, 780	194, 195
Minter v. Priest, [1930] A.C. 558; Digest Supp.; 99 L.J.K.B. 391; 143 L.T. 57	507, 509
Mitchell v. Mitchell, [1931] S.L.T. 484	780, 781
Mitchener v. Equitable Investment Co., Ltd., [1938] 2 K.B. 559; [1938] 1 All E.R. 303; Digest Supp.; 107 L.J.K.B. 316; 158 L.T. 176	695, 696
Monro & Cobley v. Bailey (1933), 102 L.J.K.B. 471; Digest Supp.; 148 L.T. 505; 17 Tax Cas. 607	260, 262
Moorcock (The) (1889), 14 P.D. 64; 12 Digest 611, 5048; 58 L.J.P. 73; 60 L.T. 654	24, 27, 28, 29, 137, 142, 194, 195, 534, 540, 979, 981
Moore v. Darton (1851), 4 De G. & Sm. 517; 25 Digest 541, 288; 20 L.J.Ch. 626; 18 L.T.O.S. 24	682, 686, 687
Moore v. Moore, Chadwick & Griffiths (1887), 12 P.D. 193; 27 Digest 326, 3045; 56 L.J.P. 104; 57 L.T. 568	780, 781
Moore (A. G.) & Co. v. Barkey, [1923] A.C. 790; 34 Digest 324, 2651; 93 L.J.P.C. 63; <i>sub nom.</i> Barkey v. Moore & Co., 130 L.T. 45; 16 B.W.C.C. 176	205
Morrison (James) & Co., Ltd. v. Shaw, Savill & Albion Co., Ltd., [1916] 2 K.B. 783; 41 Digest 486, 3176; 86 L.J.K.B. 97; 115 L.T. 508	444, 450
Mortgage Insurance Corp. v. Inland Revenue Comrs. (1888), 21 Q.B.D. 352; 6 Digest 497, 3150; 57 L.J.Q.B. 630	712, 714, 719, 720
Moses v. Midland Ry. (1915), 84 L.J.K.B. 2181; 25 Digest 48, 437; 113 L.T. 451	297, 298
Moung Tha Hnyeen v. Moung Pan Nyo, [1900] L.R. 27 Ind. App. 166; 16 Digest 163, 653	953, 956
Mousell Brothers v. London & North Western Ry., [1917] 2 K.B. 836; 14 Digest 44, 133; 87 L.J.K.B. 82; 118 L.T. 25	297, 298
Muffett, Re, Jones v. Mason (1888), 39 Ch.D. 534; 40 Digest 693, 2290; 57 L.J.Ch. 1017; 59 L.T. 499	7, 10
Munns & Longden, Re, [1884] W.N. 117; Digest, Practice, 738, 3200; 50 L.T. 356	113, 114
Musgrove v. Pandells, [1919] 2 K.B. 43; 36 Digest 193, 343; 88 L.J.K.B. 915; 120 L.T. 601	253, 254, 256
Musson v. Moxley, [1936] 1 All E.R. 64; Digest Supp.	534, 544
Natal Land, etc., Co. v. Pauline Colliery Syndicate, [1904] A.C. 120; 9 Digest 638, 4213; 73 L.J.P.C. 22; 89 L.T. 678	209, 213
Neill v. Devonshire (Duke) (1882), 8 App. Cas. 135; 25 Digest 7, 41	622, 624
Neumann v. Inland Revenue Comr., [1934] A.C. 215; Digest Supp.; 103 L.J.K.B. 210; 150 L.T. 481; 18 Tax Cas. 332	762, 764, 767, 769, 770, 771, 773, 774, 775, 776, 777, 778, 803, 808
Neville, Re, Neville v. First Garden City, Ltd., [1925] Ch. 44; 44 Digest 736, 5913; 94 L.J.Ch. 130; 132 L.T. 602	689, 690
Newhill Compulsory Purchase Order, 1937, Re, Payne, Application of, [1938] 2 All E.R. 163; Digest Supp.; 158 L.T. 523	549, 550, 560, 561
Newton v. Marsden (1862), 2 John. & H. 356; 44 Digest 459, 2794; 31 L.J.Ch. 690; 6 L.T. 155	148, 150
Niblett v. Midland Ry. Co. (1907), 96 L.T. 462; 34 Digest 86, 639	194, 198
Nicholls v. Ely Beet Sugar Factory, [1931] 2 Ch. 84; Digest Supp.; 100 L.J.Ch. 259; 145 L.T. 113	813, 823
Nicholson, Re, Chadwyck-Healey v. Crawford, [1938] 3 All E.R. 270; Digest Supp.	201, 202
Nixon, Re, Gray v. Bell, [1904] 1 Ch. 638; 24 Digest 608, 6384; 73 L.J.Ch. 446	269, 270
North British & Mercantile Insurance Co. v. Moffatt (1871), L.R. 7 C.P. 25; 29 Digest 316, 2602; 41 L.J.C.P. 1; 25 L.T. 662	64, 65, 68, 70
Northumberland (Duke) v. Inland Revenue Comrs., [1911] 2 K.B. 343; 37 Digest 479, 764; 80 L.J.K.B. 866; 104 L.T. 506; <i>on appeal</i> , [1911] 2 K.B. 1011	921, 923
Northwestern Utilities, Ltd. v. London Guarantee & Accident Co., Ltd., [1936] A.C. 108; Digest Supp.; 105 L.J.P.C. 18; 154 L.T. 89	49
Nugent v. Smith (1875), 1 C.P.D. 19; 3 Digest 53, 2; 45 L.J.Q.B. 19; 33 L.T. 731; <i>revid.</i> on another point (1876), 1 C.P.D. 423	372, 373
No. 7 Steam Sand Pump Dredger (Owners) v. Greta Holme (Owners), The Greta Holme, [1897] A.C. 596; 41 Digest 808, 6639; 66 L.J.P. 166; 77 L.T. 231; <i>re vsg.</i> S.C. <i>sub nom.</i> The Emerald, The Greta Holme, [1896] P. 192	641, 642, 643, 648, 651, 653
Oliver v. Nautilus Steam Shipping Co., [1903] 2 K.B. 639; 34 Digest 495, 4087; 72 L.J.K.B. 857; 89 L.T. 318; 5 W.C.C. 65	340, 350, 351, 353, 698, 700, 706
Oliver, Re, Newbald v. Beckett (1890), 62 L.T. 533; 44 Digest 439, 2656	7, 9, 10
Ollett v. Jordan, [1918] 2 K.B. 41; 25 Digest 110, 336; 87 L.J.K.B. 934; 119 L.T. 50	979, 985
Oppenheim v. White Lion Hotel Co. (1871), L.R. 6 C.P. 515; 29 Digest 14, 179; 40 L.J.C.P. 231; 25 L.T. 93	372, 375
Ord v. Ord, [1923] 2 K.B. 432; 27 Digest 237, 2080; 92 L.J.K.B. 859; 129 L.T. 605	833, 887
Original Hartlepood Collieries Co. v. Gibb (1877), 5 Ch.D. 713; 44 Digest 105, 833; 46 L.J.Ch. 311; 36 L.T. 433	24
Orme v. Holloway (falsely calling herself Orme) (1847) 5 Notes of Cases, 267; 27 Digest 47, 259	896, 899
Ottawa Valley Power Co. v. A.G. for Ontario, [1936] 4 D.L.R. 594; Digest Supp.	99, 100
Owen, Re, Slater v. Owen, [1912] 1 Ch. 519; 40 Digest 699, 2335; 81 L.J.Ch. 337; 106 L.T. 671	7, 10
Paget v. Marshall (1884), 28 Ch.D. 255; 35 Digest 123, 291; 54 L.J.Ch. 375; 51 L.T. 351	566, 567
Palmer v. Locke (1880), 15 Ch.D. 294; 37 Digest 508, 1008; 50 L.J.Ch. 113; 43 L.T. 454	391, 395
Pape v. Pape (1887), 20 Q.B.D. 76; 27 Digest 317, 2945; 57 L.J.M.C. 3; 58 L.T. 399	780, 781

	PAGES
Parker v. Chapman (1928), 138 L.T. 729; Digest Supp.; 13 Tax Cas. 677 ..	310, 313
Parker v. Parker, [1926] S.C. 574 ..	826, 827
Payzu, Ltd. v. Saunders, [1919] 2 K.B. 581; 39 Digest 571, 1765; 89 L.J.K.B. 17; 121 L.T. 563 ..	484, 485, 487
Pease v. Courtney, [1904] 2 Ch. 503; 40 Digest 746, 2766; 73 L.J.Ch. 760; 91 L.T. 341 ..	549, 550, 553, 557
Peel's Release, <i>Re</i> , [1921] 2 Ch. 218; 8 Digest 328, 1109; 90 L.J.Ch. 369 ..	1, 2
Peizer v. Federman (1921), 38 T.L.R. 54; 31 Digest 569, 7164 ..	636
Perkins, <i>Re</i> , Brown v. Perkins, [1907] 2 Ch. 596; 40 Digest 694, 2295; 77 L.J.Ch. 16; 97 L.T. 706 ..	7, 8, 12
Pettit, <i>Re</i> , Le Fevre v. Pettit, [1922] 2 Ch. 765; 39 Digest 167, 587; 91 L.J.Ch. 732; 127 L.T. 491 ..	82, 83, 84, 88, 89
Phen's Trusts, <i>Re</i> (1870), 5 Ch. App. 139; 22 Digest 164, 1402; 39 L.J.Ch. 316; 22 L.T. 111 ..	895, 897
Pimm v. Talbot (Clement), Ltd., [1914], 7 B.W.C.C. 565; 34 Digest 355, 2861 ..	591, 592
Pole v. Leask (1863), 33 L.J.Ch. 155; 1 Digest 267, 1; 8 L.T. 645 ..	642, 649
Polemia & Furness, Withy & Co., <i>Re</i> , [1921] 3 K.B. 560; 36 Digest 29, 151; <i>sub nom.</i> Polemia v. Furness, Withy & Co., 90 L.J.K.B. 1353; 126 L.T. 154 ..	507, 508
Poliakoff v. News Chronicle, Ltd., [1939] 1 All E.R. 390; Digest Supp. ..	7, 10, 15, 16
Popham, <i>Re</i> , Butler v. Popham (1914), 111 L.T. 524; 39 Digest 173, 637 ..	35
Potter v. Welch (John) & Sons, Ltd., [1914] 3 K.B. 1020; 34 Digest 493, 4082; 83 L.J.K.B. 1852; 112 L.T. 7; 7 B.W.C.C. 788 ..	
Powell v. Kempton Park Racecourse Co., [1899] A.C. 143; 25 Digest 441, 358; 68 L.J.Q.B. 392; 80 L.T. 538; <i>aff.</i> , [1897] 2 Q.B. 242 ..	400, 402, 403, 404, 406, 407, 408, 412, 423, 424, 428, 429
Powell v. Main Colliery Co., [1900] A.C. 366; 34 Digest 367, 2971; 69 L.J.Q.B. 758; 83 L.T. 85; 2 W.C.C. 29 ..	431, 435
Poyser, <i>Re</i> , Landon v. Poyser, [1910] 2 Ch. 444; 40 Digest 694, 2297; 79 L.J.Ch. 748; 103 L.T. 134 ..	7, 8, 9, 12, 13
Pratt v. London Passenger Transport Board, Green v. Vandekar, [1937] 1 All E.R. 473; Digest Supp.; 156 L.T. 265 ..	929, 930
Pratt v. Pratt, [1939] 3 All E.R. 437; Digest Supp.; 161 L.T. 49 ..	780, 781, 825, 826, 827, 828, 832
Price & Co. v. Union Lighterage Co., [1904] 1 K.B. 412; 8 Digest 44, 265; 73 L.J.K.B. 222; 89 L.T. 731; <i>aff.</i> , [1903] 1 K.B. 750 ..	127, 128, 131
Pringle v. Grosvenor (1894), 21 R. (Ct. of Sess.) 532; 24 Digest 911, case <i>g</i> ..	724, 738
Prophet v. Roberts (1918), 88 L.J.K.B. 975; 34 Digest 372, 3020; 120 L.T. 239; 11 B.W.C.C. 301 ..	35
Proprietary Articles Trade Assocn. v. A.-G. for Canada, [1931] A.C. 310; Digest Supp.; 100 L.J.P.C. 84; 144 L.T. 577 ..	99, 100
Public Works Comr. (Cape Colony) v. Logan, [1903] A.C. 355; 11 Digest 109, case <i>k</i> ..	669, 671
Puddephatt v. Leith (No. 2), [1916] 2 Ch. 168; 42 Digest 284, 3195; 85 L.J.Ch. 543; 114 L.T. 1159 ..	306, 309
Pugh v. Golden Valley Ry. Co. (1880), 15 Ch.D. 330; 30 Digest 187, 548; 49 L.J.Ch. 721; 42 L.T. 863 ..	598, 601
Pusey v. Desbouvrie (1734), 3 P. Wms. 315; 35 Digest 125, 265 ..	698, 699
Pyman S.S. Co. v. Hull & Barnaley Ry. Co., [1915] 2 K.B. 729; 41 Digest 976, 8660; 84 L.J.K.B. 1235; 112 L.T. 1103 ..	127, 128, 131
R. v. B.C. Brick & Tile Co., Ltd., [1936] Ex. C.R. 71; Digest Supp. ..	992
R. v. Benn & Church (1795), 6 Term Rep. 198; 18 Digest 403, 1431 ..	795, 800
R. v. Bishop (1880), 5 Q.B.D. 259; 14 Digest 37, 70; 49 L.J.M.C. 45; 42 L.T. 240 ..	297, 298
R. v. Bradford, [1908] 1 K.B. 365; 26 Digest 356, 819; 77 L.J.K.B. 475; <i>sub nom.</i> R. v. Bradford, <i>Ex p.</i> Chambers, 98 L.T. 620 ..	549, 550, 554, 557, 559, 560
R. v. Brown, [1895] 1 Q.B. 119; 25 Digest 446, 395; 64 L.J.M.C. 1; 72 L.T. 22 ..	400, 408, 410
R. v. Colgate-Palmolive-Peet Co., Ltd., & Palmolive Manufacturing Co. (Ontario), Ltd., [1932] Ex. C.R. 120; Digest Supp.; <i>varied</i> [1933] S.C.R. 131 ..	992
R. v. Crawshaw (1860), Bell, C.C. 303; 25 Digest 457, 457; 30 L.J.M.C. 58; 3 L.T. 510 ..	400, 411
R. v. Curgerwen (1865), L.R. 1 C.C.R. 1; 15 Digest 742, 8015; 35 L.J.M.C. 58; 13 L.T. 383 ..	109, 112
R. v. Deaville, R. v. Deaville, R. v. Simpson, [1903] 1 K.B. 468; 25 Digest 446, 392; 72 L.J.K.B. 272; 88 L.T. 32 ..	400, 411, 412
R. v. Ewart (1905), 25 N.Z.L.R. 709; 14 Digest 32, case 33ii ..	297, 298
R. v. Faulkes (1903), 9 T.L.R. 250; 15 Digest 742, 8017 ..	109, 111
R. v. Income Tax Special Comrs., <i>Ex p.</i> University College of North Wales (1909), 78 L.J.K.B. 578; 28 Digest 11, 53; 100 L.T. 585; 5 Tax Cas. 408 ..	470, 475
R. v. Leresche, [1891] 2 Q.B. 418; 27 Digest 313, 2910; 60 L.J.M.C. 153; 65 L.T. 602 ..	780, 785, 825, 829
R. v. Marais, <i>Ex p.</i> Marais, [1902] A.C. 51; 17 Digest 424, 60; 71 L.J.P.C. 32; 85 L.T. 363 ..	122, 126
R. v. Midland Ry. Co. (1855), 4 E. & B. 958; 38 Digest 534, 796; 25 L.T.O.S. 114 ..	58, 59
R. v. Preedy (1888), 17 Cox, C.C. 433; 25 Digest 436, 337 ..	400, 410
R. v. Rule, [1937] 2 K.B. 375; [1937] 2 All E.R. 772; Digest Supp.; 106 L.J.K.B. 807; 157 L.T. 48 ..	507, 508
R. v. Sleep (1861), Le. & Ca. 44; 14 Digest 32, 33; 30 L.J.M.C. 170; 4 L.T. 525 ..	297, 298
R. v. Speed (1702), 12 Mod. Rep. 328; 18 Digest 429, 1664 ..	795, 800
R. v. Sussex Licensing JJ., <i>Ex p.</i> Bubb (1934), 50 T.L.R. 410; Digest Supp. ..	106, 107
R. v. Tibshelf (Inhabitants) (1830), 1 B. & Ad. 190; 27 Digest 47, 261; 8 L.J.O.S. M.C. 120 ..	895, 899
R. v. Wroxton (Inhabitants) (1833), 4 B. & Ad. 640; 27 Digest 47, 254; 2 L.J.M.C. 61 ..	896, 899
Race v. Ward (1855), 4 E. & B. 702; 19 Digest 145, 997; 24 L.J.Q.B. 153; 24 L.T.O.S. 270; <i>subsequent proceedings</i> (1857), 7 E. & B. 384 ..	813, 823
Radcliffe, <i>Re</i> , Radcliffe v. Bewes, [1892] 1 Ch. 227; 37 Digest 520, 1111; 61 L.J.Ch. 186; 66 L.T. 363 ..	391, 395
Radley v. London & North Western Ry. Co. (1876), 1 App. Cas. 754; 36 Digest 109, 729; 46 L.J.Q.B. 573; 35 L.T. 637 ..	724, 730
Ragdale, <i>Re</i> , Public Trustee v. Tuffill, [1934] Ch. 352; Digest Supp.; 103 L.J.Ch. 181; 150 L.T. 459 ..	657, 658, 660
Raingold v. Bromley, [1931] 2 Ch. 307; Digest Supp.; 100 L.J.Ch. 337; 145 L.T. 611 ..	217, 219

Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., [1921] 2 A.C. 465; 36 Digest 192, 332; 90 L.J.K.B. 1252; 126 L.T. 70; <i>aff.</i> , [1920] 2 K.B. 487	253, 254, 257, 580, 581, 992
Ralli Brothers v. Compañía Naviera Sota y Aznar, [1920] 2 K.B. 287; 11 Digest 397, 699; 89 L.J.K.B. 999; 123 L.T. 375	39, 40, 42, 44, 45, 47
Ramsden & Carr v. Chessum & Sons & Ward (1913), 110 L.T. 274; 7 Digest 435, 409	591, 592
Rapier v. London Tramways Co., [1893] 2 Ch. 588; 38 Digest 44, 258; 63 L.J.Ch. 36; 69 L.T. 361	49
Ratcliffe v. Ratcliffe, [1938] 3 All E.R. 41; Digest Supp.	780, 781
Rawsthorne v. Ottley, [1937] 3 All E.R. 902; Digest Supp.	614, 617, 619
Raymond v. Wooten (1931), 47 L.T. L.R. 606; Digest Supp.	534, 543, 544, 545
Rayner, <i>Re</i> , Rayner v. Rayner, [1904] 1 Ch. 176; 44 Digest 623, 4535; 73 L.J.Ch. 111; 89 L.T. 681	689, 690
Reading Trust, Ltd. v. Spero, Spero v. Reading Trust, Ltd., [1930] 1 K.B. 492; Digest Supp.; 99 L.J.K.B. 186; 142 L.T. 361	695, 696
Reddaway v. Banham, [1896] A.C. 199; 43 Digest 277, 1098; 65 L.J.Q.B. 381; 74 L.T. 289	228, 229, 233, 513, 517
Reigate v. Union Manufacturing Co. (Ramsbottom), [1918] 1 K.B. 592; 34 Digest 99, 739; 87 L.J.K.B. 724; 118 L.T. 479	194, 195, 979, 981
Reniger v. Fogossa (1552), 1 Plowd. 1	372, 373
Reynolds v. Boston Deep Sea Fishing & Ice Co., Ltd. (1922), 38 T.L.R. 429; Digest Supp.	128, 136
Rhoades, <i>Re</i> , <i>Ex p.</i> Rhoades, [1899] 2 Q.B. 347; 23 Digest 374, 4429; 63 L.J.Q.B. 804; 80 L.T. 742	747, 749, 750, 753
Richards v. Goskar, [1937] A.C. 304; [1936] 3 All E.R. 839; Digest Supp.; 106 L.J.K.B. 85; 156 L.T. 52; 29 B.W.C.C. 357	159, 163, 164
Richardson v. Le Maitre, [1903] 2 Ch. 222; Digest, Practice, 508, 1817; 72 L.J.Ch. 779; 88 L.T. 626	354
Richardson, <i>Re</i> , Richardson v. Richardson, [1915] 1 Ch. 353; 23 Digest 420, 4914; 84 L.J.Ch. 438; 112 L.T. 554	201
Richmond v. White (1879), 12 Ch.D. 361; 23 Digest 373, 4428; 48 L.J.Ch. 798; 41 L.T. 570	747, 748, 749, 753, 754, 755
Rickards v. Lothian, [1913] A.C. 263; 36 Digest 194, 353; 82 L.J.P.C. 42; 108 L.T. 225	48, 52
Rigling v. Minister of Munitions (1921), 14 B.W.C.C. 1; 34 Digest 324, 2650	204, 205
Robbins v. Jones (1863), 15 C.B.N.S. 221; 31 Digest 347, 4895; 33 L.J.C.P. 1; 9 L.T. 523	329, 330, 333, 334, 335, 337
Robertson v. Petros M. Nomikos, Ltd., [1939] 2 All E.R. 723; Digest Supp.; 108 L.J.K.B. 433; 160 L.T. 542	909, 915
Robins v. National Trust Co., [1927] A.C. 515; Digest Supp.; 96 L.J.P.C. 84; 137 L.T. 1	953, 954, 956
Robins & Co. v. Gray, [1895] 2 Q.B. 501; 29 Digest 19, 240; 65 L.J.Q.B. 44; 73 L.T. 252	372, 373
Robinson, <i>Re</i> , McLaren v. Public Trustee, [1911] 1 Ch. 502; 32 Digest 518, 1761; 80 L.J.Ch. 381; 104 L.T. 331	501, 502
Robinson v. Ommamney (1883), 23 Ch.D. 285; 44 Digest 179, 83; 52 L.J.Ch. 440; 49 L.T. 19	148, 149, 150, 153
Roby, <i>Re</i> , Sherbrooke v. Taylor (1916), 60 Sol. Jo. 291; 24 Digest 837, 8692	747, 748, 749, 750
Rochdale Canal Co. v. Crawford Spinning Co. (1908), Unreported	57, 59
Rochdale Canal Co. v. Manchester Ship Canal Co. (1901), 85 L.T. 585; 38 Digest 405, 967; <i>aff.</i> (1899), 81 L.T. 472	57, 58, 60
Rock v. Leighton (1700), 1 Conn. 87; 24 Digest 744, 7731	606, 608
Rodgers v. Nowill (1847), 5 C.B. 109; 43 Digest 264, 1017; 17 L.J.C.P. 52; 10 L.T.O.S. 88	513, 515, 519, 527
Rogers v. Ingham (1876), 3 Ch.D. 351; 35 Digest 93, 25; 35 L.T. 677	501, 502
Rogers v. Rice, [1892] 2 Ch. 170; 31 Digest 489, 6362; 61 L.J.Ch. 573; 66 L.T. 640	889, 892
Rogers v. Taylor (1857), 1 H. & N. 706; 19 Digest 176, 1276; 26 L.J. Ex. 203; 23 L.T.O.S. 275; <i>subsequent proceedings</i> (1858), 2 H. & N. 828	598, 600
Rollin v. Steward (1854), 14 C.B. 595; 17 Digest 122, 306; 23 L.J.C.P. 148; <i>sub nom.</i> Rollin v. Steward, 23 L.T.O.S. 114	514, 526, 577, 579
Rosen v. Quercus S.S. Owners, [1933] A.C. 494; Digest Supp.; 102 L.J.K.B. 427; 148 L.T. 532; 26 B.W.C.C. 286	204, 206
Roswell v. Prior (1701), Holt, K.B. 500; 36 Digest 215, 581	580, 581
Rouse, <i>Re</i> , Rouse v. Tribble (1889), 59 L.T. 887; Digest, Practice, 738, 3201	113, 114
Routh v. Thompson (1811), 13 East, 274; 29 Digest 89, 471; <i>previous proceedings</i> (1809), 11 East, 428	64, 65
Rowbotham v. Wilson (1860), 8 H.L. Cas. 348; 34 Digest 613, 121; 30 L.J.Q.B. 49; 2 L.T. 642; <i>aff.</i> (1857), 8 E. & B. 123	191, 192, 598, 600
Royal Bank of Canada v. R., [1913] A.C. 283; 17 Digest 442, 175; 82 L.J.P.C. 33; 108 L.T. 129	99, 100
Royal Trust Co. (Judicial Trustee of Shell Estate) v. A. G. for Alberta, [1937] 1 W.W.R. 376	99, 100
Rutter v. Palmer, [1922] 2 K.B. 87; Digest Supp.; 91 L.J.K.B. 657; 127 L.T. 419	127, 128, 131, 132, 136
Rye & Eyre v. Inland Revenue Commissioners, [1935] A.C. 274; Digest Supp.; 104 L.J.K.B. 401; 152 L.T. 493; 19 Tax Cas. 164	144, 145
Rylands v. Fletcher (1868), L.R. 3 H.L. 330; 36 Digest 187, 311; 37 L.J. Ex. 161; 19 L.T. 220; <i>aff.</i> (1866), L.R. 1 Exch. 265; <i>reversg.</i> (1865), 3 H. & C. 774	48, 49, 50, 52, 253, 254, 255, 256
St. Francis Hydro Electric Co. v. R., [1937] 2 All E.R. 541; Digest Supp.	953, 954
St. Mungo Manufacturing Co. v. Viper & Recovering Co. (1910), 27 R.P.C. 420; 43 Digest 222, 669	228, 229
Salsbury (Marquis) v. Gladstone (1861), 9 H.L. Cas. 692; 17 Digest 14, 114; 34 L.J.C.P. 222; 4 L.T. 349	191, 192, 598, 600, 601
Samson, <i>Re</i> , Robbins v. Alexander, [1906] 2 Ch. 584; 23 Digest 373, 4123; 76 L.J.Ch. 21; 95 L.T. 633	748, 749
Samuel v. Adelaide Club, Ltd., [1934] 2 K.B. 69; Digest Supp.; 103 L.J.K.B. 561; 151 L.T. 116	400, 401, 408, 413, 414, 422, 426, 428
Sarel v. Sarel (1856), 23 Beav. 87; 44 Digest 1214, 10496	658, 659

Scarf v. Jardine (1882), 7 App. Cas. 345; 36 Digest 382, 581; 51 L.J.Q.B. 612; 47 L.T. 258	340, 343, 344, 698, 699
Scorer, <i>Re</i> , Burtt v. Harrison (1924), 94 L.J.Ch. 196; 44 Digest 706, 5486; 132 L.T. 529	689, 691
Scott v. Stansfield (1868), L.R. 3 Exch. 220; 32 Digest 104, 1352; 37 L.J. Ex. 155; 18 L.T. 572	17, 19
Scottish Shire Line, Ltd. v. London & Provincial Marine & General Insurance Co., Ltd., [1912] 3 K.B. 51; 29 Digest 173, 1300; 81 L.J.K.B. 1066; 107 L.T. 46	909, 910
Scowcroft, <i>Re</i> , Ormrod v. Wilkinson, [1898] 2 Ch. 638; 8 Digest 247, 68; 67 L.J.Ch. 697; 79 L.T. 342	471, 476, 477
Seaman v. Burley, [1896] 2 Q.B. 344; 18 Digest 422, 1603; 65 L.J.M.C. 208; 75 L.T. 91	795, 796
Secretary of State for India in Council v. Satish Chandra Sen, (1930) 57 L.A. 339	708, 710
Selwood v. Towneley Coal & Fireclay Co., Ltd., [1939] 2 All E.R. 132; Digest Supp. 339, 340, 342, 343, 352, 353, 698, 699, 700	917, 918
Selwyn (A. H.) Ltd. v. Baker, [1924] W.N. 195; Digest, Practice, 806, 3692	724, 738, 740
Senior v. Ward (1859) 1 E. & E. 385; 36 Digest 137, 910; 28 L.J.Q.B. 139; 32 L.T.O.S. 252	58, 59
Seton v. Lidlithgow Burgh Comrs. (1900), 2 F. (Ct. of Sess.) 907; 43 Digest 1062, case <i>o</i>	960, 965
Sharp v. Avery & Kerwood, [1938] 4 All E.R. 85; Digest Supp.	194, 195, 199
Sharpington v. Fulham Guardians, [1904] 2 Ch. 449; 38 Digest 109, 783; 73 L.J.Ch. 777; 91 L.T. 739	689, 694
Shaw, <i>Re</i> , Mountain v. Mountain (1929), 168 L.T.Jo. 371; Digest Supp.; 63 L.Jo. 334; [1929] W.N. 246	780, 781
Shaw v. Shaw, [1939] P. 269; [1939] 2 All E.R. 381; Digest Supp.; 161 L.T. 63	90, 91, 92
Shipman v. Shipman, [1939] P. 147; [1938] 4 All E.R. 732; Digest Supp.; 160 L.T. 299	329, 330, 335, 337, 338
Shirvell v. Hackwood Estates Co., Ltd., [1938] 2 K.B. 577; [1938] 2 All E.R. 1; Digest Supp.; 107 L.J.K.B. 713; 159 L.T. 49	99, 100
Shoolbred v. Clarke (1890), 17 S.C.R. 265; 17 Digest 434, case <i>bb</i>	303, 304, 305
Short Bros., Ltd. v. Inland Revenue Comrs. (1926), 12 Tax Cas. 955	780, 781
Sifton v. Sifton, [1939] P. 221; [1939] 1 All E.R. 109; Digest Supp.	813, 814
Simeon & Isle of Wight Rural District Council, <i>Re</i> , [1937] Ch. 525; [1937] 3 All E.R. 149; Digest Supp.; 106 L.J.Ch. 335; 157 L.T. 473	695, 696
Simmons v. Russell Financiers, Ltd., [1934] 2 K.B. 487; Digest Supp.; 103 L.J.K.B. 724; 151 L.T. 472	795, 799
Simpson v. Hartopp (1774), Willes, 512; 18 Digest 288, 247	204, 205, 206, 207
Simpson v. London, Midland & Scottish Ry. Co., [1931] A.C. 351; Digest Supp.; 100 L.J.P.C. 98; 144 L.T. 730; 24 B.W.C.C.1	929
Simpson, In the Estate of, Gunning, In the Estate of, [1936] P. 40; Digest Supp.; 105 L.J.P. 7; 154 L.T. 136	689, 690
Singer v. Williams, [1921] 1 A.C. 41; 28 Digest 78, 439; 89 L.J.K.B. 1218; 123 L.T. 625	514
"Singer" Machine Manufacturers v. Wilson (1877), 3 App. Cas. 376; 43 Digest 272, 1070; 47 L.J.Ch. 481; 38 L.T. 303	960, 965
Singleton Abbey S.S. Owners v. Paludina S.S. Owners, The Paludina, [1927] A.C. 16; Digest Supp.; 95 L.J.P. 135	896, 900
Small v. Small & Furber (1923), 67 Sol.Jo. 277; 27 Digest 48, 274	566, 567
Smith v. Hughes (1871), L.R. 6 Q.B. 597; 35 Digest 107, 125; 40 L.J.Q.B. 221; 25 L.T. 329	49, 580, 581
Smith v. Kenrick (1849), 7 C.B. 515; 36 Digest 157, 8; 18 L.J.C.P. 172; 12 L.T.O.S. 556	780, 781
Smith v. Smith, [1915] P. 288; 27 Digest 317, 2949; 85 L.J.P. 16; 113 L.T. 1166	166, 167
Smith v. Smith, [1923] P. 191; 28 Digest 68, 361; 92 L.J.P. 132; 130 L.T. 8	392, 396
Somes, <i>Re</i> , Smith v. Somes, [1896] 1 Ch. 250; 37 Digest 504, 971; 74 L.T. 49; <i>sub nom.</i> <i>Re</i> Somes, Somes v. Somes, 65 L.J.Ch. 202	883, 886
Southwark & Vauxhall Water Co. v. Wandsworth District Board of Works (1898), 62 J.P. 519; 38 Digest 32, 178; <i>revid. on other grounds</i> , [1898] 2 Ch. 603	514, 517
Spalding & Brothers v. Gamage (A. W.), Ltd. (1915), 84 L.J.Ch. 449; 43 Digest 264, 1018	460, 469
Spencer's Case (1583), 5 Co.Rep. 16 a; 31 Digest 144, 2798	357, 358
Stallmann, <i>Re</i> (1911), L.L.R. 39 Cal. 164	658
Stanford v. Roberts, [1901] 1 Ch. 440; 30 Digest 287, 130; 83 L.T. 756; <i>sub nom.</i> <i>Re</i> Stanford, Stanford v. Roberts, 70 L.J.Ch. 203	780, 781
Stanley's Settlement, <i>Re</i> , Maddocks v. Andrews, [1916] 2 Ch. 50; 40 Digest 563, 1016; 85 L.J.Ch. 809; 114 L.T. 933	128
Starkey v. Starkey, [1938] 3 All E.R. 773; Digest Supp.; 159 L.T. 490	209, 216
Stella, The [1900] P. 161; 8 Digest 57, 376; 69 L.J.P. 70; 82 L.T. 390	658, 659
Stennett v. Hancock and Peters, [1939] 2 All E.R. 578; Digest Supp.	377, 378, 379, 380
Stevens v. Pyle (1860), 28 Beav. 388; 44 Digest 1160, 10045	947, 950, 951, 952
Stevens v. Walker, [1936] 2 K.B. 215; [1936] 1 All E.R. 892; Digest Supp.; 106 L.J.K.B. 683; 154 L.T. 550	64, 65
Stevenson v. Stevenson, [1911] P. 191; 27 Digest 320, 2986; 80 L.J.P. 137; 105 L.T. 183	549, 550
Stockdale v. Dunlop (1840), 6 M. & W. 224; 29 Digest 107, 641; 9 L.J.Ex. 83; 7 L.T. 804	780, 781
Stocker v. Minister of Health, [1938] 1 K.B. 655; Digest Supp.; 107 L.J.K.B. 146; 158 L.T. 29; <i>sub nom.</i> <i>Re</i> London County (Stoke Newington) Housing Order, 1936, Stocker's Appeal, [1937] 4 All E.R. 678	689, 694
Stockley v. Stockley, [1939] 2 All E.R. 707; Digest Supp.	194
Stocks v. Barre (1859), John 54; 44 Digest 725, 5773; 33 L.J.O.S. 8	795, 799
Storey v. Fulham Steel Works Co. (1907), 24 T.L.R. 89; 12 Digest 377, 3121	876, 879, 880
Storey v. Robinson (1795), 6 Term Rep. 138; 18 Digest 443, 1796	297, 298
Strathcona, Lord, v. Inland Revenue Comrs., [1929] S.C. 800; Digest Supp.	392, 397
Strutt v. Clift, [1911] 1 K.B. 1; 14 Digest 32, 36; 80 L.J.K.B. 114; 103 L.T. 722	788, 789, 790
Stuart v. Kennedy (1851), 3 Ir.Jur. 305	883, 886
Sudeley (Lord) v. A.-G. [1897] A.C. 11; 21 Digest 122, 917; 66 L.J.Q.B. 21; 75 L.T. 393; <i>aff. S.C. sub nom.</i> A.-G. v. Sudeley (Lord), [1896] 1 Q.B. 354	724, 734, 737, 740
Sutton v. Clarke (1815), 6 Taunt. 29; 38 Digest 22, 122	
Swadling v. Cooper, [1931] A.C. 1; Digest Supp.; 100 L.J.K.B. 97; 143 L.T. 732	

	PAGES
Swaffer v. Mulcahy, Hooker v. Mulcahy, Smith v. Mulcahy, [1934] 1 K.B. 608; Digest Supp.; 103 L.J.K.B. 347; 150 L.T. 240	795
Tailby v. Official Receiver (1888), 13 App. Cas. 523; 20 Digest 334, 770; 58 L.J.Q.B. 75; 60 L.T. 182	921, 924
Tamplin v. James (1880), 15 Ch.D. 215; 35 Digest 101, 84; 43 L.T. 520	566, 567
Tamplin (F. A.) S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd., [1916] 2 A.C. 397; 12 Digest 390, 3194; 85 L.J.K.B. 1389; <i>sub nom. Re F. A. Tamplin S.S. Co., Ltd.</i> , and Anglo-Mexican Petroleum Products Co., Ltd., 115 L.T. 315; <i>affg.</i> , [1916] 1 K.B. 485; [1915] 3 K.B. 668	314, 316, 317, 318
Tate v. Tate, [1938] 4 All E.R. 264; Digest Supp.	780, 781
Tatem (W. J.), Ltd. v. Gamboa, [1939] 1 K.B. 132; [1938] 3 All E.R. 135; Digest Supp.; 108 L.J.K.B. 34; 160 L.T. 159	314, 317
Taylor v. Hawkins (1851), 16 Q.B. 308; 32 Digest 160, 1931; 20 L.J.Q.B. 313; 16 L.T.O.S. 409	507, 508
Taylor v. Lanyon (1830), 6 Bing. 536; 18 Digest 343, 793; 8 L.J.O.S.C.P. 180	795, 796
Telfair, <i>Re</i> , Garrioch v. Barclay (1902), 86 L.T. 496; 44 Digest 1215, 10503	658
Tennant v. Union Bank of Canada, [1894] A.C. 31; 17 Digest 429, 99; 63 L.J.P.C. 25; 69 L.T. 774	99, 100
Terraz, <i>Ex p.</i> (1878), 4 Ex.D. 63; 14 Digest 187, 1667; 48 L.J.Q.B. 214; 39 L.T. 502	357, 358
Thom (or Simpson) v. Sinclair, [1917] A.C. 127; 34 Digest 320, 2619; 86 L.J.P.C. 102; 116 L.T. 609; 10 B.W.C.C. 220	205
Thomas v. Metropolitan Housing Corp., Ltd., [1936] 1 All E.R. 210; Digest Supp. 636, 637, 638	636, 637, 638
Thomas v. Thomas, [1924] P. 194; 27 Digest 315, 2925; 93 L.J.P. 61; 130 L.T. 716	437, 442, 826
Thompson v. Hopper (1858), E.B. & E. 1038; 29 Digest 205, 1642; 27 L.J.Q.B. 441; 32 L.T.O.S. 38	909
Thompson, <i>Re</i> , Thompson v. Watkins, [1908] W.N. 195; 40 Digest 694, 2296 .. 7, 8, 9, 10, 14, 16	7, 8, 9, 10, 14, 16
Thorman v. Dowgate S.S. Co., Ltd., [1910] 1 K.B. 410; 41 Digest 307, 1685; 79 L.J.K.B. 287; 102 L.T. 242	128, 133
Tidy v. Battman, [1934] 1 K.B. 319; Digest Supp.; 103 L.J.K.B. 158; 150 L.T. 90	960, 964
Tilmanstone (Kent) Collieries, Ltd., <i>Re</i> , [1928] 1 K.B. 599; Digest Supp.; 97 L.J.K.B. 169; 138 L.T. 452; 19 Ry. & Can. Tr. Cas. 26	864, 868
Timms, <i>Re</i> (1878), 47 L.J.Ch. 831; 24 Digest 778, 8075; 38 L.T. 679	606, 610
Tipping v. Power (1842), 1 Hare 405; 23 Digest 373, 4427; 11 L.J.Ch. 257	747, 748, 753
Todd v. Bielby (1859), 27 Beav. 353; 23 Digest 421, 4925	322, 325
Tompson v. Dashwood (1883), 11 Q.B.D. 43; 32 Digest 116, 1478; 52 L.J.Q.B. 425; 48 L.T. 943	507, 508
Toogood v. Spyring (1834), 1 Cr.M. & R. 181; 32 Digest 117, 1489; 3 L.J.Ex. 347	507, 508, 509
Toronto Corp., v. York Corp., and A.-G. for Ontario, [1938] A.C. 415; [1938] 1 All E.R. 601; Digest Supp.; 107 L.J.P.C. 43	99, 100
Townsend v. Townsend (1873), L.R. 3 P. & D. 129; 27 Digest 311, 2892; 42 L.J.P. & M. 71; 29 L.T. 254	826
Travers (Joseph) & Sons, Ltd. v. Cooper, [1915] 1 K.B. 73; 8 Digest 44, 266; 83 L.J.K.B. 1787; 111 L.T. 1088	128
Tredegear Iron & Coal Co. v. Calliope (Owners), The Calliope, [1891] A.C. 11; 44 Digest 104, 829; 60 L.J.P. 28; 63 L.T. 781	24
Trinder, Anderson & Co. v. Thames & Mersey Marine Insurance Co., Trinder, Anderson & Co. v. North Queensland Insurance Co., Trinder, Anderson & Co. v. Weston, Crocker & Co., [1898] 2 Q.B. 114; 29 Digest 196, 1562; 67 L.J.Q.B. 668; 78 L.T. 485	909
Trollope (George) & Sons v. Caplan, [1936] 2 K.B. 382; [1936] 2 All E.R. 842; Digest Supp.; 105 L.J.K.B. 819; 155 L.T. 365	533, 534, 541, 542
Trollope (George) & Sons v. Martyn Bros., [1934] 2 K.B. 436; Digest Supp.; 103 L.J.K.B. 634; 152 L.T. 88	534, 539, 540, 541, 543, 544, 545
Turner v. Coates, [1917] 1 K.B. 670; 2 Digest 235, 230; 86 L.J.K.B. 321; 115 L.T. 766	854, 857
Turner v. Goldsmith, [1891] 1 Q.B. 544; 12 Digest 382, 3157; 60 L.J.Q.B. 247; 64 L.T. 301	314, 317
Tyler v. Bennett (1836), 5 Ad. & El. 377; 19 Digest 145, 996	813, 814
Tyson v. Smith (1838), 9 Ad. & El. 406; 17 Digest 4, 5	598, 599
United Steel Companies, Ltd. v. Cullington, [1939] 1 All E.R. 454; Digest Supp.	300, 302
Urquhart, <i>Re</i> , ex p. Urquhart (1890), 24 Q.B.D. 723; 4 Digest 137, 1264; 59 L.J.Q.B. 364	430
Valin v. Langlois (1879), 5 App. Cas. 115; 17 Digest 431, 111; 49 L.J.P.C. 37; 41 L.T. 662	99, 100
Van den Berghs, Ltd. v. Clark, [1935] A.C. 431; Digest Supp.; 104 L.J.K.B. 345; 153 L.T. 171; 19 Tax Cas. 390	303, 304, 305
Vanderpant v. Mayfair Hotel Co., Ltd., [1930] 1 Ch. 138; Digest Supp.; 99 L.J.Ch. 84; 142 L.T. 198	49
Vernon v. Findlay, [1938] 4 All E.R. 311; Digest Supp.; 160 L.T. 130; <i>reversd.</i> , [1939] 2 All E.R. 716	137
Vickers-Armstrong, Ltd. v. Regan, [1933] 1 K.B. 232; Digest Supp.; 101 L.J.K.B. 657; 147 L.T. 298; 25 B.W.C.C. 211	431, 436
Victoria Insurance Co., Ltd. v. Junction North Broken Hill Mine, [1925] A.C. 354; 34 Digest 463, case 7	159
Vinkinstone v. Edden (1698), Carth. 357; 18 Digest 427, 1650	795, 800
Wakelin v. London & South Western Ry. Co. (1884), [1896] 1 Q.B. 189 n.; 36 Digest 7, 4; 65 L.J.Q.B. 224 n.; 73 L.T. 615 n.; <i>on appeal</i> (1886), 12 App. Cas. 41 724, 735, 742	724, 735, 742
Warburton v. Co-operative Wholesale Society, Ltd., [1917] 1 K.B. 663; 12 Digest 378, 3122; 86 L.J.K.B. 529; 116 L.T. 107; 10 B.W.C.C. 83	194
Waters v. Monarch Life Assurance Co. (1856), 5 E. & B. 970; 29 Digest 311, 2568; 25 L.J.Q.B. 102; 26 L.T.O.S. 217	64, 65, 68, 69
Watson v. Watson, [1938] P. 258; [1938] 3 All E.R. 770; Digest Supp.; 107 L.J.P. 160; 159 L.T. 523	780, 781
Watt v. Longson, [1930] 1 K.B. 130; Digest Supp.; 98 L.J.K.B. 711; 142 L.T. 4	507, 508, 509
Webster v. Cecil (1861), 30 Beav. 62; 35 Digest 103, 133	566, 567
Weigall v. Westminster Hospital, [1936] 1 All E.R. 232; Digest Supp.	128
West Wales, The, [1932] P. 165; Digest Supp.; 101 L.J.P. 92; 148 L.T. 80	642, 648, 653

	PAGES
Westcombe v. Hadnock Quarries, Ltd. (1931), 16 Tax Cas. 137; Digest Supp.	221, 222, 223
Western Bank of Scotland v. Addie, Addie v. Western Bank of Scotland (1867), L.R. 1 Sc. & Div. 145; 35 Digest 30, 214; 5 Macph. (H.L.) 80	272, 279
Westminster Corpn. v. Southern Ry. Co., Railway Assessment Authority & Smith & Sons, Ltd., Westminster Corpn. & Kent Valuation Committee v. Southern Ry. Co.; Railway Assessment Authority & Pullman Car Co., Ltd.; [1936] A.C. 511; [1936] 2 All E.R. 322; Digest Supp.; 105 L.J.K.B. 537	813, 814
Weston, Re, Bartholomew v. Menzies, [1902] 1 Ch. 680; 25 Digest 544, 302; 71 L.J.Ch. 343; 86 L.T. 551	682, 686
Westropp v. Equitable Investment Co., Ltd., unreported	695, 696
Wetherley v. Wilson (1836), 1 Keen, 80; 28 Digest 244, 1013; 5 L.J.Ch. 235	154, 157
White v. Chitty (1866), L.R. 1 Eq. 372; 5 Digest 664, 5898; 35 L.J.Ch. 343; 13 L.T. 750	902, 903, 906
White, Re, Knight v. Briggs, [1925] Ch. 179; 44 Digest 394, 2272; 94 L.J.Ch. 211; 132 L.T. 481	586, 587
White v. Turnbull, Martin & Co. (1898), 78 L.T. 726; 1 Digest 516, 1785	534, 545
Whitney v. Joyce (1906), 75 L.J.P.C. 89; 16 Digest 163, 661; 95 L.T. 74	953, 954
Wilkins, Re, Wilkins v. Rotherham (1884), 27 Ch.D. 703; 39 Digest 161, 527; 54 L.J.Ch. 188	322, 325
Williames, Re, Andrew v. Williames (1885), 54 L.T. 105; 40 Digest 650, 1890	7, 8, 12, 13
Wilson v. Coxwell (1883), 23 Ch.D. 764; 23 Digest 372, 4417; 52 L.J.Ch. 975	748, 749
Wiltshire v. Prince (1830), 3 Hag.Ecc. 332; 27 Digest 48, 262	896, 899, 901
Wimbledon Local Board v. Underwood, [1892] 1 Q.B. 836; 7 Digest 151, 819; 61 L.J.Q.B. 484; 67 L.T. 55	795, 796
Woking Urban Council (Basingstoke Canal) Act, 1911, R. [1914] 1 Ch. 300; 17 Digest 352, 1638; 83 L.J.Ch. 201; 110 L.T. 49	2
Wombwell's Settlement, Re, Clerke v. Menzies, [1922] 2 Ch. 298; 27 Digest 457, 4752; 92 L.J.Ch. 18; 127 L.T. 295	501, 502
Wood v. Manchester Corpn., Yearly Practice of the Supreme Court, 1939, p. 1283; Digest, Practice, 806, 3693	917, 919
Wood v. Scarth (1855), 2 K. & J. 33; 35 Digest 140, 385; 26 L.T.O.S. 87	566, 567
Woodward v. Darcy (Lord) (1558), 1 Plowd. 184; 23 Digest 370, 4392	748, 749
Wynne v. Wynne, [1898] P. 18; 27 Digest 310, 2879; 67 L.J.P. 5; subsequent proceedings, 78 L.T. 796	825, 826, 827, 830
Yarrow v. Yarrow, [1892] P. 92; 27 Digest 324, 3025; 61 L.J.P. 69; 66 L.T. 383	968, 971
Yeap Cheah Neo v. Ong Cheng Neo (1875), L.R. 6 P.C. 381; 8 Digest 261, 237	470, 475
Yeo v. Dawe (1885), 53 L.T. 125; 6 Digest 498, 3153	712, 714
Young v. Darrah, [1929] S.C. (J.) 17; Digest Supp.	400, 406, 423
Young v. Robertson (1862), 4 Macq. 337; 30 Digest 187, 547	598, 601
Yousoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd. (1934), 50 T.L.R. 581; Digest Supp.	264, 268

CORRIGENDA.

- P. 81. HILL v. WOLVERHAMPTON IRON CO., LTD. *Berrymans* were agents for *T. Haynes Duffell & Son*, Birmingham.
- P. 490. MILK MARKETING BOARD v. LAWRENCE. The solicitors for the defendant were *Guscombe, Wadham, Thurland & Howard*, agents for *Burges, Ware & Scammell*, Bristol.
- P. 678. RYNOLDS v. PHILLIPS. The appeal in this case was by the defendant and in the headnote "the appellant" must be replaced by "the respondent," and *vice versa*.
- P. 694. *Re SMITHERS, WATTS v. SMITHERS. Walker, Martineau & Co.* were the solicitors for *Bernard Smithers*, and *Bennett, Ferris & Bennett* were the solicitors for *Leonard Smithers*.
- P. 723. One line below A for "available" read "available."
- P. 729.G. For "safely" read "safety."

INDEX

	PAGE
Abatement, annuities payable out of residue, power to resort to capital, rights of annuitants and residuary legatees ..	321
—, legacies, annuities in nature of settled legacies, rights of annuitants ..	200
Access, carriageway giving access to building behind buildings fronting on highway, minimum width, "street" ..	366
Accident, date, industrial disease, workmen's compensation ..	158
—, or fortuitous casualty, goods converted by firm to whom sent for processing, whether a loss under an all-risk policy ..	857
Acquiescence, gift to determine on remarriage, marriage annulled on ground of husband's incapacity, wife's delay in taking proceedings, loss of right to restitution ..	500
Administration action, costs of, executor's right of retainer ..	746
Administration, <i>ad litem</i> , grant of representation of deceased in proposed action ..	928
Advertisements, regulation, amenities of public park, validity of bye-law ..	246
AGENCY.	
Commission—Agent prevented from earning—Sole agent—Sale effected through another agent after termination of his authority—Damages—Assessment of damages [HAMPTON & SONS, LTD. v. GEORGE] ..	627
—, Wilful default of principal—Just excuse [WAY & WALLER, LTD. v. VERRALL] ..	533
—, Contract to let premises—Prospective tenant—Communication by him to second prospective tenant—Causa causans—Chain of causation—Novus actus interveniens [COLES v. ENOCH] ..	327
Professional agent—Duty to use care and skill—Valuation of property—Valuer instructed by promoters of company to be formed—Duty to company—Principle in <i>Malister (or Donoghue) v. Stevenson</i> [OLD GATE ESTATES, LTD. v. TOPPIS & HARDING & RUSSELL] ..	209
Secret profits—Termination of agency—Agent's duty to act honestly and faithfully—Non-disclosure of secret profit—Duty to account [REGIER v. CAMPBELL-STUART] ..	235
Agent, mortgagee also solicitor acting in sale for mortgagor, person by or through whom payment made, income tax ..	144
—, secret profits, non-disclosure, duty to account ..	235
Agreement, documents to be stamped as ..	712
AGRICULTURE.	
Marketing scheme—Milk Marketing Board contract—Provision for stop notices on 7 days' default by purchaser—Subsidiary agreement for non-issue of stop notices on certain conditions—Implied term that stop notices issuable immediately on breach of subsidiary agreement [MILK MARKETING BOARD v. LAWRENCE] ..	483
<i>Allhusen v. Whittell</i> , rule in, gift of residuary estate charged with payment of an annuity, no personal covenant to pay annual sums ..	6
Allurement, sugar escaping from sacks on lorry, child running into highway ..	613
Alterations, dwelling-house converted into shops and flats to enable to be let, payment out of capital ..	531

	PAGE
Amenities, public park, regulation of advertisements, validity of bye-law ..	246

ANIMALS.

<i>Liability of owner—Negligence—Ordinary consequences of negligence—Scienter—Bullock being unloaded from lorry escaping on to highway—Deliberate attack on human being</i> [LATHALL v. A. JOYCE & SON] ..	854
—, <i>Horse left unattended attacking passer-by</i> [ALDHAM v. UNITED DAIRIES (LONDON), LTD.] ..	478
Annuitants, annuities payable out of residue, power to resort to capital, abatement ..	321
—, rights, legacies, abatement, annuities in nature of settled legacies ..	200

ANNUITIES.

Annuity of clear sum after "deduction of income tax"—No reference to standard or current rate of tax—Rate computed in relation to reliefs and allowances [RE MACLENNAN, FEW v. BYRNE] ..	81
Annuity, forfeiture on bankruptcy, discharge from bankruptcy operating after death of testator, whether forfeiture clause operative ..	902
Anticipated freight, insurable interest in Appeal, against one tortfeasor, jurisdiction of Court of Appeal as to contribution ..	47
—, entered late, mistake of legal adviser, discretion of court ..	916
—, jurisdiction, judge exercising executive function ..	29
—, transcripts of proceedings in court below, right to bring appeal without transcripts and rely upon the judge's notes ..	611
Apportionment, assessment, income tax, mixed farm, nurseries and market gardens ..	259
—, income of investment company, method to be adopted ..	241
Appurtenances, extent of demise, foreclosure ..	663
Arbitration, proceedings commenced in, proceeded to Court of Appeal, set-off of costs notwithstanding solicitor's lien ..	305

ARBITRATION.

<i>Remission of award—Fresh evidence since award—Not sufficient to disturb award</i> [N. V. ARNOLD OTTO MEYER v. AUNE] ..	163
<i>Restraint of arbitration—Arbitration under salvage agreement—Action in Turkish courts to set aside salvage agreement</i> [TURK GEMI KURTAMA v. ITHAKA (OWNERS), THE ITHAKA] ..	630
—, Stay of proceedings—"Step in proceedings"—Transfer of summons to counsel's list—Arbitration Act, 1889 (c. 49), s. 4 [LANE v. HERMAN] ..	353
Bailee, deduction from insurance moneys in respect of commission and charges not earned, right to make ..	63
Bank deposit book, whether the subject-matter of a valid <i>donatio mortis causa</i> ..	682

BANKERS.

<i>Cheque—Wrongful dishonour—Non-trader—Proof of damage</i> [GIBBONS v. WESTMINSTER BANK, LTD.] ..	577
--	-----

	PAGE
BANKRUPTCY.	
<i>Deed of arrangement—Composition with creditors—Receipt stating terms of oral agreement—Whether receipt should have been registered—Deeds of Arrangement Act, 1914 (c. 47), s. 1 [HUGHES AND FALCONER v. NEWTON]</i>	869
<i>Forfeiture clause—Annuity—Discharge from bankruptcy operating after death of testator and before any payment of annuity due—Whether forfeiture clause operates—Bankruptcy Act, 1914 (c. 59), ss. 26 (9), 28 (2), 29 (2), 38 (2) (a), 47 (1) [Re WALKER, PUBLIC TRUSTEE v. WALKER]</i>	902
<i>Petition—Service—Substituted service—Debtor proceeding out of jurisdiction and concealing whereabouts—Bankruptcy Rules, 1915, r. 156 [Re A DEBTOR (No. 419 OF 1939)]</i>	429
<i>Banns, publication in maiden name of married woman, proof of wilful intention to conceal identity</i>	895
<i>Berth, safety, unsafe for particular ship, liability of wharfinger</i>	23
<i>Betting, facilities, charge to bookmakers for, basis of calculation</i>	93
—, houses, club, telephone-betting with bookmaker in room above	399
<i>Bigamy prosecutions, analogy, presumption of death in divorce proceedings, onus of proof</i>	108
<i>Bill of lading, c.i.f. contract, custom of trade</i>	168

BILLS OF EXCHANGE.	
<i>Promissory note—Irrevocable undertaking to pay contained in letter—Bills of Exchange Act, 1882 (c. 61), s. 83 (1) [WIRTH v. WEIGEL LEYGOONIE & CO., LTD.]</i>	712
<i>Bookmakers, charge to, for betting facilities, basis of calculation</i>	93
<i>Boundaries, fishery, manorial, evidence of title</i>	622
<i>Brick, fall from defective chimneystack, injuring tenant's daughter in yard attached to demised premises, liability of landlord</i>	329

BUILDING CONTRACTS.	
<i>Building owner and subcontractor—Privilege of contract—R.I.B.A. standard form of contract—Insolvency of contractor—Ratification [A. VIGERS SONS & CO., LTD. v. SWINDELL]</i>	590
<i>Bullock, attacking passer-by, negligence, scienter</i>	854
<i>Bye-law, validity, regulation of advertisements, amenities of public park</i>	246
<i>Bystanders, defamatory statements overheard by, privileged occasion, reciprocity of interest</i>	507
<i>Canal, supply of water to railway company</i>	57
<i>Cantonment, resumption of possession of, compensation</i>	707
<i>Capital, expenditure payable out of capital, alterations to enable buildings to be let</i>	531
<i>Cargo, full and complete, stowage in bundles</i>	672

CARRIERS.	
<i>Carriage of passengers—Passenger ticket—Conditions—General exclusion of liability—Followed by exclusion of particular risks—"From any other cause whatsoever"—Passenger slipping on floor being washed [BEAUMONT-THOMAS v. BLUE STAR LINE, LTD.]</i>	127
<i>Causa causans, commission, agent, communication by prospective tenant to second prospective tenant</i>	327

	PAGE
CHARITIES.	
<i>Charitable purposes—Gift to vicar and churchwardens for parish work [FARLEY v. WESTMINSTER BANK, LTD.]</i>	491
<i>Charity, income tax, object of general public utility, policy of newspaper</i>	469
<i>Charterparty, construction, option to charterers to load and discharge at two safe berths in one port without extra charge</i>	528
—, deviation, whether evidence of trade custom admissible, absence of ambiguity in terms of charterparty, claim for general average	444
—, war, frustration of contract, duration of impossibility of performance	314
<i>Cheque, dishonour, wrongful, non-trader, proof of damage</i>	577
<i>Chessmen, passing off, genuine Staunton chessmen</i>	227
<i>Children, allowance, sums over £50 payable to guardian for maintenance of children, whether children entitled to such sums in their own right</i>	154
—, disposition in favour of settlement, allotment of shares in company	224
—, full discretionary trust, no power of revocation, revocable settlement	386
—, negligence, degree of care required, allurement, lorry laden with sacks of sugar, sugar escaping	613
<i>Children's court, remand in custody, excess of jurisdiction</i>	16

CHOSSES IN ACTION.	
<i>Assignment—Expectancy—Voluntary settlement of interests under marriage settlement—Sum appointed under special power in marriage settlement after voluntary settlement—Trustee of voluntary and marriage settlements same person—Whether trustee can be permitted to retain appointed sum when requested to hand it over to settlor of voluntary settlement [Re BROOKS' SETTLEMENT TRUSTS, LLOYDS BANK, LTD. v. TILLARD]</i>	920
<i>Cinemas, controller, contract of service, determination, reasonable notice</i>	136
<i>Clearance order, demolition by local authority under, interference with right of support</i>	669
<i>Clerk, solicitor's, articulated, covenant in restraint of trade</i>	182
<i>Coal, restrictions on working, rights of pre-emption</i>	864
<i>Coal mine, winding times, employers' obligation to provide proper winding facilities</i>	938
<i>Collusion, petition by wife, whether bar to subsequent proceedings by husband founded on desertion</i>	946
<i>Colonial courts, judges, appointment as acting judges of Supreme Court, whether puisne judges and as such entitled to sit in Court of Criminal Appeal</i>	121
<i>Commission, agent, letting premises, communication to client</i>	327
—, sole agent, sale effected through another agent after termination of his authority	627
—, wilful default of principal, just excuse	533
—, deduction from insurance moneys in respect of, bailee's right to make	63
<i>Common, proprietors of common rights in, right to grant easement in respect of water, Inclosure Acts</i>	812
<i>Company, foreign, subsidiary of, undistributed income</i>	319
<i>Compensation, mine, letting down surface, plea of custom or prescription, invalidity</i>	597
<i>Composition, with creditors, receipt stating terms of oral agreement, whether receipt should be registered</i>	869

	PAGE
Compulsory purchase, "park, garden or pleasure ground," "required for the amenity or convenience of any house," finality of Minister's decision	548

CONTRACT.

<i>Implied terms—Business efficacy—Broker's contract—Sale of fruit by agent—Advantage to grower by agent—Shipment unsound on arrival and unsaleable in market—Implied term that fruit on arrival to be of merchantable quality</i> [BROOME v. PARDESS CO-OPERATIVE SOCIETY OF ORANGE GROWERS (ESTABLISHED 1900), LTD.]	978
<i>Impossibility of performance—Foreign law—Exchange restrictions</i> [KLEINWORT, SONS & CO. v. UNGARISCHE BAUMWOLLE INDUSTRIE ACTIENGESSELLSCHAFT AND HUNGARIAN GENERAL CREDITBANK]	38
<i>—Frustration—Duration of impossibility—Estimate of parties at happening of event and not as subsequently ascertained—Charterparty—War—Boom placed across river—Ship in fact released in time to fulfil charter</i> [COURT LINE, LTD. v. DANT & RUSSELL INC.]	314
<i>Quantum meruit—Contract to erect shop window—Wife's premises apparently owned by husband—Contract with husband partly guaranteed by wife—Whether wife liable for rest of contract price on a quantum meruit</i> [EDMONDS & CO., LTD. v. FAGIN]	974
Contract, breach, damages, measure, deprivation of use of chattel	641
—, cancellation, lump sum paid for, profits from trade and trade receipts . .	302
—, c.i.f., sale of goods, bill of lading, custom of trade	68
—, director directly or indirectly interested, lease of house for chairman of railway directors	930
—, fruit broker, common interest with grower, implied term that fruit should be of merchantable quality	978
—, mistake in price of goods offered, offeree's knowledge of mistake, whether acceptance of such offer a binding contract	566
—, privity of, building owner and subcontractor, insolvency of contractor, ratification	590
—, service, determination, reasonable notice, controller of cinemas	136
—, necessity for writing, modification of previous employment, request and promise to reduce contract into writing	136
—, recovery of pay, regulations of council relating to sick pay	193
Contribution, joint tortfeasors, no appeal against one tortfeasor	47
—, party found not negligent not a tortfeasor	634
Contributory negligence, as defence to breach of statutory duty	722
Conversion, of goods insured against all risks, whether a loss under an all-risk policy	857
Conveyance, school, under School Sites Acts, revert on cesser of use for school, conveyance for full value . .	1
Costs, against co-respondent, decree nisi subsequently rescinded, whether order as to costs stands	1001
—, disallowal of successful plaintiff's writ issued without previous application five days after rent due, costs awarded to defendant	257
—, set-off, proceedings commenced in arbitration and proceeding to Court of Appeal, set-off notwithstanding solicitor's lien	305
Court, children's, remand in custody, excess of jurisdiction	16
—, payment out, indemnity fund, lapse of time, liability in respect of leaseholds . .	239

	PAGE
Court of Criminal Appeal, colonial, whether acting judge a puisne judge and as such entitled to sit in	121
Covenant, not to revoke will, revocation by marriage, restraint of marriage, public policy	148
—, repairing covenant, sum payable whether or not repairs executed . .	460
Creditors, composition with, receipt stating terms of oral agreement, whether receipt should be registered	869
Cross-remainders, implication of, gift to tenants in common for life, gift over on death of all tenants in common	657
Cruelty, charge of, divorce proceedings, respondent of unsound mind, acts proceeding from conscious malignity . .	972
Cruise, ship, liability for negligence, exceptions in conditions on ticket	127
Custom, bills of lading from port of transshipment, validity	168
—, evidence as to, admissibility, deviation from charterparty	444
—, mines, working, letting down surface without compensation, invalidity	190, 597
Damage, proof, cheque dishonoured, non-trader	577
—, reversion, covenant to repair, breach, nature of remedy	460

DAMAGES.

<i>Measure of damages—Breach of contract—Deprivation of use of chattel—Machine let on hire for short periods—Machine idle for one week through delay in transit</i> [B. SUNLEY & CO., LTD. v. CUNARD WHITE STAR, LTD.]	641
Damages, assessment of, agent prevented from earning commission	627
—, passing off, right to substantial damages, sales to middleman	513
Dangerous machinery, coal mine, impracticability of preventing statutory breach	722
Death, presumption of, husband not heard of for 7 years	895
—, onus of proof, divorce, analogy to bigamy prosecutions	108
Debtor, proceeding out of jurisdiction and concealing whereabouts, substituted service of bankruptcy petition	429
Decontrol, whole house decontrolled before 1933, no registration	673
Deductions, sur-tax, annual payments, making up deficiency between mental patient's income and sum required for maintenance	165
Defamation, statements made to plaintiff and overheard by bystanders, privileged occasion	507
Default, judgment by, motion to set aside order, inherent jurisdiction of court not to be invoked where alternative remedy available	113
Delivery, of bank deposit book, whether a valid <i>donatio mortis causa</i>	682
Demise, extent of, appurtenances, forecourt	663
Demolition, by local authority under clearance order, interference with right of support	669
Desertion, date of institution of proceedings for justices' order, issue of summons	546
—, effect of separation deed	779
—, letter by deserting spouse asking for meeting to discuss resumption of cohabitation, no reply by other spouse, interruption of desertion	437
—, whether interrupted by insanity	825
—, whether period interrupted by petition presented in collusion with party asserting desertion	946
Detention, person of unsound mind, whether interrupted, absence on trial . .	89

	PAGE
<i>Devastavit</i> , presumption of, rebuttal, action against personal representatives, judgment by default, return of <i>nulla bona</i> on execution, appointment of receiver of estate	606
Deviation, charterparty, whether evidence of trade custom admissible, absence of ambiguity	444
Director, directly or indirectly interested in contract with railway company, lease of house to chairman of directors	930
Discretion, court, appeal entered late through mistake of legal adviser	916
Disease, industrial, injury by accident, date of accident	158
Dishonour, cheque, wrongful, non-trader, proof of damage	577

DISTRESS.

Priority— <i>Distress for rent and distress for rates</i> [HICKMAN v. POTTS]	794
Distress, for rates under a justice's warrant, whether an execution within the Landlord and Tenant Act, 1709	794
Dividend, without deduction of tax, liability to sur-tax	761

DIVORCE.

<i>Ancillary relief</i> —Settlement of wife's property for benefit of children—Children wards of court in custody and care of mother — Jurisdiction [ATKINS v. ATKINS]	872
Costs—Husband's petition alleging adultery with named co-respondent—Decree nisi with costs—Intervention by member of the public—Issue resulting in finding of no adultery—Whether order against co-respondent as to costs should stand [UNDERWOOD v. UNDERWOOD AND HAIGH (POCOCK SHOWING CAUSE)]	1001
Cruelty—Respondent of unsound mind—Acts of cruelty committed—Acts proceeding from conscious malignity [KELLOCK v. KELLOCK]	972
—, Test of legal responsibility—Application of common law rule—Matrimonial Causes Act, 1937 (c. 57), s. 2 [ASTLE v. ASTLE (BY HIS GUARDIAN)]	967
Desertion—Husband's petition—Collusive petition by wife within statutory period dismissed—Whether collusive petition interrupts period of desertion [MILBANK v. MILBANK]	946
—, Insanity—Certification of deserting respondent—Statutory period interrupted—Matrimonial Causes Act, 1937 (c. 57), s. 2 [WILLIAMS v. WILLIAMS]	825
—, Institution of proceedings for justices' order—Date of institution—Issue of summons—Matrimonial Causes Act, 1937 (c. 57), s. 6 (3) [TERRY v. TERRY]	546
—, Letter by deserting spouse asking for meeting to discuss resumption of cohabitation—No reply by other spouse—Whether period of desertion interrupted—Matrimonial Causes Act, 1937 (c. 57), s. 2 [PRATT v. PRATT]	437
—, Separation deed—Husband's failure to perform covenant to pay—Repudiation of deed—Acceptance of repudiation by wife [PARDY v. PARDY]	779
Gift of money by wife's father in contemplation of marriage—Joint account in names of husband and wife—Marriage taking place and subsequently dissolved—Whether gift made to parties jointly—Married Women's Property Act, 1882 (c. 75), s. 17 [KELNER v. KELNER]	957
Insanity—"Persons under care and treatment"—Respondent's absence on trial—House maintained by Mental After-Care Association—Whether period of detention interrupted—Lunacy Act, 1890 (c. 5), s. 55—Matrimonial Causes Act, 1937 (c. 57), ss. 2 (d), 3 [GREEN v. GREEN (BY HIS GUARDIAN)]	89

	PAGE
<i>Maintenance—Lunatic spouse—Purchase of annuity out of patient's capital—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190—Matrimonial Causes Act, 1937 (c. 57), s. 10 (2) [SWETTENHAM v. SWETTENHAM]</i>	989
<i>Presumption of death—Onus of proof—Analogy to bigamy prosecutions—Offences Against the Person Act, 1861 (c. 100), s. 57—Matrimonial Causes Act, 1937 (c. 57), s. 8 (2) [PARKINSON v. PARKINSON]</i>	108
<i>Summary jurisdiction—Maintenance order—Allegation of wife's adultery—Previous finding of adultery in county court in action to enforce separation agreement—Res judicata—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 6 [WHITTAKER v. WHITTAKER]</i>	833
<i>Donatio mortis causa</i> , chattels passing by delivery, articles in bag	682
—, delivery of bank deposit book	682
Double taxation, relief, dividends of English company suffering tax, preference shareholder in Indian company	803
Duration, impossibility of performance of contract, frustration, estimate of parties at happening of event and not as subsequently ascertained	314
Dwelling-house, conversion into shops and flats, expenditure payable out of capital	531
Easement, <i>de facto</i> possession of, whether sufficient to found a claim for disturbance	812

EASEMENTS.

<i>Right of way—Proof of user for horses and carts—Right to use for mechanically-propelled vehicles</i> [LOCK v. ABERCESTER, LTD.]	562
<i>Support—Interference—Demolition of adjoining house by corporation in pursuance of clearance order—Liability of corporation—Housing Act, 1936 (c. 51), ss. 13, 26 [BOND v. NOTTINGHAM CORPORATION]</i>	669
<i>Title to easement—Licence granted by proprietors of common rights to sink a well on common—Right of proprietors to make grant—Inclosure Acts dealing with common—Nuisance—Pollution of water by third party—Grantee's right of action</i> [PAINE & CO., LTD. v. ST. NEOTS GAS & COKE CO.]	812

EDUCATION.

<i>School—Conveyance under School Sites Acts—Reverter on cesser of use for school—Conveyance for full value—Enrolment—School Sites Act, 1841 (c. 38), s. 2—Public Parks, Schools and Museums Act, 1871 (c. 13), ss. 3, 4 [Re CAWSTON'S CONVEYANCE, ST. LUKE, BROMLEY COMMON (VICAR AND CHURCHWARDENS) v. CAWSTON]</i>	1
Election, alternative remedies, receipt of compensation, notice to employer that receipt was without prejudice	697
—, —, receipt signed "without prejudice"	339
Employee, restraint of trade, article clerk to solicitor	182

ESTATE DUTY.

<i>Aggregation—Gift inter vivos—Finance Act, 1894 (c. 30), s. 2 (1) (c) [Re PAYNE, POPLETT v. A.-G.]</i>	875
--	-----

	PAGE
<i>Gift inter vivos—Gift by way of settlement—Value of fund increased before death of deceased—Customs and Inland Revenue Act, 1881 (c. 12), s. 38—Customs and Inland Revenue Act, 1889 (c. 7), s. 11—Finance Act, 1894 (c. 30), ss. 2 (1) (c), 5, 7—Finance (1909-10) Act, 1910 (c. 8), s. 59—Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 3 [Re PAYNE, POPELLET AND ANOTHER v. A-G.]</i>	875
<i>Testator domiciled in Northern Ireland—Annuity given to widow—Property locally situate in Northern Ireland at testator's death and duty paid there—Part of property locally situate in England at widow's death—Liability to duty—Whether exemption still applicable—"Property upon which estate duty already paid"—Finance Act, 1894 (c. 30), ss. 2 (1) (h), 5 (2)—Finance Act, 1914 (c. 10), s. 14—Government of Ireland Act, 1920 (c. 67), ss. 8, 61—Government of Ireland (Adaptation of Taring Acts) Order, 1922 (S.R. & O., 1922, No. 80) [SKINNER v. ATTORNEY-GENERAL]</i>	787
ESTOPPEL.	
<i>Res judicata—Two actions in respect of same street closed—One for personal injuries and other for damage to car [JOHNSON v. CARLEDGE AND MATTHEWS (MATTHEWS, THIRD PARTY)]</i>	654
<i>Evidence, admissibility, trade custom, deviation from charterparty</i>	444
—, fishery, manorial, title	622
—, shorthand note, judge's request, evidence for taxing master, duty of counsel	56
—, —, provision of copies for Court of Appeal at public expense, discretion of judge, right of appeal	29
<i>Exchange restrictions, foreign law, impossibility of performance of contract</i>	39
EXECUTORS.	
<i>Actions against personal representatives—Judgment by default—Return of nulla bona on execution—Presumption of devastavit—Rebuttal of presumption—Order for administration and appointment of receiver of estate [BATCHELAR v. EVANS]</i>	606
<i>Legacies—Abatement—Annuities—Annuities in nature of settled legacies—Rights of annuitant [Re CAREW, CHANNER v. FRANKLYN]</i>	200
<i>Letters of administration—Representation of deceased in action—Grant to Official Solicitor—Whether general grant or one limited to defending particular action—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162—Administration of Justice Act, 1928 (c. 26), s. 9—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1 (1) [IN THE GOODS OF KNIGHT]</i>	928
<i>Liability in respect of leaseholds—Lapse of time—Payment out of court of indemnity fund [Re LEWIS, JENNINGS v. HEMSLEY]</i>	269
<i>Residuary estate—Determination of residue—Valuation—Date for valuing estate for purpose of final distribution [Re GUNTHER'S WILL TRUSTS, ALEXANDER v. GUNTHER]</i>	291
<i>Retainer—Against costs of administration action—Discretion of court—Administration of Estates Act, 1925 (c. 23), s. 34—R.S.C., Ord. 65, r. 1 [Re WESTER WEMYSS, TILLEY v. WESTER WEMYSS]</i>	746
<i>Extradition, surrender of prisoner to native state, exclusion of writ of habeas corpus</i>	356
<i>Farm, mixed, nurseries and market gardens, income tax, apportionment of assessment</i>	259

	PAGE
<i>Finality, decision of Minister in regard to compulsory purchase of land</i>	548
<i>Fire, accidental, escape to adjoining premises, principle in Rylands v. Fletcher</i>	253
—, insurance, bailee insuring goods held in trust or on commission, extent of insurance	63
—, lorry, damage to highway, inadvertently caused	297

FISHERIES.

<i>Private fisheries—Evidence of title—Several fishery in tidal waters—Necessity to prove existence of grant prior to Magna Carta—Manorial fishery—Boundaries [STEPHENS v. SNELL]</i>	622
<i>Flooding, mine, artificial work of defendants' causing flooding, work outside defendants' land</i>	579
<i>Foreclosure, sale, charging order of judgment creditor</i>	495
<i>Forecourt, appurtenances, extent of demise</i>	663
<i>Foreign law, exchange restrictions, impossibility of performance of contract</i>	38
<i>Forfeiture, annuity, bankruptcy, discharge operating after death of testator, whether forfeiture clause operates</i>	902
—, relief from, mortgages by sub-demise, indemnity to lessor in respect of all costs in proceedings for breach of covenant and relief from forfeiture	889
<i>Fruit broker, common interest with fruit grower, implied term in contract that fruit should be of merchantable quality</i>	978
<i>Frustration, contract, impossibility of performance, duration of impossibility</i>	314

GAMING AND WAGERING.

<i>Betting houses—Club—Used by bookmaker—Special user—Betting Act, 1853 (c. 119), s. 3 [MILNE v. COMMISSIONER OF POLICE FOR CITY OF LONDON, LEONARD v. COMMISSIONER OF POLICE FOR CITY OF LONDON, BOUNDFOOT v. COMMISSIONER OF POLICE FOR CITY OF LONDON]</i>	399
<i>Bookmakers—Charge to bookmakers on tracks for betting facilities—Not exceeding five times amount of highest charge made to public—Basis of calculation—Betting and Lotteries Act, 1934 (c. 58), s. 13 (1), (2) [PEARSON v. WANDSWORTH STADIUM, LTD.]</i>	93

GAS.

<i>Nuisances from gas—Liability of undertakings—Breakage of main by reason of subsidence due to mining operations—Mining company entitled to let down surface [HANSON v. WEARMOUTH COAL CO., LTD., AND SUNDERLAND GAS CO.]</i>	47
<i>Gas works, pollution of well</i>	812
<i>General average, claim, charterparty, deviation, whether evidence of trade custom admissible, absence of ambiguity in terms of charterparty</i>	444
<i>Gift, by father to daughter in contemplation of marriage, account in joint names of husband and wife, marriage subsequently dissolved, gift to parties jointly</i>	957
—, determination on remarriage, marriage annulled on ground of husband's incapacity, wife's delay in taking proceedings, acquiescence	500
—, for parish work, charitable purpose	491
—, tenants in common for life, gift over on death of all tenants in common, implication of cross-remainders	657

GIFTS.

<i>Donatio mortis causa—Chattels—Delivery—Choses in action—Bank deposit book [DELGOFFE v. FADER]</i>	682
<i>Grant, of administration ad litem, representation of deceased in proposed action, whether general grant or one limited to defending particular action</i>	928

	PAGE
Guarantee, of loan secured by bill of sale, unusual terms, not referred to in memorandum	695
Gymnastic class, employee compelled to attend, accident while attending class, whether accident arising out of and in the course of employment	660
<i>Habeas corpus</i> , writ, exclusion, surrender of prisoner to native state	356
Highway, access to carriage-way, minimum width, "street"	366
—, property adjoining, forecourt indistinguishable from pavement, duty to repair	663

HIGHWAYS.

Damage to highway—Inadvertently caused—Lorry catching fire—Highway Act, 1835 (c. 50), s. 72 [TUNNICLIFFE v. PICKUP]	297
Horse, unattended, attack on passer-by, negligence, <i>scienter</i>	478
Housing, compulsory purchase, "park, garden or pleasure ground," "required for the amenity or convenience of any house," finality of Minister's decision ..	548

HUSBAND AND WIFE.

Proceedings before justices for desertion and maintenance—Presumption of death of previous husband—Not heard of for over 7 years—Banns of second marriage read in wife's maiden name—Validity of second marriage—Marriage Act, 1823 (c. 76), s. 22 [CHIPCHASE v. CHIPCHASE]	895
Implied terms, agreement giving time, reservation of all remedies	483

INCOME TAX.

Disposition in favour of children—Disposition by allotment of shares in company—"Settlor"—"Settlement"—Finance Act, 1936 (c. 34), s. 21 (1), (9) (b) (c) [COPEMAN v. COLEMAN (FOR COLEMAN MINORS)]	224
—, Settlement—Full discretionary trust to pay income to father, any wife of his, and his issue—No power of revocation—Revocable settlement—Finance Act, 1936 (c. 34), s. 21 (8), (10) [INLAND REVENUE COMMISSIONERS v. DELAMERE (LORD)]	386
Dividends—Sur-tax—Dividend paid "without deduction of tax"—Nil assessment upon company—Sum set aside to meet future tax on sum paid as dividends—Whether net or gross sum—Finance Act, 1931 (c. 28), s. 7 [CULL v. INLAND REVENUE COMMISSIONERS]	761
Double taxation—Relief—Shares in English company held by Indian company—Dividend of English company suffering tax—Relief to preference shareholder in Indian company [BARNES (INSPECTOR OF TAXES) v. HELY HUTCHINSON]	803
Profits from trade—Construction of private siding—Sale and resale of siding—Consideration on resale paid in annual instalments out of railway company's share of freight—Capital payment [LEGGE v. FLETTONS, LTD.]	220
Profits from trade and trade receipts—Lump sum paid for cancellation of contract—Contract in ordinary course of trade—Cancellation not excluding company from part of business [BUSH, BEACH & GENT, LTD. v. ROAD]	302
Reliefs—Children's allowance—Sums over £50 payable to guardian for maintenance of children—Whether children entitled to such sums in their own right—Finance Act, 1920 (c. 18), s. 21 [STEVENS v. TIRARD]	154

	PAGE
Schedule B—Nurseries and market gardens—Mixed farm—Apportionment of assessment—Income Tax Act, 1918 (c. 40), Sched. B, r. 8 [BOMFORD v. OSBORNE]	259
Succession to trade—New partnership—Exercise of option of treating old trade as discontinued—Limits of right of continuing partner to relief in respect of losses in old trade—Finance Act, 1926 (c. 22), ss. 32 (1), 33 [BATTY v. SCHRODER (BARON)]	299
Sur-tax—Deductions—Annual payments—Payments by receiver of person of unsound mind made in pursuance of undertaking given on appointment—Making up deficiency between patient's income and sum required for maintenance—Income Tax Act, 1918 (c. 40), s. 27 [WATKINS v. INLAND REVENUE COMMISSIONERS] ..	165
Undistributed income—Apportionment of income—"Interest corresponding to his interest in the assets of the company available for distribution among the members in the event of a winding up"—Method of apportionment of income to be adopted—Finance Act, 1937 (c. 54), s. 14 (3) [INLAND REVENUE COMMISSIONERS v. FRED'S SECURITIES CO.]	241
—, Dividend paid by cheque on condition that sum paid be lent to payer—No genuine distribution of income [INLAND REVENUE COMMISSIONERS v. MARBOB, LTD.]	309
—, Subsidiary company—Subsidiary of foreign company—Finance Act, 1922 (c. 17), s. 21 (6)—Finance Act, 1927 (c. 10), s. 31 (3) [BARROWFORD HOLDINGS, LTD. v. INLAND REVENUE COMMISSIONERS]	319
Yearly interest—Interest on mortgage retained out of proceeds of sale—Mortgagee also solicitor acting in sale for mortgagor—Whether receipt as agent for mortgagor or as mortgagee—Person by or through whom payment made—Income Tax Act, 1918 (c. 40), All Schedules Rules, r. 21 [HOWELLS v. INLAND REVENUE COMMISSIONERS]	144
Income tax, charity, object of general public utility, policy of newspaper ..	469
Indemnity fund, payment out of court, lapse of time, liability in respect of leaseholds	269

INNS AND INNKEEPERS.

Care of guests' property—Liability for negligence—Failure of guest to take reasonable care of property—Locking bedroom—Failure to deliver jewellery to innkeeper for safe custody [SHACKLOCK v. ETHORPE, LTD.]	372
Insanity, divorce, maintenance	989
—, of respondent to divorce proceedings based on cruelty, legal responsibility, application of common law rule	967
—, respondent's absence on trial from institution, whether detention interrupted	89
—, whether defence to a charge of cruelty, acts proceeding from conscious malignity	972
—, whether interrupting period of desertion	825
Insurable interest, anticipated freight ..	908

INSURANCE.

Marine insurance—Shipping—Claim for general average—Charterparty—Ship proceeding from Port to Istanbul—Voyage via Constantza—Deviation—Whether evidence of trade custom admissible—Absence of ambiguity in terms of charterparty [REARDON SMITH LINES, LTD. v. BLACK SEA AND BALTO GENERAL INSURANCE CO., LTD., THE INDIAN CITY]	444
--	-----

	PAGE
—, War risk policy on hull and freight— Vessel sequestered by Spanish insurgents while on lawful contract voyage—Docu- mentation of vessel—Loss of anticipated freight—Insurable interest—Marine In- surance Act, 1906 (c. 41), s. 67—Insti- tute Time Clauses (Freight), cl. 5 [PAPADIMITRIOU v. HENDERSON] ..	908
Property insurance—All-risk policy— Goods sent to Germany for treatment— Insolvency of German firm—Accident or fortuitous casualty [LONDON & PROV- INCIAL LEATHER PROCESSES, LTD. v. HUDSON] ..	857
Insurance, extent, profits, right of bailee to deduct from insurance moneys in respect of commission and charges not earned ..	63
Interest, yearly, interest on mortgage retained out of proceeds of sale, mort- gagee also solicitor acting in sale for mortgagor, whether receipt as agent for mortgagor or as mortgagee ..	144
Interference, right of support, demolition of adjoining premises by local author- ity under clearance order ..	669
—, with riparian rights, by local authority acting under statutory powers ..	882
INTOXICATING LIQUORS.	
Licensing—Permitted hours—Extension— “Special requirements of the district”— Licensing Act, 1921 (c. 42), s. 1 (1) [R. v. BRADFORD LICENSING JJ., <i>Ex</i> parte ILLINGWORTH] ..	106
Judge, request for shorthand note, evidence of request for taxing master, duty of counsel ..	56
Judges, acting, Supreme Court, appoint- ment, whether puisne judges and as such entitled to sit in Court of Criminal Appeal ..	121
Judgment, default judgment, action against personal representatives, return of <i>nulla bona</i> on execution, presump- tion of <i>devastavit</i> , rebuttal of pre- sumption, order for administration and appointment of receiver of estate ..	606
—, discovery of mistake, motion to set aside order, inherent jurisdiction of court not to be invoked where alternative remedy available ..	113
—, on specially indorsed writ ..	924
Judgment creditor, charging order, remedy, mortgage, foreclosure, sale ..	495
Jurisdiction, inherent, not to be invoked where alternative remedy available, judgment by default, discovery of mis- take, motion to set aside order ..	113
—, of court, settlement of wife's property for benefit of children, children wards of court in care and custody of mother ..	872
Jury, trial, failure to answer one of five questions, answers not read out in court ..	263
Justices, whether bound by county court judge's finding of adultery ..	833
LAND IMPROVEMENT.	
Expenditure payable out of capital— Alterations—To enable buildings to be let—Conversion of dwelling-house into shops and flats—Settled Land Act, 1925 (c. 18), Sched. III, Part I (xxiii) [Re SWANWICK HOUSE, PRESTBURY] ..	531
Landlord, “actual possession” ..	635
LANDLORD AND TENANT.	
Agreement for lease—Acceptance—“Sub- ject to a lease to be drawn up by our clients' solicitors” [H. C. BERRY, LTD. v. BRIGHTON AND SUSSEX BUILDING SOCIETY] ..	217
Demise—Extent of—Appurtenances— Forecourt—Law of Property Act, 1925 (c. 20), s. 62 [OWENS v. THOMAS SCOTT & SONS (BAKERS), LTD., AND WASTALL]	603

	PAGE
Forfeiture—Relief—Lease mortgaged —Relief of mortgages—Conditions of relief—Full indemnity to landlord in respect of all costs in proceedings for breach of covenant and relief from for- feiture—Law of Property Act, 1925 (c. 20), s. 146 (4) [EGGERTON v. JONES] ..	889
Liability of landlord for injuries due to want of repair—Liability to tenant and his family—Injury suffered outside demised premises—Yard attached to premises over which tenants had a right to pass—Fall of brick from defective chimney stack [TAYLOR v. LIVERPOOL CORPORATION] ..	329
Rent restriction—“Actual possession” by landlord—Key handed over to landlord's agent—Premises let to new tenant at in- creased rent—Application to register house as decontrolled—Error in filling in form —Wrong date inserted—Whether applica- tion valid—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 2—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 2 (2) [HOLT v. DAWSON] ..	635
—, House let in two portions—Recovery of possession by landlord in 1924—Portions united, but redivided in a different manner in 1928—No registration of house as decontrolled—Whether portion of house controlled—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 2—Rent and Mortgage Interest Restric- tions (Amendment) Act, 1933 (c. 32), s. 2 (2) [RYNOLDS v. PHILLIPS] ..	678
Repairs—Covenant by lessees to spend £500 per annum on repairs or pay difference between £500 and sum actually spent— Whether failure to pay gives rise to action on covenant or for breach of covenant— Damage to reversion—Landlord and Tenant Act, 1927 (c. 38), s. 18 (1) [MOSS EMPRES, LTD. v. OLYMPIA (LIVERPOOL), LTD.] ..	460
Lapse, interest determinable at death ..	852
Lease, extent of demise, appurtenances, forecourt ..	663
Leaseholds, liability in respect of, lapse of time, payment out of court of indemnity fund ..	269
Legacies, abatement, annuities in nature of settled legacies, rights of annuitant ..	200
Legacy, contingent upon attaining age of 25, death of legatee in lifetime of testator under 25 ..	852
Legislation, Dominion and provincial, in- solvent local government bodies, right of province to amalgamate and make consequential provisions ..	98
Lessees, covenant to repair, breach, nature of remedy ..	460
LIBEL AND SLANDER.	
Slander—Defamatory statements made to plaintiff and overheard by bystanders— Privileged occasion—Reciprocity of interest [WHITE v. J. & F. STONE, LTD.] ..	507
True statement about existing person of same name as plaintiff—Whether referable also to plaintiff [NEWSTEAD v. LONDON EXPRESS NEWSPAPER, LTD.] ..	263
Licensing, permitted hours, extension ..	106
LIMITATION OF ACTIONS.	
Co-owners—Receipt of rent and profits by one co-owner—Co-owner trustee of the legal estate—Real Property Limitation Act, 1833 (c. 27), s. 12—Law of Prop- erty Act, 1925 (c. 20), s. 12 [Re LANDI, GEORGI v. NAVANI] ..	569
Loan, memorandum of, necessity to refer to clause in bill of sale imposing un- usual terms upon guarantor ..	695

LOCAL GOVERNMENT.

<i>Poor law relieving officer—Contract of service—Recovery of pay—Regulations of council relating to sick pay—Public Authorities Protection Act, 1893 (c. 61), s. 1—Public Assistance Order, 1930 (S.R. & O., 1930, No. 185), arts. 142 (1), 162 (COMPTON v. WEST HAM COUNTY BOROUGH COUNCIL)</i>	193
<i>Local government bodies, insolvency, right of province to amalgamate and make consequential provisions</i>	98
<i>Lorry, fire, accidental, damage to highway, inadvertently caused</i>	297
<i>—, sugar escaping from sacks, allurement, child running into highway</i>	613
<i>M'Alister (or Donoghue) v. Stevenson, principle in, whether applicable to valuation of property</i>	209

MAGISTRATES.

<i>Children's court—Conviction—Maximum penalty fine of 40s.—Remand in custody—Excess of jurisdiction—Children and Young Persons Act, 1933 (c. 12), ss. 47 (3), 107 (1)—Summary Jurisdiction (Children and Young Persons) Rules, 1933 (S.R. & O., 1933, No. 819/L. 25), r. 11 [R. v. TOYNBEE HALL JUVENILE COURT JJ., Ex parte JOSEPH]</i>	16
<i>Magna Carta, grant prior to, necessity to prove, evidence of title to manorial fishery</i>	622
<i>Maintenance, children, guardian paid sums over £50 for, whether children entitled to such sums in their own right, relief from income tax, children's allowance</i>	154
<i>—, lunatic spouse, purchase of annuity out of lunatic's capital</i>	989
<i>—, mental patient, sum required greater than patient's income, receiver making up deficiency, sur-tax, deductions</i>	165
<i>Marriage, gift determining on remarriage, marriage annulled on ground of husband's incapacity, wife's delay in taking proceedings, acquiescence</i>	500
<i>—, revocation of will, restraint of marriage, public policy</i>	148

MASTER AND SERVANT.

<i>Contract of service—Determination—Notice—Reasonable notice—Controller of cinemas [ADAMS v. UNION CINEMAS, LTD.]</i>	136
<i>—, Necessity for writing—Modification of previous employment—Request and promise to reduce contract into writing—Statute of Frauds, 1677 (c. 3), s. 4 [ADAMS v. UNION CINEMAS, LTD.]</i>	136
<i>Memorandum, sufficiency of, guarantee for larger sum than necessary</i>	974
<i>Mental patient, receiver making up deficiency between patient's income and sum required for maintenance, sur-tax, deductions</i>	165
<i>Middleman, sales to, passing off, right to substantial damages</i>	513
<i>Milk Marketing Board, contract, stop notices, how affected by agreement giving time</i>	463
<i>Miner, coal mine, winding times, necessity to be present in time to be taken down in cage</i>	938

MINES.

<i>Coal mine—Contract of employment—Winding times—Necessity for workmen to be present in time to be taken down in cage—Plaintiff present in time but not taken down—Whether plaintiff an absentee—Coal Mines Regulation Act, 1908 (c. 57), s. 1 [BARSEY v. DONCASTER AMALGAMATED COLLIERIES, LTD.]</i>	938
--	-----

<i>—, Dangerous machinery—Absolute duty to fence—Machinery only dangerous while moving—Duty on workman to see that fence was in position—Standard of care to be applied to workman—Impracticability of preventing statutory breach—Coal Mines Act, 1911 (c. 50), ss. 55, 102 (8) [CASWELL v. POWELL DUFFEYN ASSOCIATED COLLIERIES, LTD.]</i>	722
<i>Flooding—After defendants' mine abandoned—Due to presence of artificial work outside their land—No right in defendants to interfere with artificial work [WESTHOUGHTON COAL & CANNEL CO., LTD. v. WIGAN COAL CORPORATION, LTD.]</i>	579
<i>Jurisdiction of tribunal—Coal mines—Restrictions on working—Rights of pre-emption—Coal under and extending for 100 yards back from turnpike road—Inclosure Act, 1845 (c. 118)—Mines (Working Facilities and Support) Act, 1923 (c. 20), ss. 1, 4—Mining Industry Act, 1926 (c. 28), s. 13 [WALSALL WOOD COLLIERY CO., LTD.'S APPLICATION.]</i>	864
<i>Working of mines—Letting down surface without compensation—Plea of custom or prescription—Invalid plea [NEWCASTLE-UNDER-LYME BOROUGH COUNCIL v. WOLSTANTON, LTD., and DUCHY OF LANCASTER]</i>	190, 597
<i>Mining operations, subsidence due to, gas main breaking by reason of subsidence, liability of gas undertaking</i>	47
MISREPRESENTATION.	
<i>Rescission—Restitutio in integrum—One party released from obligations which cannot be restored—Sale of shares—Shares pledged to bank—Bank charge redeemed since sale [SPENCE v. CRAWFORD]</i>	271
MISTAKE.	
<i>Determination of gift on marriage—Marriage annulled on ground of husband's incapacity—Wife waiting 12 years before taking proceedings—Acquiescence—Loss of right to restitution [EAVES v. EAVES]</i>	500
<i>Price of subject-matter of transaction—Goods offered at certain prices per pound instead of per piece—Offeree's knowledge of mistake—Whether acceptance of such offer a binding contract [HARTOG v. COLIN & SHIELDS]</i>	366
<i>Mistake, discovered after judgment by default, motion to set aside order, inherent jurisdiction of court not to be invoked where alternative remedy available</i>	113
MONEYLENDING.	
<i>Memorandum—Insufficiency—Unenforceable contract—Guarantee and bill of sale—Clause that if bill became invalid guarantors would repay loan and interest—Clause not in memorandum—Moneylenders Act, 1927 (c. 21), s. 6 [CENTRAL ADVANCE & DISCOUNT CORPORATION, LTD. v. MARSHALL]</i>	695
MORTGAGE.	
<i>Charging order of judgment creditor—Remedy—Foreclosure—Sale—Judgments Act, 1838 (c. 110), s. 14 [DAPONTE v. SCHUBERT]</i>	495
<i>Mortgage, interest, retention out of proceeds of sale, mortgagee also solicitor acting in sale for mortgagor, whether receipt as agent for mortgagor or as mortgagee, person by or through whom payment made</i>	144
<i>Mortgagee, by sub-demise, whether entitled to notice of proceedings brought by lessee for relief against forfeiture</i>	889
<i>—, —, whether to be made party to proceedings against lessee to recover possession</i>	889

NEGLIGENCE.	PAGE
Degree of care required—Children—Allurement—Child running into highway—Lorry laden with sacks of sugar—Sugar escaping on to highway—Provision of look-out man at rear [CULKIN v. MCFIE & SONS, LTD.]	613
Fire—Accidental fire—Escape of fire to adjoining premises—Principle in Rylands v. Fletcher—Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 86 [MULHOLLAND & TEDD, LTD. v. BAKER]	253
Personal injuries—Motor cyclists—String of motor cyclists engaged on treasure-hunt—Sudden braking by leading cyclist—Injury to pillion rider on fourth motor cycle [SMITH v. HARRIS]	960
Property adjoining highway—Forecourt indistinguishable from pavement—Duty to repair forecourt—Liability to passer-by [OWENS v. THOMAS SCOTT & SONS (BAKERS), LTD., AND WASTALL]	663
Valuation of property—Valuer instructed by promoters of company to be formed—Duty to company—Principle in M'Alister (or Donoghue) v. Stevenson [OLD GATE ESTATES, LTD. v. TOPPLIS & HARDING & RUSSELL]	209
Negligence, guest at inn, liability of inn-keeper	372
—, ordinary consequences of, scienter, bullock escaping and attacking passer-by	854
—, —, horse left unattended attacking passer-by	478
—, string of motor cyclists engaged on treasure-hunt, sudden braking by leading cyclist	960
Northern Ireland, death duties, exemption on death of wife	787
Notice, reasonable, contract of service, controller of cinemas	136
—, to mortgages by sub-demise of proceedings brought by lessee for relief against forfeiture	889
Nuisance, gas main breaking by reason of subsidence due to mining operations, liability of gas undertaking	47
Nullity, incapacity of husband, gift to wife determined on remarriage, whether widowhood determined	500
Parish work, gift to vicar and churchwardens for, charitable purposes	491
Park, garden or pleasure ground, "required for the amenity or convenience of any house," compulsory purchase, finality of Minister's decision	548
—, public, amenities, regulation of advertisements, validity of bye-law	246
Partnership, new, succession to trade, income tax	299
Passenger, ticket, conditions, liability for negligence	127
Passing off, damages, right to substantial damages, sales to middleman	513
—, Staunton chessmen, genuineness	227
Performance, contract, impossibility, foreign law, exchange restrictions	38
—, impossibility, frustration, duration of	314
Personal representatives, action against, judgment by default, return of nulla bona on execution, presumption of devastavit, rebuttal of presumption, order for administration and appointment of receiver of estate	606
Petition, bankruptcy, service, substituted service, debtor proceeding out of jurisdiction and concealing whereabouts	429
Policy, all-risk policy, goods sent to Germany for processing and there converted, liability of underwriter, accident or casualty	857
Poor law, relieving officer, recovery of pay, regulations of council relating to sick pay	193

POWERS.	PAGE
Release of power—Release as regards one particular object—Whether fiduciary relationship between donee and objects—Whether distinction between release and covenant not to exercise power [RE BROWN'S SETTLEMENT, PUBLIC TRUSTEE v. BROWN]	391

PRACTICE.	PAGE
Appeal—Transcripts of proceedings in court below—Right to bring appeal without providing such transcripts and to rely upon the judge's notes [BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY v. BORDERS (No. 2)]	611
Costs—Disallowing costs of successful plaintiff—Writ issued without previous application five days after rent due—Costs awarded to defendant—R.S.C., Ord. 65, r. 1—R.S.C., Ord. 70, r. 1 [CROMWELL PROPERTY INVESTMENT CO., LTD. v. HUCKS]	257
—, Set-off—Proceedings commenced in arbitration and proceeding to Court of Appeal—Set-off notwithstanding solicitor's lien—R.S.C., Ord. 65, r. 14 [WELCH v. ROYAL EXCHANGE ASSURANCE]	305
Judgment by default—Discovery of mistake—Motion to set aside order—Inherent jurisdiction of court not to be invoked where alternative remedy available [PERRY v. ST. HELENS LAND AND CONSTRUCTION CO., LTD.]	113
Remission of action for personal injuries to county court—Grounds for exercise of discretion—Action against two defendants—Probability of plaintiffs' success in action—County Courts Act, 1919 (c. 73), s. 2 [FAWCETT v. JOHNSON'S SERVICE GARAGE]	377
Shorthand note—Request by judge for transcript—Evidence of request for taxing master—Duty of counsel [GRIFFITHS v. HOWARD]	56
Shorthand notes of evidence—Copies of notes for Court of Appeal—Provision at public expense—Discretion of judge an executive function—No jurisdiction in Court of Appeal to entertain an appeal [BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY v. BORDERS (No. 2)]	29
Slip rule—Damages awarded against two defendants—Judgment entered as "each defendant liable for half judgment"—Whether error can be corrected under slip rule [SMITH v. HARRIS]	960
Summons for judgment under R.S.C., Ord. 14, r. 1—No attendance by defendants—Judgment signed—Negotiations—Lapse of time for appealing—Unsuccessful application to extend time for appealing—Application under R.S.C., Ord. 27, r. 15 to set aside judgment—Whether judgment had been obtained on default [SPIRA v. SPIRA]	924
Time for appeal—Appeal entered late—Mistake of legal adviser—Discretion of court to extend time—R.S.C., Ord. 58, r. 15, Ord. 64, r. 7 [GATTI v. SHOOT-SMITH]	916
Trial by jury—Failure to answer one of five questions—Answers not read out in court [NEWSTEAD v. LONDON EXPRESS NEWSPAPERS, LTD.]	263
Practice, stay of proceedings, arbitration, transfer of summons to counsel's list	353
Pre-emption, rights of, restrictions on working coal	864
Prescription, plea of, mines, letting down surface without compensation, validity	597
Price, mistake in, offeree's knowledge of mistake, whether acceptance of goods offered at mistaken price a binding contract	566
Principal, default, wilful, agent thereby prevented from earning commission, just excuse	533

	PAGE
Priority, distress for rent and distress for rates	794
Privilege, slander, defamatory statements made to plaintiff and overheard by bystanders, reciprocity of interest ..	507
PRIVY COUNCIL.	
Australia—Insurance—Fire—Insurance by bailee—Goods held in trust or on commission—Extent of insurance—Profits—Right of bailee to deduct from insurance moneys in respect of commission and charges not earned [MAURICE v. GOLDSBROUGH MORT & Co., LTD.] ..	63
Canada—Dominion and provincial legislation—Insolvent local government bodies—Right of provinces to amalgamate and make consequential provisions—British North America Act, 1867 (c. 3), ss. 91 (19), (21), 92 (8)—City of Windsor (Amalgamation) Act, 1935 (S.O., c. 74 of 1935)—City of Windsor (Amalgamation) Amendment Act, 1936 (S.O., c. 66 of 1936)—Ontario Municipal Board Act, 1932 (S.O., c. 27 of 1932 and c. 51 of 1935), Part VI—Department of Municipal Affairs Act, 1935 (S.O., c. 16 of 1935) [LADORE v. BENNETT] ..	98
Canada—Revenue—Sales tax—Sales company formed by manufacturing company—Whether agents of manufacturing company—Special War Revenue Act (R.S.C., 1927, c. 179), s. 86 (1), as amended by Statutes of Canada, 1932, c. 54, s. 11 [CANADA RICE MILLS, LTD. v. R.] ..	991
India—Extradition—Surrender of prisoner to native state—Exclusion of writ of habeas corpus—Government of India Act, 1935 (c. 42), s. 223—Indian Extradition Act, 1903 (No. 15 of 1903), s. 7—Code of Criminal Procedure, 1898 (No. 5 of 1898), ss. 75, 491, 561A—Appellate Side Rules of the Madras High Court, rr. 2, 2A [MATTHEW v. TRIVANDRUM DISTRICT MAGISTRATE] ..	356
—, Income Tax—Charity—Object of general public utility—Policy of newspaper—Duty of commissioner—Indian Income Tax Act, 1922 (No. 11 of 1922), s. 4 (3) (i) [TRIBUNE PRESS, LAHORE (TRUSTEES) v. INCOME TAX COMMISSIONER, PUNJAB, LAHORE] ..	469
—, North-West Frontier Province—Compulsory purchase—Resumption of possession of cantonment—Appurtenances—Compensation—Land Acquisition Act (1 of 1894), ss. 4, 6, 9, 11, 18 [HARI CHAND v. SECRETARY OF STATE] ..	707
Quebec—Practice—Concurrent findings of fact—Dismissal of appeal [THE PEOPLE OF THE STATE OF NEW YORK v. HEIRS OF THE LATE JOHN M. PHILLIPS] ..	952
—, Railways—Contract—Director directly or indirectly interested—Lease of house for chairman of directors—Railway Act of Canada (R.S.C., 1927, c. 170), s. 121—Canadian National Railways Act (R.S.C., 1927, c. 172) [MONTREAL TRUST CO. v. CANADIAN NATIONAL RY. Co.] ..	930
Trinidad and Tobago—Colonial courts—Judges—Appointment as acting judge of Supreme Court—Whether puisne judge and as such entitled to sit in Court of Criminal Appeal—Judicature Ordinance, 1880 (c. 35), s. 7 (1), (3)—Judicature (Amendment) Ordinance, 1936 (No. 24 of 1936), s. 4 (1)—Criminal Appeal Ordinance, 1931 (No. 31 of 1931), s. 3 (1)—Interpretation Ordinance, 1933 (No. 19 of 1933), ss. 17, 20 [BUTLER v. R.] ..	121
West Africa—Practice—Appeal from high native tribunal—Leave to appeal—Juris-	

	PAGE
diction of Court of Appeal to hear appeal although leave to appeal not given—Native Administration Ordinance, 1927 (No. 18 of 1927), s. 77—Native Administration Amendment Ordinance, 1935 (No. 18 of 1935), s. 13 [ADABLA (SUBSTITUTED FOR AFIANU, DECEASED) ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS OF THE ANYIGBE TRIBE v. GREVLO AGAMA] ..	381
Profit a prendre, pollution of water in well, grantees' right of action ..	812
Profits, insurance of, bailee of goods held in trust or on commission, extent of insurance ..	63
—, secret, agency, non-disclosure, agent's duty to act honestly and faithfully, duty to disclose ..	235
Promissory note, irrevocable undertaking to pay contained in letter ..	712
Proof, onus of, damage caused by work done under statutory authority ..	882
—, —, presumption of death, divorce, analogy to bigamy prosecutions ..	108
PUBLIC AUTHORITIES.	
Exercise of statutory powers—Damage to riparian owner—Possibility of alternative method—Onus of proof [PROVENDER MILLERS (WINCHESTER), LTD. v. SOUTHAMPTON COUNTY COUNCIL] ..	882
PUBLIC HEALTH.	
Advertisements—Regulation—Amenities of public park—Validity of bye-law—Advertisements Regulation Act, 1907 (c. 27), s. 2 [TWICKENHAM CORPORATION v. SOLOSIGNS, LTD.] ..	246
Housing—Compulsory purchase—"Park, garden or pleasure ground"—"Required for the amenity or convenience of any house"—Finality of Minister's decision—Housing Act, 1936 (c. 51), s. 75 (Re RIPON (HIGHFIELD) HOUSING ORDER, 1938, APPLICATIONS OF WHITE AND COLLINS) ..	548
Public Health—Housing—Letting part of clearance site for air raid shelter—Previous schemes refused approval by ministers—Lease to company constructing shelter—Lease of shelter when constructed to authority—Validity of scheme—London Government Act, 1899 (c. 14), s. 5 (2), Sched. II, Part II—Housing Act, 1936 (c. 51), s. 30 Air-Raid Precautions Act, 1937 (c. 6) ss. 1 (3), (7) [ATTORNEY-GENERAL (AT THE RELATION OF MARTIN) v. MAYOR ALDERMEN & BURGESSES OF THE METROPOLITAN BOROUGH OF FINSBURY] ..	995
Streets—Strips between two streets running in same direction not made up—Walls—When removable by local authority—Public Health Act, 1875 (c. 55), s. 26 [URBAN HOUSING CO., LTD. v. THE MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF OXFORD] ..	839
Public park, amenities, regulation of advertisements, validity of bye-law ..	246
Public policy, covenant not to revoke will, revocation by marriage, restraint of marriage ..	148
Quantum meruit, contract to erect shop window on wife's premises apparently owned by husband, request by wife to complete the work ..	974
RAILWAYS AND CANALS.	
Canals—Supply of water to railway company—Statute restricting supply to mills and works on adjoining lands—Rochdale Canal Act, 1899 (c. cctvii), s. 37 [ATTORNEY-GENERAL (AT THE RELATION OF ROCHEDALE CORPORATION) v. ROCHEDALE CANAL Co.] ..	57
RATES AND RATING.	
Distress for rates—Rent in arrear—Claim by landlord for rent out of <i>procceds</i> of distress—Whether distress is an execution—Landlord and Tenant Act, 1709 (c. 14), s. 1 [HICKMAN v. POTTS] ..	794

	PAGE
Rejection, sale of goods, invoices, validity of first tender, whether withdrawn by amended provisional invoice, validity of second tender	175
Release, of power, as regards one particular object, subsequent exercise of power by will	391
Relief, double taxation, dividend of English company suffering tax, whether preference shareholder in Indian company entitled to relief	803
—, income tax, children's allowance, sums over £50 payable to guardian for maintenance of children, whether children entitled to such sums in their own right	154
Remission to county court, probability of plaintiff's success	377
Rent restriction, application to register house as decontrolled, wrong date inserted, whether application valid	635
—, whole house decontrolled before 1933, no registration	678
Repair, covenant by lessee to spend £500 per annum on repairs or pay difference between £500 and sum actually spent, legality	460
—, duty to, forecourt indistinguishable from adjoining pavement	663
—, want of, injuries due to, liability of landlord to tenant and his family	329
Res judicata, county court judge's finding of adultery, whether binding on court of summary jurisdiction	833
—, estoppel, two actions in respect of street accident, one for personal injuries and other for damage to car	634
Rescission, <i>restitutio in integrum</i> , one party released from obligations which cannot be restored	271
Residuary legatees, annuities, annuities payable out of residue, power to resort to capital, abatement	321
Residue, determination of, valuation, date for valuing estate for purposes of final distribution	291
<i>Restitutio in integrum</i> , rescission, one party released from obligations which cannot be restored	271
Restitution, right to, loss of, gift to determine on marriage, marriage annulled on ground of husband's incapacity, wife's delay in taking proceedings, acquiescence	500
Retainer, executor's right of, against costs of administration action	746

REVENUE.

Stamps—Irrevocable undertaking to pay—Whether agreement or promissory note for purposes of stamping—Stamp Act, 1891 (c. 39), s. 33 (2) [WIRTH v. WEIGEL LEYGOINIE & CO., LTD.]	712
Reversion, damage to, covenant to repair, breach, nature of remedy	460
Revocation, will, covenant against, revocation by marriage	148
Right of way, user for horses and carts proved, right to use for mechanically propelled vehicles	562
River, interference with flow of water in, by local authority acting under statutory powers	882
Rylands v. Fletcher, principle in, fire, accidental, escape to adjoining premises	253
Sale, foreclosure, remedy, mortgage, charging order of judgment creditor	495

SALE OF GOODS.

C.i.f. contract—Bill of lading—From port of transhipment—Dated as from port of loading—Custom of trade [N. V. ARNOLD OTTO MEYER & ACNE]	168
---	-----

	PAGE
Rejection—Sale of 15,000 units of corn—"Separate documents for each 1,000 units and each 1,000 units to be considered a separate contract"—Notice of appropriation for about 15,444 units—First provisional invoice for 15,444 units—Amended provisional invoice for 15,000 units—Validity of first tender—Whether withdrawn by amended provisional invoice—Validity of second tender [RE AN ARBITRATION BETWEEN T. D. BAILEY, SON & CO. AND ROSS T. SMYTH & CO., LTD.]	175
Salvage agreement, arbitration under, restraint of, action in foreign court to set aside salvage agreement	630
School, conveyance under School Sites Acts, revert on cesser of use for school, conveyance for full value, enrolment	1
Scienter, bullock escaping into street and attacking passer-by, ordinary consequences of negligence	854
—, horse left unattended attacking passer-by, liability of owner, ordinary consequences of negligence	478
Security for costs, probability of plaintiff's success	377
Separation deed, effect on subsequent petition for desertion	779
Service, contract, determination, reasonable notice, controller of cinemas	136
—, necessity for writing, modification of previous employment, request and promise to reduce contract into writing	136
—, recovery of pay, regulations of council relating to sick pay	193
—, substituted, bankruptcy petition, debtor proceeding out of jurisdiction and concealing whereabouts	429
Set-off, costs, proceedings commenced in arbitration and proceeding to Court of Appeal, set-off notwithstanding solicitor's lien	305
Settled fund, increase of value before settlor's death, estate duty	875
—, whether aggregable with free estate to form one estate for determining rate of estate duty	875
Settlement, disposition in favour of children, allotment of shares in company	224
—, revocable, full discretionary trust, no power of revocation	386
—, of wife's property for benefit of children, children wards of court in care and custody of mother	872

SETTLEMENTS.

Incidence of expenditure as between capital and income—Conversion of dwelling-house into shops and flats—Expenditure to enable buildings to be let [Re SWANWICK HOUSE, PRESTBURY]	531
Settlements, special and voluntary, same trustee of both settlements, whether obliged to hand appointed sum to voluntary settlor	920
Sewers, walls built over, whether removable by local authority	839
Shares, sale, shares pledged to bank, bank charge redeemed since sale, <i>restitutio in integrum</i>	271
Ship, charterparty, impossibility of performance, frustration, duration of impossibility	314
—, invitation to berth, berth unsafe for particular ship, liability of wharfinger	23

SHIPPING.

Charterparty—Construction—Option to charterers to load and discharge at two safe berths in one port without extra charge [W. I. RADCLIFFE S.S. CO., LTD., AND WYNSTAY S.S. CO., LTD. v. EXPORT KHLIEB OF MOSCOW, THE LIANISHEN]	528
---	-----

	PAGE
—, "Full and complete cargo"—Timber shipped in bundles—Custom to bundle—Stowage place completely filled but cargo short of carrying capacity—Dead freight [ANGFARTYGS A/B HALFDAN v. PRICE & PIERCE, LTD.]	672
Shipping, charterparty, deviation, whether evidence of trade custom admissible, absence of ambiguity in terms of charterparty	444
Shorthand note, evidence, provision of copies for Court of Appeal at public expense, discretion of judge an executive function, no appeal	29
—, request by judge for transcript, evidence of request for taxing master, duty of counsel	56
Slander, privileged occasion, reciprocity of interest, defamatory statements made to plaintiff and overheard by bystanders	507
Slip rule, damages awarded against two defendants, entered as "each defendant liable for half judgment," whether error can be corrected under slip rule	960
Solicitor, clerk in articles, covenant in restraint of trade	182
—, mortgagee, acting in sale for mortgagor, interest on mortgage retained out of proceeds of sale, person by or through whom payment made	144
Solicitor's lien, set-off of costs notwithstanding, proceedings commenced in arbitration and proceeding to Court of Appeal	305
Stamp, irrevocable undertaking to pay	712
Statutory duty, breach of, contributory negligence	722
Stay of proceedings, "step in proceedings," transfer of summons to counsel's list	353
Subcontractor, building owner and, privity of contract, insolvency of contractor, ratification	590
Succession, trade, new partnership, exercise of option of treating old trade as discontinued, limits of right of continuing partner to relief in respect of losses in old trade	299
Sugar, lorry laden with sacks of, sugar escaping on to highway, whether an allurement to children	613
Summary jurisdiction, proceedings for maintenance order, whether barred by county court judge's prior finding of adultery of complainant	833
Support, interference, demolition of adjoining house by local authority under clearance order	669
Sur-tax, deductions, annual payments making up deficiency between mental patient's income and sum required for maintenance	165
Tax, no reference to standard or current rate, annuities	81
Taxing master, evidence of request by judge for shorthand note	56
Tenant, injuries suffered in yard attached to demised premises over which tenants have a right to pass, liability of landlord	329
Tenants in common, gift to, for life, gift over on death of all tenants in common, implication of cross-remainders	657
Ticket, exceptions, negligence, passenger slipping on wet corridor	165
Time, workmen's compensation claim, widow of workman pursuing other remedy, failure through misjoinder of parties, further proceedings barred by lapse of time	34

	PAGE
TORT.	
Contribution between joint tortfeasors—No appeal against one tortfeasor—Duty of Court of Appeal—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 [HANSON v. WEARMOUTH COAL CO., LTD., AND SUNDERLAND GAS CO.]	47
—, Party found not negligent not a tortfeasor—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (1) (c) [JOHNSON v. CARLEIDGE AND MATTHEWS (MATTHEWS, THIRD PARTY)]	654
Tortfeasors, joint, contribution, no appeal against one tortfeasor	47
—, —, party found not negligent not a tortfeasor	654
TOWN AND COUNTRY PLANNING.	
Access to highway—Carriageway giving access to building behind buildings fronting on highway—Minimum width—"Street"—Public Health Act, 1875 (c. 55), s. 4 [COWAN v. HENDON BOROUGH COUNCIL]	366
TRADE.	
Restraint of trade—Covenant by employee in articles—Solicitor—Articled clerk—Not to practise within 15 miles of town where employer's business situated during whole life of employee [DICKSON v. JONES]	182
TRADE MARKS AND TRADE NAMES.	
Passing off—Damages—Right to substantial damages—Sales to middleman [DRAPER v. TRIST]	513
—, "Staunton chessmen"—Genuine Staunton chessmen [JOHN JAMES & SON, LTD. v. CHESS (A FIRM)]	227
Transcripts, appeal, right to bring appeal without providing transcripts of proceedings in court below and to rely upon the judge's notes	611
Treasure-hunt, string of motor cyclists engaged in, sudden braking by leading cyclist, negligence	960
Trial, jury, failure to answer one of five questions, answers not read out in court	263
Trust, discretionary, to pay income to father, any wife of his, and his issue, no power of revocation, revocable settlement	336
—, secret, revocation of will, secret trust excepted from revocation, sum subject to secret trust increased by later will, increase not communicated to trustees, whether failure of increased gift	526
TRUSTS.	
Rule in Allhusen v. Whittell—Gift of residuary estate charged with payment of an annuity—Settlement by will of property including that estate—No personal covenant to pay annual sums—Exclusion of rule [RE DARBY, RUSSELL v. MACGREGOR]	6
User, club, by bookmaker, telephone-betting to room above	399
—, right of way, for horses and carts, proof of, right to use for mechanically-propelled vehicles	562
Validity, bye-law, regulation of advertisements, amenities of public park	246
Valuation, property, duty of agent to use care and skill, valuer instructed by promoters to company to be formed, duty to company	204
—, residue, determination, date for valuing estate for purpose of final distribution	291
Vicar and church wardens, gift to, for parish work, charitable purposes	491

	PAGE
Wages, increase in basic rate, compensation to injured workman, application for review, less work available	72
Walls, erected without consent, when removable by local authority	839
—, whether buildings within meaning of Public Health Act,	839
War, charterparty, impossibility of performance, frustration, duration of impossibility	314
Water, pollution of in well, by gas works, grantees' right of action	812
—, supply to railway company by canal company, statutory restriction on supply	57

WATERS AND WATERCOURSES.	
Riparian owners—Interference with flow of water by works executed under statutory powers—Reasonable steps to avoid interference—Onus of proof [PROVENDER MILLERS (WINCHESTER), LTD. v. SOUTHAMPTON COUNTY COUNCIL]	882
Wharves—Safety of berth—Invitation to ship to berth—Arrangement for ship to go to berth adjoining her usual berth—Berth unsafe for particular ship—Liability of wharfinger [ONESIMUS DORREY & SONS, LTD. v. HEADLEY'S WHARF, LTD., AND WILLIAM ASHBY LTD.]	23
Wharf, safety of ship, ship invited to go to berth adjoining her usual berth, unsafe for particular ship, liability of wharfinger	23

WILLS.	
Construction—Gift during widowhood—Decree of nullity in respect of second marriage—Whether gift restored [EAVES v. EAVES]	500
—, Gift to tenants in common for life—Gift over on death of all tenants in common—Implication of cross-remainders [Re RIALI, WESTMINSTER BANK, LTD. v. HARRISON]	657
—, "My securities"—"Remainder of the money" [Re SMITHERS, WATTS v. SMITHERS]	689
Covenant not to revoke—Revocation by marriage—Restraint of marriage—Public policy—Wills Act, 1837 (c. 26), ss. 18, 20 [Re MARSLAND, LLOYDS BANK, LTD. v. MARSLAND]	148
Gifts of annuities—Annuities payable out of residuum—Power to resort to capital—Abatement—Rights of annuitants and residuary legatees [Re DE CHASSIRON, LLOYDS BANK, LTD. v. SHARPE]	321
Lapse—Gift contingent on attaining age of twenty-five—Death of legatee in lifetime of testator under twenty-five—Legatee would have attained twenty-five had she died immediately after the testator—Wills Act, 1837 (c. 26), s. 33 [Re WOLSON, WOLSON v. JACKSON]	852

	PAGE
Secret trust—Revocation of will—Secret trust excepted from revocation—Sum subject to secret trust increased by later will—Increase not communicated to trustees—Failure of increased gift [Re COOPER, LE NEVE FOSTER v. NATIONAL PROVINCIAL BANK, LTD.]	586

WORKMEN'S COMPENSATION.	
Accident arising out of and in the course of the employment—Boy employed to repair telephone apparatus—Condition of employment that he should attend gymnasium class—Accident while attending class [LUCAS v. POSTMASTER-GENERAL]	660
—, Unexplained death—Night watchman found gassed—Workmen's Compensation Act, 1925 (c. 84), s. 1 (1) [ALEXANDER v. J. DICKINSON & SONS, LTD.]	204
Alternative remedies—Election between two remedies—Receipt of compensation—Knowledge of workman—Receipt signed "without prejudice"—Onus of proof where unequivocal act proved—Workmen's Compensation Act, 1925 (c. 84), s. 29 (1) [BURKE AND UNSWORTH v. ELDER DEMPSTER LINES, LTD.]	339
—, —, —, Notice to employer that payments being received without prejudice—Workmen's Compensation Act, 1925 (c. 84), s. 29 (1), (2) [PERKINS v. HUGH STEVENSON & SONS, LTD.]	697
Claim—Time for—Widow of workman pursuing other remedy—Failure through misjoinder of parties—Further proceedings barred by lapse of time—Reasonable cause—Workmen's Compensation Act, 1925 (c. 84), s. 14 [HARRIS v. JAMES HOWDEN & CO. (LAND), LTD.]	34
Compensation—Increase in basic rate of wages—Application for review—Increase of more than 20 per cent.—Whether fact that less work available should be considered—Workmen's Compensation Act, 1925 (c. 84), s. 11 (3) [HILL v. WOLVERHAMPTON CORRUGATED IRON CO., LTD.]	72
Industrial disease—Injury by accident—Date of accident—Death of workman without obtaining certificate and while not in receipt of compensation—Workmen's Compensation Act, 1925 (c. 84), s. 1 (1), (2) (b) [MAYER & SHERRATT v. CO-OPERATIVE INSURANCE SOCIETY, LTD.]	158
Review of compensation—Infant workman—Time within which application must be made—Meaning of "review"—Change in probable earnings at a date later than application but prior to hearing—Workmen's Compensation Act, 1925 (c. 84), s. 11 (2)—Workmen's Compensation Act, 1926 (c. 42), s. 1 [DOBSON SHIP REPAIRING CO., LTD. v. BURTON]	431

STATUTES, ETC., REFERRED TO

	PAGE
Statute of Frauds, 1677 (c. 3), s. 4	136
Landlord and Tenant Act, 1709 (c. 14), s. 1	794
Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 86	253
Marriage Act, 1823 (c. 76), s. 22	895
Real Property Limitation Act, 1833 (c. 27), s. 12	569
Highway Act, 1835 (c. 50), s. 72	297
Wills Act, 1837 (c. 26), ss. 18, 20	148
—, s. 33	852
Judgments Act, 1838 (c. 110), s. 14	495
School Sites Act, 1841 (c. 38), s. 2	1
Inclosure Act, 1845 (c. 118)	864
Betting Act, 1853 (c. 119), s. 3	399
Offences Against the Person Act, 1861 (c. 100), s. 57	108
British North America Act, 1867 (c. 3), ss. 91 (19), (21), 92 (8)	98
Public Parks, Schools and Museums Act, 1871 (c. 13), ss. 3, 4	1
Public Health Act, 1875 (c. 55), s. 4	366
—, s. 26	839
Customs and Inland Revenue Act, 1881 (c. 12), s. 38	875
Bills of Exchange Act, 1882 (c. 61), s. 83 (1)	712
Married Women's Property Act, 1882 (c. 75), s. 17	957
Customs and Inland Revenue Act, 1889 (c. 7), s. 11	875
Arbitration Act, 1889 (c. 49), s. 4	353
Lunacy Act, 1890 (c. 5), s. 55	89
Stamp Act, 1891 (c. 39), s. 33 (2)	712
Public Authorities Protection Act, 1893 (c. 61), s. 1	193
Finance Act, 1894 (c. 30), ss. 2 (1) (b), 5 (2)	787
—, ss. 2 (1) (c), 5, 7	875
Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 6	833
London Government Act, 1899 (c. 14), s. 5 (2), Sched. II, Part II	995
Marine Insurance Act, 1906 (c. 41), s. 67	908
Advertisements Regulation Act, 1907 (c. 27), s. 2	246
Coal Mines Regulation Act, 1908 (c. 57), s. 1	938
Finance (1909-10) Act, 1910 (c. 8), s. 59	875
Coal Mines Act, 1911 (c. 50), ss. 55, 102 (8)	722
Finance Act, 1914 (c. 10), s. 14	787
Deeds of Arrangement Act, 1914 (c. 47), s. 1 (2)	869
Bankruptcy Act, 1914 (c. 59), ss. 26 (9), 28 (2), 29 (2), 38 (2) (a), 47 (1)	902
Income Tax Act, 1918 (c. 40), s. 27	165
—, Sched. B, r. 8	259
—, Sched. D, Case V, r. 1	803
—, All Schedules Rules, r. 21	144
County Courts Act, 1919 (c. 73), s. 2	377
Finance Act, 1920 (c. 18), s. 21	154
Government of Ireland Act, 1920 (c. 67), ss. 8, 61	787
Licensing Act, 1921 (c. 42), s. 1 (1)	106
Finance Act, 1922 (c. 17), s. 21 (6)	319
Mines (Working Facilities and Support) Act, 1923 (c. 20), ss. 1, 4	864
Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 2	635, 678
Settled Land Act, 1925 (c. 18), Sched. III, Part I (xxiii)	531
Law of Property Act, 1925 (c. 20), s. 12	569
—, s. 62	663
—, s. 146 (4)	889
Administration of Estates Act, 1925 (c. 23), s. 34	746
Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162	928
—, s. 190	939
Workmen's Compensation Act, 1925 (c. 84), s. 1 (1)	158, 204
—, s. 1 (2) (b)	168
—, s. 11 (2)	431
—, s. 11 (3)	72
—, s. 14	34
—, s. 29 (1)	339
—, s. 29 (1), (2)	697
Finance Act, 1926 (c. 22), ss. 32 (1), 33	299
Mining Industry Act, 1926 (c. 38), s. 13	864
Workmen's Compensation Act, 1926 (c. 42), s. 1	431
Finance Act, 1927 (c. 10), s. 31 (3)	319
Moneylenders Act, 1927 (c. 21), s. 6	695
Landlord and Tenant Act, 1927 (c. 36), s. 18 (1)	460
Administration of Justice Act, 1928 (c. 26), s. 9	928
Finance Act, 1931 (c. 28), s. 7	761
Children and Young Persons Act, 1933 (c. 12), ss. 47 (3), 107 (1)	16
Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 2 (2)	635, 678
Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 3	875
Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1 (1)	928
Betting and Lotteries Act, 1934 (c. 58), s. 18 (1), (2)	93
Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6	47
—, s. 6 (1) (c)	654
Government of India Act, 1935 (c. 42), s. 223	356
Finance Act, 1936 (c. 34), s. 21 (1), (9) (b) (c)	224
—, s. 21 (8), (10)	386
Housing Act, 1936 (c. 51), ss. 13, 26	669
—, s. 30	995
—, s. 75	548

	PAGE
Air-Raid Precautions Act, 1937 (c. 6), ss. 1 (3), 7	995
Finance Act, 1937 (c. 54), s. 14 (3)	241
Matrimonial Causes Act, 1937 (c. 57), s. 2	437, 825, 967
—, s. 2 (d)	89
—, s. 3	89
—, s. 4	437
—, s. 6 (3)	546
—, s. 8 (2)	108
—, s. 10 (2)	989
Rochdale Canal Act, 1899 (c. cclvii), s. 37	57
Land Acquisition Act (I of 1894), ss. 4, 6, 9, 11, 18	707
Indian Extradition Act, 1903 (No. 15 of 1903), s. 7	356
Indian Income Tax Act, 1922 (No. 11 of 1922), s. 4 (3) (i)	469
Railway Act of Canada (R.S.C., 1927, c. 170), s. 121	930
Canadian National Railways Act (R.S.C., 1927, c. 172)	930
Special War Revenue Act, (R.S.C., 1927, c. 179), s. 86 (1), as amended by Statutes of Canada, 1932, c. 54, s. 11	991
Ontario Municipal Board Act, 1932 (Ontario, c. 27 of 1932 and c. 51 of 1935), Part VI	98
Department of Municipal Affairs Act, 1935 (Ontario, c. 16 of 1935)	98
City of Windsor (Amalgamation) Act, 1935 (Ontario, c. 74 of 1935)	98
City of Windsor (Amalgamation) Amendment Act, 1936 (Ontario, c. 66 of 1936)	98
Judicature Ordinance, 1880 (c. 35), s. 7 (1), (3)	121
Code of Criminal Procedure, 1898 (No. 5 of 1898), ss. 75, 491, 561A	356
Native Administration Ordinance, 1927 (No. 18 of 1927), s. 77	381
Criminal Appeal Ordinance, 1931 (No. 31 of 1931), s. 3 (1)	121
Interpretation Ordinance, 1933 (No. 19 of 1933), ss. 17, 20	121
Native Administration Amendment Ordinance, 1935 (No. 18 of 1935), s. 13	381
Judicature (Amendment) Ordinance, 1936 (No. 24 of 1936), s. 4 (1)	121
Appellate Side Rules of the Madras High Court, rr. 2, 2A	356
R.S.C., Ord. 14, r. 1	924
—, Ord. 27, r. 15	924
—, Ord. 58, r. 15	916
—, Ord. 64, r. 7	916
—, Ord. 65, r. 1	257, 746
—, r. 14	305
—, Ord. 70, r. 1	257
Bankruptcy Rules, 1915, r. 156	429
Government of Ireland (Adaptation of Taxing Acts) Order, 1922 (S.R. & O., 1922, No. 80)	787
Public Assistance Order, 1930 (S.R. & O., 1930, No. 185), arts. 142 (1), 162	193
Summary Jurisdiction (Children and Young Persons) Rules, 1933 (S.R. & O., 1933, No. 819/L.23), r. 11	16
Institute Time Clauses (Freight), cl. 5	908

WORDS AND PHRASES

	PAGE
Accident or casualty	857
Actual possession	635
Anticipated freight	908
Deduction of income tax	81
From any other cause whatsoever	127
Full and complete cargo	672
Genuine Staunton chessmen	227
Interest corresponding to his interest in the assets of the company available for distri- bution among the members in the event of a winding up	241
My securities	689
Park, garden or pleasure ground	548
Persons under care and treatment	89
Property upon which estate duty already paid	787
Remainder of the money	689
Required for the amenity or convenience of any house	548
Review	431
Separate documents for each 1,000 units and each 1,000 units to be considered a separate contract	175
Settlement	224
Settlor	224
Special requirements of the district	106
Staunton chessmen	227
Step in proceedings	353
Street	366
Without deduction of tax	761
Without prejudice	339

THE ALL ENGLAND LAW REPORTS ANNOTATED

Re CAWSTON'S CONVEYANCE, ST. LUKE, BROMLEY
COMMON (VICAR AND CHURCHWARDENS) *v.* CAWSTON.

[CHANCERY DIVISION (Simonds, J.), **May 18, 19, 1939.**]

Education—School—Conveyance under School Sites Acts—Reverter on cesser of use for school—Conveyance for full value—Enrolment—School Sites Act, 1841 (c. 38), s. 2—Public Parks, Schools, and Museums Act, 1871 (c. 13), ss. 3, 4.

By a conveyance dated Aug. 20, 1883, a piece of land was conveyed in fee simple in consideration of £250, its full value, to the vicar and churchwardens of a parish for the purposes of a school under the School Sites Acts. In 1938, the school erected thereon ceased to be used as such, having become redundant by reason of the erection of large modern schools in the neighbourhood. The conveyance of 1883 was not enrolled. It was contended that, by reason of the premises having ceased to be used for the purposes of a school, the land had reverted to the grantor:—

HELD: (i) the provisions of the School Sites Act, 1841, as to reverter applied to a grant in fee simple.

(ii) those provisions applied equally to a grant for consideration as to a voluntary conveyance.

(iii) the Public Parks, Schools, and Museums Act, 1871, ss. 3, 4, applied to this grant as being one of a school-house for an elementary school, and the conveyance of 1883 did not require to be enrolled.

(iv) in the result, the reverter under the School Sites Act, 1841, s. 2, took effect.

[EDITORIAL NOTE.] The question of reverter in the case of a voluntary grant was considered in *Dennis v. Malcolm* (1). The present decision extends that decision to a grant for full consideration. There is, however, an additional point, in that it is decided that the conveyance was within the Public Parks, Schools, and Museums Act, 1871, and thus exempt from the restrictions placed upon conveyances by the Statutes of Mortmain.

AS TO THE SCHOOL SITES ACTS, see HALSBURY, Hailsham Edn., Vol. 12, p. 131, para. 279; and FOR CASES, see DIGEST, Vol. 19, p. 597, Nos. 258, 259.]

Cases referred to:

- (1) *Dennis v. Malcolm*, [1934] Ch. 244; Digest Supp.; 103 L.J.Ch. 140; *sub nom.* *Re Cheam Common School*, *Dennis v. Malcolm*, 150 L.T. 394.
- (2) *A.-G. v. Shudwell*, [1910] 1 Ch. 92; 8 Digest 334, 1204; 79 L.J.Ch. 113; 101 L.T. 630.
- (3) *Re Peel's Release*, [1921] 2 Ch. 218; 8 Digest 328, 1109; 90 L.J.Ch. 369.
- (4) *Chapman v. Gibson* (1791), 3 Bro. C.C. 229; 37 Digest 501, 947.
- (5) *Cotter v. Layer* (1731), 2 P. Wms. 623; 37 Digest 500, 928.
- (6) *Dixon v. Rackham* (1913), Unreported.

(7) *Churcher v. Martin* (1889), 42 Ch.D. 312; 8 Digest 354, 1510; 58 L.J.Ch. 586; 61 L.T. 113.

(8) *Re Woking Urban Council (Basingstoke Canal) Act, 1911*, [1914] 1 Ch. 300; 17 Digest 352, 1638; 83 L.J.Ch. 201; 110 L.T. 49.

ADJOURNED SUMMONS to determine whether certain land conveyed for the purposes of a school under the School Sites Act, 1841, was subject to the provisions of that Act respecting reverter upon the property ceasing to be used for such purposes. The facts are fully stated in the judgment.

T. K. Wigan for the plaintiffs.

J. V. Nesbitt for the defendant.

Wigan: In all cases of a grant by an owner in fee simple, there is no reversion, and, even if I am wrong in this contention, in any case where the grant is made for full value by an owner in fee simple, conveying as beneficial owner, there is no reversion. This Act did not excuse enrolment, and, as this conveyance was never enrolled, it was void *ab initio*, and the defendant's rights are now long since barred: *A.-G. v. Shadwell* (2), *Re Peel's Release* (3) and *Dennis v. Malcolm* (1). The summons, as amended, to be found in the report of the last case is the same in form as is the summons in the present case. The reasoning of CLAUSON, J., in that case has no application where the grant is made for value. The grantor here has expressed to convey as beneficial owner, and it must be taken that, if the reverter was to take effect, the grantor should have limited his grant. [Counsel referred to *Chapman v. Gibson* (4), *Cotter v. Layer* (5), *Dixon v. Rackham* (6), *Churcher v. Martin* (7) and FARWELL ON POWERS, 3rd Edn., p. 378.]

Nesbitt: The answer to this is *Dennis v. Malcolm* (1). This case is on all fours with it, except that in that case there was a gift and here there was a conveyance for valuable consideration. [Counsel referred to *Re Woking Urban Council (Basingstoke Canal) Act, 1911* (8).] The Act of 1871 dispensed with the necessity for enrolment. Reverter has taken place.

SIMONDS, J.: In this case, a question has been raised which involves the consideration of the School Sites Act, 1841. By a conveyance of Aug. 20, 1883, Samuel Cawston for the sum of £250, which appears to have been the full value, conveyed to the vicar and churchwardens of the parish of Holy Trinity, Bromley Common, who are in the deed called the trustees, a certain piece of land situate at Bromley Common and particularly described in the conveyance, together with the school thereon erected and built:

... to hold unto and to the use of the said trustees and their successors in fee simple for the purposes of the said Act and upon trust subject nevertheless to the proviso hereinafter contained to permit the said premises and all buildings thereon now or hereafter erected to be for ever hereafter appropriated and used as and for a school for the education of children and adults or children only of the labouring manufacturing and other poorer class in the parish of Holy Trinity Bromley Common aforesaid or of any new district which may hereafter be assigned therefrom and as a residence for the teacher or teachers of the said school and for no other purpose.

That conveyance purported to be made under the authority of the Act which I have mentioned, the School Sites Act, 1841, which in the conveyance is called

... an Act passed in the fifth year of the reign of Her Majesty Queen Victoria intituled "An Act to afford further facilities for the conveyance and endowment of sites for schools"

A

and of the amending Act of 1844. That conveyance having been thus made in 1883, the school was used for the purposes which were therein prescribed until in or about June, 1937, when it appeared that the school had become out of date and expensive to maintain, and that the building of large modern schools in the neighbourhood had made the Church of England school redundant. Notice was then given to the local education authority of intention to close the school, and in fact it has not been used as a school since the end of the summer term of 1938.

B

C

In those circumstances, the question which arises is whether there has been a reverter to the estate of the grantor, Samuel Cawston, under the provisions of the School Sites Act, 1841. Sect. 2 of that Act, so far as it is material, provides as follows :

D

Any person, being seised in fee simple, fee tail, or for life, of and in any manor or lands of freehold, copyhold, or customary tenure, and having the beneficial interest therein, or in Scotland being the proprietor in fee simple or under entail, and in possession for the time being, may grant, convey, or enfranchise by way of gift, sale, or exchange, in fee simple or for a term of years, any quantity not exceeding one acre of such land, as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purposes of the education of such poor persons in religious and useful knowledge . . .

E

Then there are certain provisions to which I need not refer, and finally there is this proviso :

Provided also, that upon the said land so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate held in fee simple or otherwise, or of any manor or land as aforesaid, as fully to all intents and purposes as if this Act had not been passed, any thing herein contained to the contrary notwithstanding.

F

It has been argued on behalf of the plaintiffs in these proceedings, the vicar and churchwardens of the parish, that that proviso for reverter has, in this case, no operation. In the first place, they say that the section is not intended to apply to the case of an owner in fee simple. In the second place, they say that it is not intended to apply, and cannot apply, to the case where the grant has been made for full consideration in money. Thirdly, they say that this conveyance was never enrolled, that at the time of the School Sites Act, 1841, and of the amending Act of 1844, it was necessary under the Statutes of Mortmain to enrol a conveyance, whether made under the authority of the School Sites Act or otherwise, if it was made for charitable purposes, that the conveyance, not having been enrolled, was altogether void, and that, accordingly, those who have been in possession ever since the grant of 1883

G

H

have been in adverse possession, and therefore the title of the vicar and churchwardens is protected by adverse possession, and there can be no question of reverter.

Upon those three points, so far as the first is concerned, any doubts which I might have had are resolved by the authority of *Dennis v. Malcolm* (1), where exactly the same point was argued before CLAUSON, J., A who decided that the provisions of the section were applicable to the case of the grant by the owner in fee simple of the fee simple of the land. He dealt with the argument, which has been addressed to me, and says, at p. 250 :

A very subtle argument has been founded upon those sections [sects. 2, 3 and 4 of the Act of 1841]: it has been contended that it is very significant that sect. 2 provides that the reverter must operate as if the Act had not been passed, but does not contain the additional words appearing in sects. 3 and 4—namely, “as if the grant had not been made”: and it is said that you must treat the grant as an existing grant, assume the Act has not been passed, and see what the result is. When I turn to the grant, I find that the utmost care has been taken to explain that the grantor, Mr. Antrobus, was acting under the authority of the School Sites Act, 1841, and was making the grant to the minister and churchwardens and their successors for the purposes of the said Act. In my view it is plain that the deed is intended to operate and operate only under the Act, and the effect of dealing with the matter as if the Act had not been passed is to destroy the authority under which and under which alone the grant was intended to operate: the result is therefore in my view precisely the same as if the statute had said the reverter is to take place as if the grant had not been made. If the deed had gone on to use some such expression as would enable me to hold that it was intended to operate either under the Act or independently of the Act, the result might be different. But I find no such expression. B C D

In view of that reasoned judgment upon the argument which was addressed to the court, it would be impossible for me, whatever my own views might be, to come to a different conclusion. E

The judge's judgment has been subjected to a close analysis by counsel for the plaintiffs in his able argument, and he has addressed to me some arguments which were not put before the judge, but I do not find it possible to differ from the judge, and I must hold that sect. 1 is applicable to the grant by an owner in fee simple of the fee simple, or to any other grant. Then, says counsel for the plaintiffs, this case is to be distinguished from *Dennis v. Malcolm* (1) because there the grant was voluntary and here it was for full consideration. It is true that that distinction might be taken, but, when I look at the Act, I find that sect. 2 distinguishes in no way between a grant by way of gift and one by way of sale or by way of exchange. In each case the policy of the Act is to provide that, upon the land ceasing to be used for the purposes of the Act mentioned, there is to be a reverter. Accordingly, I must hold that the decision of CLAUSON, J., is one which binds me equally both in regard to a case where there has been consideration for a grant and in regard to a case where there has been no consideration. That view of the section is certainly reinforced by the provisions of sects. 3 and 4 of the Act, where, in the case of a grant by the Chancellor and Council of the Duchy of Lancaster or by the Duchy of Cornwall, it is clear that a case is contemplated where money has been paid for the grant, because the section proceeds to deal with F G H

what is to happen to the moneys received upon such grant, but there is the same provision as to reverter. I must therefore hold here that, notwithstanding that full value was received by the grantor upon the grant, yet, since the purpose for which the land was granted has ceased, there must be a reverter.

A Then the last point is taken, which I have already stated—namely, that the possession has been adverse. That rests upon the fact that there was the necessity for enrolment, and, as there was no enrolment, the deed was void. It is quite true that, under the law as it stood in 1841 and 1844, a conveyance made under the authority of the School Sites Acts required to be enrolled, and, if there was no enrolment, the conveyance was void. Was it necessary in 1883? That turns upon the meaning and effect of the Public Parks, Schools, and Museums Act, 1871. That was an Act to facilitate gifts of land for public parks, schools and museums. It is necessary to look at sect. 3, which is the definition section. It is thereby provided as follows :

... the words "elementary school" shall mean a school or department of a school at which elementary education is the principal part of the education there given, and shall not include any school or department of a school at which the ordinary payments in respect of the instruction from each scholar exceed 9d. a week; the word "school-house" shall include the teachers dwelling-house, and the playground (if any), and the offices and all premises belonging to or required for a school ...

I now turn to sect. 4, which provides as follows :

From and after the passing of this Act all gifts and assurances of land of any tenure, and whether made by deed or by will or codicil, for the purposes only of a public park, a school-house for an elementary school, or a public museum, and all bequests of personal estate to be applied in or towards the purchase of land for all or any of the same purposes only, shall be valid notwithstanding the [Charitable Uses Act, 1735] and other statutes commonly known as the Statutes of Mortmain.

It was the Charitable Uses Act, 1735, which made enrolment necessary. Once that statute was out of the way, no enrolment was necessary. The only question here, then, is whether or not this was a grant made of a school-house for an elementary school within the meaning of the statute to which I have referred.

It has been argued by counsel for the plaintiffs that this was not a grant of a school-house for an elementary school, and in aid of that argument he refers to the fact that the purpose defined in the conveyance is :

... a school for the education of children and adults or children only of the labouring manufacturing and other poorer class in the parish of Holy Trinity Bromley Common ...

It appears to me that that is a purpose which properly falls within the definition of "elementary education" which is contained in the Public Parks, Schools and Museums Act, 1871, s. 3. Elementary education is none the less the principal part of the education because it is possible that some education may be given to adults which may not be of an elementary character. Accordingly, it was not necessary to enrol this conveyance of 1883. Therefore, the deed was not void, and the possession

of the vicar and churchwardens has not been adverse, whence it follows that the reverter under the School Sites Act, 1841, s. 2, must take place, and the land (or the proceeds of sale, since it has now been sold) belongs to the estate of Samuel William Cawston. I do not propose to decide what happens to it now it is there. That must lie between the various persons who are interested or derive title under the will. A

I should have said that a case was called to my attention which came before EVE, J., on a motion for judgment. It is not reported in any of the recognised reports, and the only note I have of it is in THE SCHOOL GOVERNMENT CHRONICLE, June 7, 1913, which does not give me any guidance at all as to the arguments, at least on one side, which were addressed to the judge or the reasons for his decision, and I am not able to accept that as an authority to displace the view which I must form having regard to the decision of CLAUSON, J. B

Solicitors: *Day & Son* (for the plaintiffs); *Dennes & Co.* (for the defendant). C

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

Re DARBY, RUSSELL v. MACGREGOR. D

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.J.J.), May 11, 12, 1939.]

Trusts—Rule in Allhusen v. Whittell—Gift of residuary estate charged with payment of an annuity—Settlement by will of property including that estate—No personal covenant to pay annual sums—Exclusion of rule. E

At the date of her death, the testatrix was in possession of property which represented the residuary estate of her father. She had taken that estate, under the will of her father, subject to, and charged with, the payment by her to her mother of an annual sum sufficient to make up the widow's income to £3,000 per annum. By her own will, the testatrix settled her residuary estate, which included her father's residuary estate, subject to that charge, and the question arose as to whether, as between the life tenant and those interested in the capital of her estate, there ought to be, so far as regards that part of her estate which represented her father's residuary estate, an adjustment as between capital and income with regard to the payments of the annuity charged by her father's will. It was contended that the rule in *Allhusen v. Whittell* was applicable, and that such an apportionment should be made, or alternatively that, if the consent of the annuitant in respect of any annual payment—which consent was admittedly required—could not be obtained, the tenant for life would, on the death of the annuitant, be entitled to be recouped out of capital a sum which would give effect to the rule. It was also contended that the testatrix ought to be treated as though she had entered into a covenant to pay the annuity on the ground that she was under a personal liability to the annuitant:— F

Held: (i) the liability to pay the annuity was a charge created by the testator's will, and could not be treated as a liability in respect of which the testatrix had entered into a personal covenant. G

(ii) the rule in *Allhusen v. Whittell* was not applicable. It could not be applied according to its terms, since the consent of the annuitant would be necessary in her lifetime. H

(iii) the rule in *Allhusen v. Whittell* could not be applied after the

annuitant's death, because the rule must be applied at the time the payments are made.

Re Thompson, Thompson v. Watkins (5) overruled. *Re Popham, Butler v. Popham* (6) applied.

[EDITORIAL NOTE. The contention in this case was, in effect, an attempt to extend the application of the rule in *Allhusen v. Whittell* (1), but it was contended that the extension had already been made by JOYCE, J., in *Re Thompson, Thompson v. Watkins* (5). The Court of Appeal has decided that the rule is not applicable to an annual payment which is a mere charge upon the property settled, but is restricted in such cases to cases where there is a personal covenant by the settlor to pay the annual sums. The above decision of JOYCE, J., if, upon a proper view, it decided this question to the contrary effect, is overruled.

AS TO THE RULE IN ALLHUSEN v. WHITTELL, see HALSBURY, 1st Edn., Vol. 28, Trusts, p. 34, para. 64; and FOR CASES, see DIGEST, Vol. 40, pp. 656, 657, Nos. 1957-1962.]

Cases referred to :

- (1) *Allhusen v. Whittell* (1867), L.R. 4 Eq. 295; 40 Digest 657, 1958; 36 L.J.Ch. 929; 16 L.T. 695.
- (2) *Re Perkins, Brown v. Perkins*, [1907] 2 Ch. 596; 40 Digest 694, 2295; 77 L.J.Ch. 16; 97 L.T. 706.
- (3) *Re Poyser, Landon v. Poyser*, [1910] 2 Ch. 444; 40 Digest 694, 2297; 79 L.J.Ch. 748; 103 L.T. 134.
- (4) *Re Williams, Andrew v. Williams* (1885), 54 L.T. 105; 40 Digest 650, 1890.
- (5) *Re Thompson, Thompson v. Watkins*, [1908] W.N. 195; 40 Digest 694, 2296.
- (6) *Re Popham, Butler v. Popham* (1914), 111 L.T. 524; 39 Digest 173, 637.
- (7) *Re Harrison, Townson v. Harrison* (1889), 43 Ch.D. 55; 40 Digest 691, 2264; 59 L.J.Ch. 169; 61 L.T. 762.
- (8) *Blackmore v. White*, [1899] 1 Q.B. 293; 44 Digest 286, 1187; 68 L.J.Q.B. 180; 80 L.T. 79.
- (9) *Jay v. Jay*, [1924] 1 K.B. 826; 40 Digest 648, 1880; 93 L.J.K.B. 280; 130 L.T. 667.
- (10) *Re Field, Sanderson v. Young*, [1925] Ch. 636; 40 Digest 652, 1911; 94 L.J.Ch. 322; 133 L.T. 463.
- (11) *Re Oliver, Newbald v. Beckitt* (1890), 62 L.T. 533; 44 Digest 439, 2656.
- (12) *Re Owen, Slater v. Owen*, [1912] 1 Ch. 519; 40 Digest 699, 2335; 81 L.J.Ch. 337; 106 L.T. 671.
- (13) *Re Bacon, Grissel v. Leathes* (1893), 62 L.J.Ch. 445; 40 Digest 693, 2292; 68 L.T. 522.
- (14) *Re Muffett, Jones v. Mason* (1888), 39 Ch.D. 534; 40 Digest 693, 2290; 57 L.J.Ch. 1017; 59 L.T. 499.

APPEAL by the defendant, Rachel Macgregor, from an order of FARWELL, J., dated Nov. 16, 1938. There was also a cross-appeal which was upon a question of construction. At the time of her death, the testatrix was possessed of an estate which she had received under her father's will. That estate was charged with the payment to the testator's widow of an annual sum sufficient to make up the income of the widow to £3,000 per annum after payment of income tax and sur-tax. The testatrix, by her own will, disposed of the whole of her residuary estate, which included the father's residuary estate, subject to that charge. The testatrix settled her residuary estate, and the question for determination was whether or not, as between tenant for life and those interested in capital, there should be an adjustment as between capital and income

of that part of the estate of the testatrix which was charged with the payment of the annuity.

J. Neville Gray, K.C., and *J. G. Strangman* for the appellant.

H. B. Vaisey, K.C., and *G. A. Rink* for the respondents.

R. H. Hodge for the trustees.

Gray, K.C.: The £1,000 per annum necessary to make up the income A of the testator's widow to £4,000 is payable out of the income of the estate of the testatrix, exclusive of that part of her estate which she received from her father, the testator. The father's estate received by the testatrix is liable to make up the mother's income to £3,000 per annum. It must be borne in mind that the father's estate is subject B to this liability before the residue of the father's estate is brought into her estate. The liabilities of the testatrix would be met out of her free estate, but the liability to make up her mother's income to £3,000 per annum is one which cannot be got rid of. The question arises as to how the liability is to be distributed as between capital and income. Where C there is a debt, obligation or charge, it must be provided for. It is not a debt for which the testatrix is personally liable, but it is a question as to what are the liabilities of her estate. *Allhusen v. Whittell* (1) was a similar case. This is not a case in which a fund has been set aside, or in which there is a direction that a fund should be set aside, but it is a D case in which a liability has been put upon the estate. The charge is put upon the whole estate, capital and income, although it will normally be paid out of income. The testator gave his estate to his daughter, subject to the liability. The rule in *Allhusen v. Whittell* (1) cannot be applied to the father's estate, but the liability imposed upon the daughter E is a liability to which the rule must be applied. In administering the father's will, the rule would not be applied, but, under the daughter's will, it is a question, not of a contingent legacy, but of an unascertained debt. Under the father's will, it is bounty, but, under the daughter's will, it is a burden on her estate. It is said on behalf of the infant F defendants that the burden is, in the first place, one falling primarily upon income. Having regard to the decision on the cross-appeal, the court will not take that view. In the circumstances of this case, there was a liability upon the daughter to make up her mother's income as directed. The daughter was not a life tenant, but the obligation to pay G the annuity, the necessary amount, was imposed by the father as a condition of the daughter receiving his bounty. The daughter took the benefit subject to the liability, and would have been personally liable if she had not discharged the liability, as in *Re Poyser, Landon v. Poyser* (3). [Counsel referred to *Re Harrison, Townson v. Harrison* (7), H *Re Perkins, Brown v. Perkins* (2), *Re Thompson, Thompson v. Watkins* (5), *Re Williamses, Andrew v. Williamses* (4), *Blackmore v. White* (8), *Jay v. Jay* (9) and *Re Field, Sanderson v. Young* (10).]

Strangman: The first point is whether or not there is any room for the application of the rule in *Allhusen v. Whittell* (1). If there is, the

- question arises as to whether or not any intention has been shown by the testator that the rule should not apply. On the first point, the fact that this liability is imposed upon the daughter by the testator's will brings in the rule. If the daughter had considered that the liability was too burdensome to undertake, she could have disclaimed the gift. The
- A terms of the gift were equivalent to saying that the daughter was given the property subject to an obligation to pay the required amount to her mother during her mother's life. By accepting the gift, the daughter became liable to pay, whatever happened to the fund which she took under her father's will. The moment the estate was paid over to her,
- B she became bound to pay. If there had been any dealings with the estate which were not in accordance with the father's will—in fact, there were not—the daughter could not be heard to say that there was not sufficient to pay her mother's annuity. When the daughter died, she was under a personal obligation to the annuitant. It might have been
- C different if the daughter had not had the estate handed over to her, and if she had not dealt with it as her own. If the daughter were still alive, she would be liable if a claim were made by her mother for payment of the annuity. Therefore the rule in *Allhusen v. Whittell* (1) applies. The decision of JOYCE, J., in *Re Thompson, Thompson v. Watkins* (5) has stood for 30 years, and it was approved by PARKER, J., in *Re Poyser, Landon v. Poyser* (3). If *Re Thompson, Thompson v. Watkins* (5) was correctly decided, it applies to this case. The present case is even stronger, because here there was no direction in the will as to how the money was to be paid, but only a direction that the payment
- E was to be made.

- Vaisey, K.C.* : It is entirely wrong to say that the daughter was under any obligation of a contractual nature to pay the annuity, because such a contention is contrary to *Re Oliver, Newbald v. Beckitt* (11). In that case, the charge was held to exclude a personal obligation. Therefore
- F the words which were used in the present case give a charge, and nothing else. If that is so, there is, in the daughter's estate, an item which is subject to a charge. It is as though it were a piece of real estate subject to a jointure, or a lease subject to a rent. In either of those cases, the legatee under the daughter's will acquires the property subject to the
- G charge. In the present case, one can regard the property which the daughter received under her father's will as property charged with an annuity. The annuitant might have a right to resort to capital. The difference between the two classes of cases is dealt with in WITHERS ON REVERSIONS, 2nd Edn., p. 294. If *Re Oliver, Newbald v. Beckitt* (11)
- H is right, the words in the testator's will in the present case do not impose any personal obligation upon the daughter. It is a case of property charged *simpliciter* with an annual sum. The tenant for life must keep down the interest on that paramount incumbrance. Nothing came into the daughter's estate from the father's estate but property burdened with a charge. Therefore, no question of the application of the rule in

Allhusen v. Whittell (1) arises. It is difficult to see how this case can be distinguished from *Re Popham, Butler v. Popham* (6). So far from *Re Thompson, Thompson v. Watkins* (5) being indistinguishable from the present case, it is quite different, because nobody could say that there was no trust in that case but only a charge. In *Re Oliver, Newbald v. Beckett* (11), there was no trust, but a charge only. *Re Thompson, A Thompson v. Watkins* (5) can be distinguished on these grounds. [Counsel referred to *Re Owen, Slater v. Owen* (12), *Re Bacon, Grissel v. Leathes* (13) and *Re Muffett, Jones v. Mason* (14).]

Gray, K.C., in reply : The present case is not one of an income charge, and therefore *Re Popham, Butler v. Popham* (6) does not apply, but the position is exactly the same as it was in *Re Thompson, Thompson v. Watkins* (5). It is immaterial whether or not the daughter was an express trustee or whether or not she took the property in such a way that the burden of the charge could be enforced against her. [Counsel referred to *Re Owen, Slater v. Owen* (12).]

SIR WILFRID GREENE, M.R. : The question raised by the main appeal now falls for determination. The testatrix, Mrs. Cope Darby, at the time of her decease was in possession of the residuary estate of her father, or the property which represented that estate. By his will she had taken that estate subject to, and charged with, the payment by her to the testator's widow of an annual sum necessary to make the widow's income up to £3,000 per annum. By her own will, she disposed of the whole of her estate, which included the testator's residuary estate, subject to that charge, and by her will, as appears from the judgment already delivered on the cross-appeal, she added to her mother's income and provided that that addition should come out of the income of her estate. So far as that gift is concerned, there is no question as to the source from which the periodical payments will fall to be made. They will be paid out of income according to her directions, and there will be no right in the persons entitled to the income of her estate subject to that payment to call for a contribution from capital. The question which arises here relates to that portion of her estate which represents the residuary estate of the testator which was charged under his will with the annuity in favour of his widow. The testatrix settled her residuary estate, and the question which now arises is whether or not, as between the life tenant and those interested in the capital of her estate, there ought to be, so far as regards that part of her estate which represents the testator's residuc, an adjustment as between capital and income with regard to the payments of the annuity charged by the testator's will. *Prima facie*, the suggestion that there should be such an apportionment is one which would not appear to be well-founded. The case in its simplest aspect is of this nature. The testatrix, being possessed of property—namely, the testator's residuary estate subject to the annual charge imposed upon it by the testator's will—settles that property,

together with her own residue, on trusts for the tenant for life and remainderman. *Prima facie*, the ordinary rule would apply that the tenant for life in such a case must keep down the annual charge upon the settled property. It is said, however, that that is not so, and that the case is one to which the rule in *Allhusen v. Whittell* (1) applies, and that,

A as the result of the application of that rule, every payment in respect of the annuity under the testator's will ought to be treated as being made in part by means of capital and in part by means of income. When I say it is said that it ought to be so treated, I mean that it ought to be so treated as between the tenant for life and remainderman, because

B it is not suggested that the application of the rule in *Allhusen v. Whittell* (1) to the present case could be allowed to affect the right of the annuitant to have the testator's residuary estate, upon which the annuity was a charge, dealt with in the proper way for the purpose of securing and paying her annuity. The proposition which is put is one

C which only enures as between tenant for life and remainderman. It is not disputed that, so far as the annuitant is concerned under the testator's will, she is entitled to have that residue properly applied and preserved as security for her annuity. *Prima facie*, her right would be to have the annuity kept down out of income without resort to capital,

D because resort to capital would involve the diminution of her security. Whether or not, as between herself and the testatrix, she could complain with regard to any specific dealing with capital might depend upon circumstances existing at the time, but, in approaching the present case, I do not think that it is permissible to deal with it on any footing

E other than that, as between herself and the testatrix, the annuitant was entitled to have the payment made primarily out of income. The consequence of that admittedly is that, if the appellant's argument is right, and the rule in *Allhusen v. Whittell* (1) applies, it could only be applied with regard to any particular payment of the annuity with the

F consent and approval of the annuitant herself. However, it is also said that, if that consent could not be obtained, nevertheless the tenant for life would be entitled, on the death of the annuitant, to require what might be called a deferred application of the rule in *Allhusen v. Whittell* (1), and insist upon being recouped out of capital a sum which would give

G effect to the rule. The rule in *Allhusen v. Whittell* (1) in its simplest form applies to the simple case where a testator has left debts immediately payable, and, with regard to such a state of affairs, the rule can be quite simply stated in the words of SIR W. PAGE WOOD, V.C., in *Allhusen v. Whittell* (1), at p. 303 :

H What I apprehend to be the true principle is, that, in the bookkeeping which the court enters upon for the purpose of adjusting the rights between the parties, it is necessary to ascertain what part, together with the income of such part for a year, will be wanted for the payment of debts, legacies, and other charges, during the year; and the proper and necessary fund must be ascertained by including the income for one year which may arise upon the fund which may be so wanted.

That year, of course, is, in the normal case, the executor's year.

Then comes a different type of case—namely, a case where the debt in question is a debt payable at some future date. In the case of an annuity which the testator covenants to pay, the instalments of that annuity become payable periodically every year, and, when it is a question of applying to such a liability the rule in *Allhusen v. Whittell* (1), the principle which has been laid down is that each instalment as it becomes payable is to be paid by means of a piece of capital together with the income on that piece of capital as from the date of the testator's death down to the date of payment. That is a logical application of the rule in *Allhusen v. Whittell* (1), and, in so far as covenants to pay annuities are concerned, it has been held in cases which were decided a long time ago that that is the proper method of working it. The cases are *Re Perkins, Brown v. Perkins* (2) and *Re Poyser, Landon v. Poyser* (3). The present case is different from cases of that character in a vital respect. There is not here any personal covenant to pay the annuity charged by the testator's will. The testatrix was under no personal liability in that sense. She had not covenanted to pay, and, accordingly, in the administration of her estate the liability to pay that annuity cannot be treated in the same way as a liability to pay an annuity in respect of which she herself had entered into a personal covenant. The liability owed its origin, not to a personal covenant by her, but to a charge created by the testator's will

An attempt was made in the argument to establish the proposition that this testatrix ought to be treated as though she had entered into a covenant to pay the annuity, on the ground that she was under a personal liability to the annuitant to pay it, and in support of that proposition several cases were referred to, of which *Re Williames, Andrew v. Williames* (4) is the typical case. *Re Williames, Andrew v. Williames* (4) and the cases which have followed the same principle are dealing with a case where property is settled on two or more persons successively, and the life tenant—or tenants, if there are more than one—has imposed upon him by the terms of the will an obligation to make certain payments, discharge certain outgoings, do certain repairs, or whatever it may be. In cases of that kind, the court treats the life tenant as binding himself by the mere acceptance of the testator's bounty to carry out the conditions which the testator has imposed upon anyone accepting it, and, in giving effect to that, they have treated the successive life tenants as subject to an obligation in equity to carry out and perform the conditions subject to which they became entitled to the gift. Those cases, in my opinion, have no application to the present at all. This is not a case of successive interests in property which, as between the persons successively interested, can only be held upon the terms of making some payment or discharging some liability. This is an absolute and out-and-out gift by the testator to his daughter, and the fact that, under the terms of the testator's will, that gift is made subject to, and charged with, the payment by her of the annuity to the testator's widow does

not, in my opinion, impose any personal liability upon the testatrix in the sense which is suggested. No doubt, when she takes the testator's residue, she takes it subject to the charge, and all the obligations which that imports. She would be liable to account for what she had received at the instance of the annuitant. She would be liable to have the annuitant's right enforced against her as the person in possession of the property subject to the charge, but that is a different thing from saying that she is under a personal liability to the annuitant. The case, in my opinion, is quite different from that of *Re Williames, Andrew v. Williames* (4), and similar cases, and it is not possible to import into the relationship between the annuitant and the testatrix any such conception of personal liability as would bring the case within the four corners of decisions like *Re Poyser, Landon v. Poyser* (3), because it is for the purpose of bringing the case within the four corners of such decisions that the argument as to personal liability is brought forward.

If one takes the case, therefore, as one in which the testatrix took the property subject to that charge, and did not in any relevant sense become subject to a personal liability, the question arises whether or not there is any room for the application of the doctrine in *Allhusen v. Whittell* (1) to such a case. No authority has been produced, with the exception of one case to which I shall presently refer, in support of that proposition, and, indeed, the proposition is one which, on principle, in my judgment, cannot be maintained. The rule in *Allhusen v. Whittell* (1), like so many other rules which the court of equity has adopted, is for the purpose of giving effect to an equitable arrangement which the testator may be presumed to have had in mind in making the dispositions which he did make. It can be displaced by any language of the will sufficiently evidencing an intention to displace it, and, in my opinion, it also ceases to be applicable where the property concerned is property in respect of which, by its nature, and owing to its circumstances, it is impossible to apply the rule as it ought to be applied. What I mean by that is this. In applying the rule in *Allhusen v. Whittell* (1) to the case of a periodical payment under a covenant, the rule contemplates that the payment will be made when the amount payable falls due, and that it will be paid in part out of capital and in part out of income. In such a case, there is nobody who can say that such a payment ought not to be made. In the present case, it is admittedly impossible, with regard to any particular payment of the annuity to the widow under the testator's will, to make the payment in such a way without the consent of the annuitant herself. That means that, as each payment comes to be made, the rule in *Allhusen v. Whittell* (1) could not be applied to such a payment without the consent of the third party. The testatrix, when she made the dispositions which she did make settling her residuary estate—which included this mass of property representing her father's residue—must be taken to have known what the rights of the annuitant were, and I find it impossible to treat her dispositions as containing an

implied intention that payments in satisfaction of the annuity should be made in a manner in which it was not possible to make them without the consent of the annuitant. As I have said, it is not disputed that such consent would be necessary. That circumstance appears to me to justify what I said a moment ago—namely, that, if the nature of the property concerned is, or the circumstances affecting it are, such that the rule cannot be applied according to its terms, then the rule is not applicable to the case at all. Here it cannot be applied in accordance with its terms because the consent of the annuitant would be necessary. Counsel for the appellant endeavours to get out of that difficulty by saying: “So be it. However, there will be no objection to a deferred application of the rule after the death of the annuitant when the capital is free from the annuity. When that event happens, it will be possible to recoup to income, out of capital, that proportion of the various instalments of the annuity which ought to have been borne by capital at the time when they were paid upon the principle of *Allhusen v. Whittell* (1).” It seems to me that that method of escape is not open to counsel for the appellant, because the fact that, at the time of payment, the rule cannot be applied appears to me to negative the proposition that the rule is applicable to the case at all. Again, no authority for the proposition that the rule can be applied by some such deferred operation was produced, and, in my judgment, on principle it is unsound.

There are two other cases to which I should make short reference. One, on which counsel for the appellant not unnaturally places strong reliance, is *Re Thompson, Thompson v. Watkins* (5). That was a decision of JOYCE, J., and in some respects it bears a close resemblance to the present case. We have been furnished with copies of documents from the Public Record Office—namely, the originating summons, the affidavit in support, an extract from the relevant will and the order of the judge—and, from those documents and from the report of the case, it appears that there, as here, there were two testators. The first testator had bequeathed his residue in trust to pay certain annuities, and in that respect the case is different from the present. The trustees had permitted the legatee of the residuary estate to take over the whole of the residue upon his undertaking to pay the annuities. It so happened that he was one of the trustees, and there can be no question but that in that case the property in his hands was subject to a trust for payment of the annuities. He, holding the property in that way, made his own will, by which he settled his residuary estate, and the question arose as to how, as between capital and income, the instalments of annuity payable under the will of the original testator ought to be met. When the documents are examined, it appears that, for the purposes of the summons, the residuary estate of the original testator, which, as I have said, in the hands of the second testator, was trust property, was treated as though it were the property of the second testator, and no particular reference seems to have been made to the existence of the trust. The

order made by JOYCE, J., was to the effect that the instalments of annuity ought to be apportioned between the corpus and income of the testator's estate on the principle of *Allhusen v. Whittell* (1). That was a case which resembles the present in the circumstance that the annuity was not one secured by covenant by the second testator, and accordingly was not one in respect of which the second testator was under a personal liability. The report gives no reasons for the judgment of the judge. It may be that he treated the case upon the footing that the first testator's estate ought to be regarded as something quite separate, and a trust estate, as though it were vested in independent trustees. I do not know, and it is impossible to ascertain what was the reasoning upon which the judge based his judgment. However, in so far as that case is inconsistent with the present decision of this court, it must be taken as being overruled. In any event, I find it impossible to obtain any real assistance from the report of that case, even when coupled with the documents which have been supplied to us. In the absence of any report of the reasoning of the judge, I therefore cannot treat that case as one which really helps us.

There is another case, also decided by JOYCE, J., which does appear to me to be precisely in point. That is *Re Popham, Butler v. Popham* (6).

In that case, under a settlement, property was subject to a rentcharge, and, subject to that rentcharge, it was appointed by the settlor under a power conferred upon him by the settlement in trust for a tenant for life with remainders over. It was a case, therefore, where property subject to a rentcharge was appointed by the person competent to appoint it in trust for one life with remainders over. There was there no covenant by the testator to pay the rentcharge. It was argued there that the rule in *Allhusen v. Whittell* (1) should apply, and that, as between the tenant for life and remainderman, there should be an appropriate apportionment. It is not without interest to observe that counsel for the tenant for life agreed that there was no case upon the point where there was no covenant by the testator. JOYCE, J., said, at p. 524 :

A suggestion is made on behalf of the tenant for life under the limitations in the will of the settlor that he ought [not] to bear [the report is obviously in error there, it omits the "not"] the whole of the rentcharge out of income, but that a proportion ought to be borne out of capital by the corpus of the estate. There appears to be no authority in support of any such contention as that which has been set up in this case, but there are no doubt plenty of cases where the estate of a testator is subject to an annuity and where the testator personally or his estate has been held liable for the payment thereof. That has, however, apparently never been done between a tenant for life and remaindermen where the testator and his estate was not liable. I cannot, in the absence of authority, accept any such contention.

Those words appear to me to be applicable to the present case. This is a case where the daughter and her own estate were not liable for this annuity at all. The liability consisted, and consisted only, of such liability as was created by the charge impressed by the testator upon that part of her estate which represented his estate, and it seems to me

that *Re Popham, Butler v. Popham* (6) is a case which really is on all fours with the present in all material respects. It is also worth noticing that *Re Thompson, Thompson v. Watkins* (5) was cited to the judge, his own decision, and he evidently did not regard it as a decision which in any way prevented him from deciding *Re Popham, Butler v. Popham* (6) as he did decide it. A

I hope that I have done justice in what I have said to the very full and clear argument put forward before us by counsel for the appellant. The judge held that the principle in *Allhusen v. Whittell* (1) had no application to the present case. I agree with that view, and the appeal must accordingly be dismissed. B

FINLAY, L.J. : I agree.

LUXMOORE, L.J. : I also agree.

Solicitors : *Minchin, Garrett & Worley* (for the appellant and for the trustees) ; *Royds, Rawstorne & Co.* (for the respondents). C

[Reported by W. K. SCRIVENER, Esq., *Barrister-at-Law.*]

R. v. TOYNBEE HALL JUVENILE COURT JJ., *Ex parte* JOSEPH. D

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Lewis, JJ.), **May 10, 25, 1939.**]

Magistrates—Children's court—Conviction—Maximum penalty fine of 40s.—Remand in custody—Excess of jurisdiction—Children and Young Persons Act, 1933 (c. 12) ss. 47 (3), 107 (1)—Summary Jurisdiction (Children and Young Persons) Rules, 1933 (S.R. & O., 1933 No. 819/L. 23), r. 11. E

A boy aged 16 was charged with having travelled for a certain distance on a railway without having paid his fare, contrary to the Regulation of Railways Act, 1889, s. 5 (3). On Feb. 7, 1939, the justices, after hearing evidence, found him guilty of the offence charged, for which the maximum penalty is a fine of 40s., and ordered him to be sent to a remand home for 7 days. An application for bail was refused. On the following day, owing to a misapprehension that the case had not been concluded, an application for bail was made to a judge in chambers who granted bail. On his second appearance before the justices, on Feb. 14, the boy was ordered to be returned to the remand home for another 7 days, and the chairman said that the boy was a liar and had to learn not to defraud the railway company, that his father had prompted him to lie, and that, for his own good, the boy ought to go to a remand home. Next day, an application was made to a judge in chambers, who made an order for the boy's immediate release on a recognisance being entered into by the father in the sum of £25. When the boy again appeared before the justices, on Feb. 21, they dismissed the charge under the Probation of Offenders Act on payment of 40s. costs. It was now sought to have the justices' orders quashed, on the grounds that they had no power to send the boy to a remand home when the maximum penalty for the offence charged was a fine of 40s., as, by so acting, they were in effect punishing the boy, a remand home in the case of young persons being equivalent to prison in the case of adults, and that, once they had found the boy guilty, the justices had no power to remand him, as the Summary Jurisdiction Act, 1848, s. 16, only gave them power to remand a de- F
G
H

fendant in custody "before or during the hearing." For the justices, it was contended that in law to remand a person in custody was not to punish, that justices were entitled to remand a person in custody although he could not be arrested or sentenced to imprisonment for the offence charged, and that the term "hearing" in sect. 16 of the Act of 1848 should be construed as meaning the whole case from its beginning until its final determination by the passing of sentence or otherwise :—

A HELD : (i) in the absence of evidence to the contrary, it must be assumed that the first remand was made by the justices on Feb. 7 in accordance with the Summary Jurisdiction (Children and Young Persons) Rules, 1933, r. 11, which empowers and directs them, "where the child or young person is found guilty of an offence," to "consider the desirability of remanding the child or young person for such inquiry as may be necessary."

B (ii) the observations made by the chairman of the justices on Feb. 14, when the second remand was made, showed quite clearly that the young person was being remanded for the indirect purpose of punishing him by means of the act of remand, and, as the order of that date was, therefore, obviously made in excess of jurisdiction, it must be quashed.

(iii) the justices had power to make the order of Feb. 21.

C [EDITORIAL NOTE. There is a distinction between remanding a person in custody while inquiries are made and so remanding a person by way of punishment or correction. The latter is not permissible where the legal penalty for the offence does not include imprisonment. In the present case, the accused was remanded in custody upon conviction of an offence for which only a fine could be inflicted. In these circumstances, there was an excess of jurisdiction, and the order fell to be quashed.

D AS TO JUVENILE COURTS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 576-582, paras. 1021-1025 ; and FOR CASES, see DIGEST, Vol. 33, p. 316.]

Cases referred to :

(1) *Gélen v. Hall* (1857), 2 H. & N. 379 ; 33 Digest 345, 555 ; 27 L.J.M.C. 78 ; 29 L.T.O.S. 183.

E (2) *Scott v. Stansfield* (1868), L.R. 3 Exch. 220 ; 32 Digest 104, 1352 ; 37 L.J. Ex. 155 ; 18 L.T. 572.

MOTION for an order of *certiorari* to bring up and quash certain orders made by the justices for Toynbee Hall juvenile court. The facts and the arguments are fully set out in the judgment of LORD HEWART, L.C.J.

F *J. W. Morris, K.C.*, and *W. M. Andrew* for the applicant.

The Solicitor-General (Sir Terence O'Connor, K.C.), *Valentine Holmes* and *H. P. J. Milmo* for the justices.

J. C. Maude for the London Passenger Transport Board.

G LORD HEWART, L.C.J. : This was a motion for a writ of *certiorari*. The applicant was Harold Joseph, of 288, Barking Road, East Ham, in the county of Essex, estate agent and justice of the peace for the county borough of East Ham, and he applied for and on behalf of his son, Kenneth Joseph. The relief which was sought was (i) that an order of
H the court of summary jurisdiction sitting at Toynbee Hall juvenile court, dated Feb. 14, 1939, whereby the court adjudged Kenneth Joseph guilty of an offence under the Regulation of Railways Act, 1889, s. 5 (3), and ordered that Kenneth Joseph should be remanded until Feb. 21, 1939, be removed by an order of *certiorari* and quashed, and (ii) that a further order of the juvenile court, dated Feb. 21, 1939, whereby the court adjudged

that Kenneth Joseph be discharged under the Probation of Offenders Act on payment of 40s. costs, be removed by an order of *certiorari* and quashed. The grounds on which that relief was sought were (a) that the order of Feb. 14, 1939, was bad on the face of it, inasmuch as it adjudged that Kenneth Joseph be imprisoned, while the maximum penalty for a first offence under the Regulation of Railways Act, 1889, s. 5 (3), is a fine of 40s., and (b) that the order of Feb. 21, 1939, was bad, inasmuch as the justices, having determined the matter by the order of Feb. 14, 1939, had no jurisdiction to make a further order thereon. A

The material facts may be shortly stated. On Feb. 7, 1939, Kenneth Joseph, who had attained the age of 14 years and was under the age of 17 years, a "young person" within the meaning of the Children and Young Persons Act, 1933, s. 107 (1), was brought up before the juvenile court at Toynbee Hall on a charge under the regulation of Railways Act, 1889, s. 5 (3), for which the maximum penalty is a fine of 40s. On that occasion, the court found him guilty, and sent him to a remand home until Feb. 14, bail being refused. By sect. 47 (3) of the Act of 1933, it is provided as follows: B C

The Lord Chancellor may make rules for regulating the procedure in juvenile courts, and such of the provisions of the Summary Jurisdiction Acts and of the Acts relating to indictable offences as regulate procedure shall have effect subject to any rules so made. D

On Aug. 15, 1933, in accordance with this section, the Lord Chancellor made the Summary Jurisdiction (Children and Young Persons) Rules, 1933 (S.R. & O., 1933, No. 819/L. 23), r. 11, which reads, so far as is material, as follows: E

Where the child or young person is found guilty of an offence, whether after a plea of guilty or otherwise. . . . (ii) the court shall, except in cases which appear to it to be of a trivial nature, obtain such information as to the general conduct, home surroundings, school record and medical history of the child or young person as may enable it to deal with the case in his best interests, and shall if such information is not fully available consider the desirability of remanding the child or young person for such inquiry as may be necessary. . . . F

If, therefore, this was a case which appeared to the court not to be one of a trivial nature, and if the necessary information was not fully available, it was the duty of the court to consider the desirability of remanding the boy for inquiries to be made upon the matters set out in r. 11. The court apparently considered that remand was desirable, and there is nothing to show that on that date—namely, Feb. 7, 1939—they did not remand the boy for those inquiries to be made, and not otherwise. On Feb. 8, 1939, an application for bail was made *ex parte* to WROTTESELEY, J., in chambers, and bail was granted. At that time, it was not realised that the court had found the boy guilty on the previous day, and WROTTESELEY, J., was told that the justices had not actually found the boy guilty. On Feb. 14, 1939, when the boy again appeared before the same justices, they again remanded him for 7 days. From the observations of the chairman on that occasion, it is quite clear that the boy was then remanded, not for the purpose of having inquiries made, but as a G H

punishment and/or for his own good. The note of the clerk to the justices on that occasion reads as follows :

The court says father prompted boy to lie. Court thought boy had got to learn not to defraud and father can't teach him to lie. For good of boy he should go to remand home.

A Bail was again refused. On the following day—namely, Feb. 15—application for bail was made to OLIVER, J., in chambers, and was granted. Finally, on Feb. 21, the justices, after making further observations, dismissed the case under the Probation of Offenders Act on payment of 40s. costs.

B With all due respect, I cannot help thinking that part at least of the argument in the present case extended to questions which do not for the moment actually arise. The present case is clearly connected with the statutory enactments and rules which relate to “young persons.” The charge was made against the “young person” Kenneth Joseph. It was

C made under the Regulation of Railways Act, 1889, s. 5 (3), whereby a penalty is imposed upon any person who :

. . . (b) having paid his fare for a certain distance, knowingly and wilfully proceeds by train beyond that distance without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof. . . .

D Under that section the offender is liable on summary conviction to a fine not exceeding 40s., and a more severe penalty is provided in the case—which was not this case—of a second or subsequent offence. Here, therefore, the court, unless the case appeared to it to be of a trivial nature, was bound to obtain adequate information with regard to the young person, and, if such information was not fully available, was bound to

E “consider the desirability of remanding” the young person for any necessary inquiry. In these circumstances, it does not seem necessary to dwell upon the provisions of the Summary Jurisdiction Act, 1848, s. 16, with reference to the power of justices in their discretion “before or

F during” the hearing of an information or complaint to adjourn the hearing and to commit the defendant to prison or to other safe custody with a view to his appearance at the time and place of adjourned hearing. Nor does it seem necessary at present to consider the exact meaning or the necessary implications of the decision in *Gelen v. Hall* (1), which

G was decided in 1857 and was referred to in 1868 in *Scott v. Stansfield* (2). I am not sure that I fully appreciate the meaning of the suggestion that the word “hearing” should be generously interpreted, or of vague phrases about “taking advantage of the ordinary machinery.” However, it could not be right for justices to remand an offender in custody for the

H real, though unavowed, purpose of punishing him by that act of remanding, and it would clearly be indefensible to make use of a judicial “discretion” for the purpose of detaining in prison an offender charged with an offence for which a punishment by imprisonment could not lawfully be ordered.

It may be that hereafter some topics of that nature may have to be very carefully considered. The true dimensions of the present case,

however, appear to be clearly restricted. The entries in the register of the Toynbee Hall juvenile court—a volume which in this case has been produced and examined—make it perfectly clear that on Feb. 7, 1939, this young person, after a plea of not guilty, was found guilty by the justices and was remanded until Feb. 14, that on Feb. 14 he was remanded until Feb. 21, and that on Feb. 21 he was discharged under the Probation of Offenders Act, 1907, and was ordered to pay 40s. costs. I refrain from repeating and from discussing the words which the chairman of the justices more than once permitted himself to use to the young person and his father. The Solicitor-General has described the words as “clearly unfortunate,” and it is not necessary to add any stronger description. In my opinion, the order of Feb. 14 was obviously made in excess of jurisdiction. The young person, as the evidence shows, was being remanded, not for the purpose of obtaining necessary information, but for the indirect purpose of punishing him by means of the act of remand. I have no doubt that that order must be quashed. With regard to the order of Feb. 21, which we are also asked to quash, it seems to me that other considerations apply. Undoubtedly it came into existence in unfortunate circumstances and surroundings, but it was an order which might properly have been made, and, notwithstanding the pertinent criticisms which have been offered by counsel for the applicants, I think that, while, after suitable amendment of the grounds of application, the order of Feb. 14 is quashed as having been made in excess of jurisdiction, the order of Feb. 21 may be allowed to remain.

HUMPHREYS, J.: I have arrived at the same conclusion. When the facts of this case are clearly ascertained, in my opinion there is little more to be said about the matter. To deal with the three dates chronologically, upon Feb. 7 this young person, as he was, was properly before a juvenile court charged with an offence. He was found guilty, and, in my opinion, upon ample evidence. He was thereupon remanded to a remand home for a week. It is true that no application is before us to quash that order of Feb. 7, although application was made to us in the course of hearing to add that to the order of Feb. 14, and the order of Feb. 21, which we were asked to quash, but it is the foundation of the whole proceeding here, and must be dealt with. In my opinion, that order was clearly good upon the face of it, so far as it is an order at all. In truth, all that the document which has been produced to us—which is the register of the juvenile court, kept in accordance with the directions under the Children and Young Persons Act, 1933—shows is a record of the fact that an order has been made. That order in truth was made, and is an order in writing, made by the court and signed, authenticated, by the court. So far as it can be called an order, however, that minute of adjudication is in form perfectly good.

We have no evidence as to the reasons which actuated the juvenile court in remanding that young person in custody for a week. It was in

their power to do so, if they acted under the Summary Jurisdiction (Children and Young Persons) Rules, 1933, r. 11. My Lord has read the terms of r. 11. In the absence of evidence to the contrary, I think this court is bound to apply the maxim *omnia praesumuntur rite esse acta*, and to assume that the court acted in accordance with the powers conferred upon it by that rule in remanding that young person into custody. Upon Feb. 14, the matter again came before the court. Upon that occasion, there was no evidence called. There was apparently no hearing of the matter in the ordinary sense of that term, and the note of the clerk is quite sufficient to show what in fact happened—a note, be it observed, of one who occupies the position of chief clerk at Bow Street police court, and who is, therefore, an experienced notetaker. An application was made for bail, and a discussion took place as to the circumstances in which an application had been made to the judge in chambers. Then follow the words which have been read by my Lord as to the observations of the court, and the reasons given by the court itself for remanding that boy further in custody :

The father prompted boy to lie.

Whether true or untrue, that is no ground whatever for sending the boy into custody.

The court thought boy had got to learn not to defraud, and father cannot teach him to lie. For good of boy he should go to remand home.

In any view, it is only necessary to read those words to see clearly that what this juvenile court was doing was something which is not authorised by r. 11. It clearly was not authorised by the conviction recorded upon Feb. 7 for the particular offence, which is punishable with a maximum penalty of 40s. It was, in my judgment, clearly in excess of jurisdiction, for the reason that it was punishment of the offender before the court in a way which the law does not permit such a person to be punished. I therefore agree that that order—the order made on that day—cannot stand.

I desire, however, to add one or two matters with regard to the form of these proceedings. It appears to me to be somewhat irregular from start to finish. The ground upon which the court is invited to quash the order of Feb. 14 is as follows :

... that that order is bad on the face of it since it adjudges that the said Kenneth Joseph be imprisoned and the maximum penalty for a first offence, under the Regulation of Railways Act, 1889, s. 5 (3), is a fine of 40s.

In my opinion, that order is perfectly good upon the face of it. If it were bad on the face of it, this court would not have received any evidence in the matter at all, but would have decided upon the form of order. It is only where an order or a document is good upon the face of it, but is alleged by the party impugning it to have been made without jurisdiction, or in excess of jurisdiction, that this court will receive affidavits, as we have in this case.

The new R.S.C., Ord. 59, which has taken the place of the old Crown Office Rules, 1906, provides in r. 3 (2) that an application for leave to issue *certiorari* :

. . . shall be accompanied by a statement setting out . . . the grounds on which it is sought . . .

Rule 6 of that order provides as follows :

. . . no grounds shall be . . . relied upon or any relief sought at the hearing of the motion or summons except the grounds . . . set out in the said statement.

An exception to this rule is to be found in para. 6 (2), which provides that the court or judge may, on the hearing of the motion or summons, allow the statement to be amended. So far, we have had no application made to this court to amend that statement. At the present moment, in my opinion, it affords no ground for quashing the order in question. I express no opinion as to what may be the result of any application which may be made hereafter.

I think it is also to be observed, however, that the real complaint which is made in this case is a complaint that this young person was wrongfully imprisoned, and that is no mere matter of form. It is a matter of substance that one should look at the document which authorised that imprisonment. That, in my judgment, is not the minute of adjudication of the court at all. It is the warrant of commitment. If one considers for a moment what would happen if an action for false imprisonment were brought against any person, such as the keeper of the remand home, or the constable who took this young person to the remand home, the answer which those persons would make would not be the minute of adjudication of the court, which in truth authorises nobody to do anything, except possibly the clerk to make out the order, but would be the warrant of commitment. That is a statutory document. It is bound to be made out. In the rules to the Children and Young Persons Act, 1933, there is a form, Form No. 6, in which it must be couched. While that document is not, as I think it ought to have been, before this court formally, I have sent for it, and I have seen it, and I have a copy of it before me at this moment. It appears to be in perfectly regular order, and in truth it follows Form No. 6 in the schedule to the rules to which I have referred. Therefore, it appears that there is nothing in the minute of adjudication of Feb. 14, or in the warrant of commitment which followed that minute of adjudication, which is bad upon the face of it. So much for Feb. 14.

The next thing which happened was that this young person was released upon bail for the second time, and upon Feb. 21 he came before the court. We are asked to quash the order which was made upon Feb. 21—namely, the order which directed that he should be discharged upon payment of 40s. costs, in the terms of the Probation of Offenders Act. The first thing to observe, I think, is that the young person was lawfully before the court. He was before the court by virtue of a recognisance

which had been entered into by his father, conditioned to bring him before the court on Feb. 21. He was, therefore, lawfully before the court. The order made by the court is one which, by the terms of many statutes now, the court has power to make, and no one has argued to the contrary. That being so, I can see no ground whatever for acceding
 A to the application to quash that order, which appears to me to be perfectly regular upon the face of it, and to be without flaw of any sort. These are the reasons which I have added to those which my Lord gave for agreeing that the order of Feb. 14 was made in excess of jurisdiction, and, as regards the others, that they were both good orders.

B

LEWIS, J. : I have nothing to add except to say that I entirely agree, for the reasons given in the judgments which have just been delivered, that the order of Feb. 14 was bad, as being in excess of jurisdiction.

Solicitors : *Gulliver & Burrow* (for the applicant) ; *Treasury Solicitor*
 C (for the justices) ; *R. B. McDonald* (for the London Passenger Transport Board).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

D

ONESIMUS DOREY & SONS, LTD. v. HEADLEY'S WHARF, LTD., AND WILLIAM ASHBY, LTD.

[COURT OF APPEAL (MacKinnon and du Parcq, L.JJ., and Macnaghten, J.),
 May 15, 16, 1939.]

E

Water and Watercourses—Wharves—Safety of berth—Invitation to ship to berth—Arrangement for ship to go to berth adjoining her usual berth—Berth unsafe for particular ship—Liability of wharfinger.

F

G

H

The plaintiffs were the owners of a coasting vessel, the *Belvedere*, and the defendants were respectively the owners of A.'s wharf and H.'s wharf, which adjoined each other on the south side of Deptford Creek. The charterers of the *Belvedere* had on many occasions in the past used H.'s wharf, but on this particular occasion it was known to them that there was not room at this wharf until another vessel left, and, accordingly, as the tides were falling, arrangements were made two days before the arrival of the *Belvedere* for her first to berth at A.'s wharf and unload part of her cargo there, and, later, when there was room, to move to H.'s wharf. She was berthed with her bow 16 ft. short of the upper end of A.'s wharf and overlapped the upper end of H.'s wharf by some 50 ft., but, owing to insufficient keel support, she sagged, and suffered damage. It was found that H.'s wharf issued no invitation to the *Belvedere* to go to A.'s wharf, or to lie partly on A.'s berth and partly on their own, but that A.'s wharf did invite the charterers to bring a vessel to their wharf, but that they were not informed of the name or size of the vessel :—

HELD : on the facts of this case, it could not be said that the wharfingers or either of them had impliedly warranted that it was safe for the *Belvedere* to berth where she did.

Decision of BRANSON, J. ([1938] 4 All E.R. 680) affirmed.

[EDITORIAL NOTE. The question at issue here was whether the facts taken as a whole amounted to an invitation by both defendants or either of them to

the ship to berth at the place where she did. It was found that the facts did not in law amount to such an invitation, and, as there is no general invitation by a wharfinger to any and every ship passing his wharf to come and berth alongside, the action failed.

AS TO SAFETY OF BERTH, see HALSBURY, 1st Edn., Vol. 28, Waters and Watercourses, pp. 423, 424, para. 837; and FOR CASES, see DIGEST, Vol. 44, pp. 103, 104, Nos. 826-831.]

Cases referred to :

- (1) *The Moorcock* (1889), 14 P.D. 64; 44 Digest 104, 828; 58 L.J.P. 73; 60 L.T. 654.
- (2) *The Bearn*, [1906] P. 48; 41 Digest 980, 8690; 75 L.J.P. 9; 94 L.T. 265.
- (3) *Indermaur v. Dames* (1866), L.R. 1 C.P. 274; 36 Digest 35, 208; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* (1867), L.R. 2 C.P. 311.
- (4) *Tredegar Iron & Coal Co. v. Calliope (Owners), The Calliope*, [1891] A.C. 11; 44 Digest 104, 829; 60 L.J.P. 28; 63 L.T. 781.
- (5) *The Grit*, [1924] P. 246; 44 Digest 104, 831; 94 L.J.P. 6; 132 L.T. 638.
- (6) *Original Hartlepool Collieries Co. v. Gibb* (1877), 5 Ch.D. 713; 44 Digest 105, 833; 46 L.J.Ch. 311; 36 L.T. 433.
- (7) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 36 Digest 38, 223; 82 L.J.K.B. 258; 108 L.T. 4.

APPEAL by the plaintiffs from a decision of BRANSON, J., dated Dec. 9, 1938, and reported [1938] 4 All E.R. 680. The facts are fully set out in the judgment of MACKINNON, L.J.

G. St. Clair Pilcher, K.C., and *A. A. Mocatta* for the appellants.

H. U. Willink, K.C., and *H. G. Willmer, K.C.*, for the first respondents.

Sir Robert Aske, K.C., and *Cyril T. Miller* for the second respondents.

Pilcher, K.C. : The doctrine of the duty owed by an invitor to an invitee, as laid down in *Indermaur v. Dames* (3), was extended to wharfingers by *The Moorcock* (1). The reason was stated to be that otherwise it would be impossible to give business efficiency to the relationship of owner and wharfinger. The wharfinger has the opportunity of knowing the state of the river bed. The doctrine requires extension in a case where a wharfinger invites a vessel to a wharf which is not his. Both defendants are responsible for the serious damage sustained. [Counsel referred to *Tredegar Iron & Coal Co. v. Calliope (Owners)*, *The Calliope* (4), *The Bearn* (2), *The Grit* (5), *Original Hartlepool Collieries Co. v. Gibb* (6), and *Latham v. Johnson (R.) & Nephew, Ltd.* (7).]

Mocatta : The court must decide whether the doctrine enunciated in *The Moorcock* (1), *The Bearn* (2) and *The Grit* (5) applies to a case where a ship is asked to lie in such a position that part of her overlaps on to an adjoining berth. The Belvedere had been to Headley's Wharf before, and they well knew her length. They knew that she would lie where she did.

Counsel for the respondents were not called upon.

MACKINNON, L.J. : The plaintiffs in this case were the owners of a small steamer named the Belvedere, and on a night in Dec., 1937, that steamer, when loaded with some thousand tons of granite, took the

ground in tidal waters in Deptford Creek, in London, and, owing to the uneven nature of the ground upon which she had to lie, was seriously strained all along her bottom, and had in consequence to incur considerable expense for repairs. Arising out of those circumstances, the plaintiffs sue the two defendant companies, Headley's Wharf, Ltd., and William

A Ashby, Ltd., alleging that both of them jointly are, or, in the alternative, one or other of them is, liable to recompense the plaintiffs for the expense so occasioned. The plaintiffs, as I have said, were the owners of the Belvedere. By a charterparty of Nov. 8, 1937, she was chartered from them by a firm called A. & F. Manuelle, Ltd., of London. The charter-

B party is in commendably brief terms and clear print, and it provides that the steamer is to load at St. Sampsons, Guernsey, a complete cargo of about 1,100 tons of stone, and, being so loaded, proceed to London, to Headley's Wharf, Deptford Creek. She did load the cargo of stone, and she came to the Thames.

C Headley's Wharf is inside a swing bridge in Deptford Creek, on the south side of the creek. Next up the creek to Headley's Wharf is a wharf owned by the second defendants, William Ashby, Ltd., called Ashby's Wharf. By the charterparty, the vessel was to proceed to Headley's Wharf to unload, and the charterers had some general contract with the owners

D of Headley's Wharf whereby all their chartered steamers bringing stone were to proceed to Headley's Wharf and be there unloaded at certain agreed prices. The Belvedere happened to arrive at a time when the tides were falling, and it was rather doubtful whether she could get into Deptford Creek on the night tide on Dec. 5, and, if she did not get in, she

E might be neaped for some days. The charterers and everybody else were anxious that she should get into Deptford Creek and get discharged with dispatch, but, unfortunately for their arrangements, there was another steamer or vessel lying at the berth in Headley's Wharf, a vessel named the Multistone, which had not quite completed her unloading, and therefore the berth at Headley's Wharf, until the Multistone was

F removed, was not available for the Belvedere.

In these circumstances, a representative of A. & F. Manuelle, Ltd., went to the foreman or manager of Headley's Wharf and said, in effect : " We are very anxious to get the Belvedere in and discharge her, and she

G cannot come to your wharf because the Multistone is there. Do you mind if we take her to Ashby's Wharf, the one next to you, and discharge some of her cargo there until the Multistone has gone, when we can come to your wharf ? " The representative of Headley's Wharf said : " I do not mind. You can do that. That is up to you. " He consented, and there-

H upon the representative of the charterers said : " Do you mind sending your foreman along with me to see the man at Ashby's Wharf, whom I do not know ? " Then the foreman took him along and introduced him to Ashby's representative, and again, summarising the effect of the evidence, the charterers' representative said to Ashby's representative : " We want to bring a ship to your wharf for you to unload a little of her cargo.

She is properly consigned to Headley's Wharf, but we cannot get in there, and, until that is vacant, we want to come to your wharf and start the discharging there." The manager of Ashby's Wharf was quite agreeable, and agreed that he should do so. It is not now disputed that, when Ashby's representative was asked if he would receive the ship at Ashby's Wharf, nothing was said to him as to the size of the ship, nor even as to its name. It was merely described as "a ship," and he agreed that the vessel should come there merely under that designation of "a ship," and nobody discussed in any way the size of the ship relative to the size of Ashby's Wharf. A

As a result of those arrangements, the Belvedere was brought up to the side of Ashby's Wharf, higher up the creek, more or less in a line with the Multistone lying at Headley's Wharf. The whole length of Ashby's Wharf, which is a good deal shorter than Headley's Wharf, was about 164 ft., and the length of the Belvedere was close upon 200 ft. Therefore, if she lay with her stem at the upper end of Ashby's Wharf, it was obvious that some part of her stern must project over Headley's Wharf, which is the one next to it. That in fact happened, and, very shortly after she was moored in that position, the tide fell, and she had to take the ground. C

The berth opposite Ashby's Wharf, for the length of Ashby's Wharf, has a straight bed, in the sense that any vessel lying in that berth and taking the ground would be borne by the ground all along its whole length, and the same thing applies to Headley's Wharf. There again the line of the ground at Headley's Wharf is a straight line, so that a vessel with a flat keel lying opposite to Headley's Wharf will be supported by the ground throughout the length of its keel. The straight line of Ashby's bed, however, is not in the same straight line as that of Headley's bed. There is, as it were, a little hill up from the bottom of Headley's berth to the top of it, and then a little descent, and then a little hill up from the bottom of Ashby's Wharf to the top of it. The result of that was that, when the Belvedere took the ground with her stem at the lower end of Ashby's Wharf, and her stern projecting over the slight rise in the ground above the end of Headley's Wharf, she was borne at the stem and down to a point near her stern on two points, and the intermediate portion of her flat-bottomed keel was not supported by the ground, but only by water or liquid mud. The effect of that was that during the night the weight of the stone in that unsupported part caused the whole length of the ship to be buckled. The decks were buckled, and considerable damage was caused. On the next day, when some of her cargo was taken out of her, and she became water-borne as the tide rose, the buckling corrected itself and the signs of it disappeared, but serious damage had been caused to her, including the distortion or breaking of a good many frames, which necessitated considerable repairs. D E F G H

Those are the facts, and, the damage having been occasioned in that way, as I have said, the plaintiffs sue the two wharfingers, the proprietors of Headley's Wharf and Ashby's Wharf, alleging that both of them jointly

are, or one or other of them is, liable for this damage. That liability is said to arise from the principle laid down many years ago in *The Moorcock* (1). The headnote of that case is as follows :

A The defendants, wharfingers, in consideration of charges for landing and storing the cargo, agreed to allow the plaintiff, a shipowner, to discharge his vessel at the defendants' jetty, which extended into the River Thames, where the vessel must necessarily ground at low water. The bed of the river adjoining the jetty was vested in the conservators. The defendants had no control over the bed of the river, and had taken no steps to ascertain whether it was or was not a safe place for the vessel to lie upon. The vessel, on grounding, sustained damage from the uneven condition of the bed of the river adjoining the jetty.

B HELD, affirming the judgment of BUTT, J., that the defendants were liable, for the use of their premises by the plaintiff could not under the circumstances be had without the vessel grounding, and the defendants must, therefore, be deemed to have impliedly represented that they had taken reasonable care to ascertain that the bottom of the river adjoining the jetty was in such a condition as not to cause injury to the vessel.

C Upon that principle, as it seems to me, the question is whether or not, in the circumstances of this case, the defendants Headley's Wharf, Ltd., jointly with the defendants William Ashby, Ltd., or either of them, must be taken to have impliedly represented to the plaintiffs that they had taken reasonable care to ascertain that, if the Belvedere took the ground partly on the ground opposite Ashby's Wharf and partly on the ground opposite Headley's Wharf, that region was in such a condition as not to
D cause injury to the vessel. That liability is an application of the general and wider principle that one who invites another to make use of his premises is liable for injury resulting from the use of those premises in consequence of the invitation.

E The judge in this case has decided that neither of the defendants jointly and neither of them severally is liable in these circumstances to the plaintiffs, and I think that he was right in that decision. In the first place, I can see no evidence whatever that Headley's invited the plaintiffs to do anything. All that happened was that Headley's, having an agreement with the charterers that they had a right to discharge this ship,
F on being asked by the charterers whether they would mind the charterers, in variation of the contract, getting the vessel discharged somewhere else, assented to that proposal, and assented to the terms that they would not object, and that it was up to the charterers to arrange about it. I can see no circumstances whatever in which it ought reasonably, or at all, to
G be inferred that, as a result of anything which took place between the representative of the plaintiffs or the charterers and the representative of Headley's, Headley's could be taken to have given any sort of representation or guarantee to the plaintiffs, such as : " If you take your ship and put her on the ground, partly on the ground opposite
H Ashby's Wharf, our neighbours, and partly on our ground, we guarantee that that portion of the bed of the river is in such a condition that you can do that with safety and without damage to the ship." So much for Headley's Wharf, Ltd.

With regard to William Ashby, Ltd., I think that the same result—namely, that they are not liable—is arrived at from somewhat different

considerations. In the case of Ashby's, it is conceivable that, if the plaintiffs had come to Ashby's and said, "Will you receive our ship, which is nearly 200 ft. long, at your wharf, and discharge her there? Of course, you will only be able to take part of her opposite your wharf, and the rest of her must lie off Headley's Wharf," and if Ashby's had assented to that, they might—although I am not expressing any opinion about it—have said that Ashby's in some way had represented that they could do that in safety. Upon the evidence, however, nothing was said to Ashby's at all as to the size of this ship. Nothing was said to them as to the disparity between the length of the Belvedere and the length of Ashby's Wharf, and nothing was said to Ashby's to indicate in any way that it was proposed that Ashby's should allow anything except that a ship should come and lie in the berth off Ashby's Wharf. A B

A berth off Ashby's Wharf, treating it as a berth for a ship only of the length of Ashby's Wharf, was, as is now admitted, perfectly safe. It is only when a ship is berthed partly in Ashby's berth and partly in Headley's berth that there is any likelihood of damage to the ship such as happened in this case. On the facts in this case, however, there is no evidence that Ashby's ever assented to the use of their berth along with any other part of the river, or that they had any knowledge whatever that the ship which was going to be brought there was going to be moored in that way. In those circumstances, it seems to me to be impossible to apply the principle of *The Moorcock* (1) and to make Ashby's, as it were, guarantee that the place at which this vessel of unknown size was going to take the ground would be safe in the position in which she would take the ground. The result is that I think the judge was right in his decision as to both these defendants upon the facts, and that the interesting questions of law which counsel for the appellants has invited us to consider really do not arise in this case at all. This appeal must fail and be dismissed with costs. C D E

DU PARCQ, L.J.: I agree entirely with what has been said by MACKINNON, L.J., and it is unnecessary that I should add more than a few words. I do, however, desire to say this. There are observations in the judgment of BRANSON, J., expressing some doubts either about the decision of this court in *The Bearn* (2) or, alternatively, about the accuracy or the completeness of the report of that decision. The judge himself says, as I understand his judgment, that those observations were not really necessary to his decision, but he was able to decide as he did upon the assumption that *The Bearn* (2) was correctly decided and correctly reported. I want to say, speaking for myself, that, as at present advised, I see no reason whatever to doubt the accuracy and completeness of the report, and I am not at all satisfied that there is any ground for the criticisms which the judge directed to that decision. My view is, however, that, the facts having once been found as the judge found them, his decision was in point of law consistent, not only with *The Bearn* (2), F G H

but also with all the other relevant cases, certainly all of those cases which have been cited to us here.

- The fact is that there was here no invitation which made it necessary to imply the kind of warranty which was implied in *The Moorcock* (1). There was no invitation by Headley's and Ashby's jointly, I think, and
 A on the facts as found, or indeed, upon the evidence which has been read to us, it would be impossible to say that there was any invitation by Headley's. As I understand the evidence, regarded certainly as the
 B judge regarded it, at the most Headley's would know that there was a possibility of some part of their berth being occupied by the Belvedere, and put themselves in the position of licensing what might otherwise
 C have been a trespass. It seems to me to be quite impossible, in the circumstances, to imply into what they said and did any warranty that they had satisfied themselves that a ship in the position which the Belvedere might conceivably occupy would be safely berthed.
 D So far as Ashby's are concerned, the matter is concluded, as MACKINNON, L.J., has said, by the finding of the judge, which is plainly consistent with the evidence, that all that they said was that they were willing that a ship should be brought to their wharf, the length of the ship being unknown to them. It is quite impossible, in those circumstances,
 E to imply any such warranty as was properly and necessarily implied in *The Moorcock* (1) and the other cases which have been cited to us. I desire to add those words only so that it might be clear that it is not in the least involved in our judgment that any doubt should be cast on *The Bearn* (2), and indeed I agree with MACKINNON, L.J., that we are not deciding or refusing to decide any novel point of law.

MACNAGHTEN, J. : I agree, and for the same reasons.

Appeal dismissed with costs in both courts.

- Solicitors: *Holman, Fenwick & Willan* (for the appellants); *Keene, Marsland, Bryden, Besant, Batham & Cork* (for the first respondents);
 F *William Charles Crocker* (for the second respondents).

[*Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.*]

G BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY v. BORDERS (No. 2).

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.),
 May 15, 17, 1939.]

- H *Practice—Shorthand notes of evidence—Copies of notes for Court of Appeal—Provision at public expense—Discretion of judge an executive function—No jurisdiction in Court of Appeal to entertain an appeal.*

A person in poor circumstances desired to appeal to the Court of Appeal. To do so, it would have been necessary to furnish the court with 3 copies of the transcript of the shorthand note of the evidence given in the court below, and the cost of such copies would have been £226. The appellant applied to the judge for an order that the transcripts be

supplied at the public expense, but the application was refused. The Court of Appeal was thereupon asked to review that decision on the ground that it was the exercise of a judicial discretion, and was open to review :—

HELD : the judge was acting in an executive, and not in a judicial, capacity, and his decision was final, and not subject to appeal.

[EDITORIAL NOTE.] It is well known that the cost of supplying the necessary copies of documents upon appeals is a great burden upon litigants. To alleviate this burden in some measure, it was provided, when the taking of an official shorthand note was made compulsory in witness cases, that the trial judge might make an order that, for the purposes of an appeal, the necessary copies of the transcript of that note might be supplied at the public expense. In the present case, the judge having refused to make the order, the party desiring to appeal sought to bring an appeal to the Court of Appeal against that refusal, but the Court of Appeal have decided that they have no jurisdiction to disturb such an order, which, in its nature, is not a judicial, but an administrative, order. A

AS TO COST OF SHORTHAND NOTE, see HALSBURY, Hailsham Edn., Vol. 26, p. 103, para. 193 ; and FOR CASE, see DIGEST, Practice, p. 929, No. 4967. See, also, YEARLY PRACTICE OF THE SUPREME COURT, 1939, pp. 1500, 1501.] B

Cases referred to :

- (1) *Maxwell v. Keun*, [1928] 1 K.B. 645 ; Digest Supp. ; 97 L.J.K.B. 305 ; 138 L.T. 310.
- (2) *Evans v. Bartlam*, [1937] A.C. 473 ; [1937] 2 All E.R. 646 ; Digest Supp. ; 106 L.J.K.B. 568 ; 157 L.T. 311.

APPEAL from a decision of BENNETT, J., refusing to give a direction that the cost of the transcripts of previous proceedings should be defrayed out of public funds. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R. D

Hon. Sir Stafford Cripps, K.C., and *C. H. A. Lewes* for the appellant. E

Cripps, K.C. : The applicant is under an obligation to supply the shorthand note before the appeal can be heard. The appellant is not sufficiently well off to be able to supply the shorthand note. The only thing which stands in the way, at present, is the decision of BENNETT, J., that there is no reasonable ground for allowing the cost of the transcript out of public funds. This court requires that there shall be 3 copies of the shorthand note. If there were no such compulsory provision, the appeal could be brought without those copies. The Court of Appeal has laid it down as a practice rule that the transcripts must be supplied to it. The judge has a discretion to allow the cost of the transcript to be defrayed out of public funds if he is satisfied that the appellant is in such poor circumstances that appeal would be denied him if he had to pay for the transcript. That must be an exercise of a judicial discretion. If that discretion is wrongly exercised, the Court of Appeal has power to substitute its own discretion. In *Maxwell v. Keun* (1), it was held that an appeal lies to the Court of Appeal from an order of the judge made in the exercise of his discretion. If the court refuses to allow the cost of the transcripts, it will be a complete bar to the appeal in the present case, as the appellant cannot pay the sum of £226 required. In *Evans v. Bartlam* (2), LORD WRIGHT stated that F
G
H

the court should not interfere with the discretion of a judge unless satisfied he is wrong, and are not entitled simply to say that they cannot review the order unless it is shown that the judge has applied a wrong principle. That would cover such a case as the present, because the judge must have been exercising his discretion as a judge. If that be so, A this court has power to review that exercise of discretion, and to substitute its own discretion for that of the judge.

SIR WILFRID GREENE, M.R. : This is an application which raises a point of some general importance. The appellant is anxious to appeal B to this court from a decision of BENNETT, J. It was a case which took a long time at the trial, and the official shorthand note of the evidence is bulky, and the transcripts are expensive. In those circumstances, the appellant applied to the judge with a view to obtaining from him a direction that the cost of the transcripts should be defrayed out of public C funds. That direction the judge refused to give, and the present appeal follows.

The rule of court which deals with the evidence to be supplied for the Court of Appeal is R.S.C., Ord. 58, r. 11. The relevant parts of that rule are as follow :

D When any question of fact is involved in an appeal, the evidence taken in the court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows . . . (b) as to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the court may deem expedient.

E In the days before the system of official shorthandwriters was introduced, the normal practice was to produce a copy of the judge's notes, or, in cases where the parties had agreed that a shorthand note should be taken and that that should take the place of the judge's note, and the judge had assented to that course, a transcript of the shorthand note itself. It was also common practice to allow, in a proper case, the F judge's note to be supplemented by reference to a shorthand note which had been taken at the trial. Notes of that description, of course, were purely private matters, and the expense of them fell on the parties, or whoever it was who had the note taken. By the system recently introduced, under which an official shorthand note is taken, the position has been altered. The provisions with regard to the taking of an official G note have never been embodied in rules of court. They have no statutory authority, nor have they the authority of rules of court made pursuant to the statutory provisions which themselves have statutory force. They are embodied in a notice which was issued from the Lord Chancellor's department and is to be found in THE ANNUAL PRACTICE, 1939, p. 1276. H It states the scheme which is to be carried out, by virtue of which the cost of taking the note is to be borne by public funds. It then provides in the next provision for the taking of transcripts for use during the hearing, and provides who is to pay for them, and then, with regard to the Court of Appeal, it contains the following paragraph :

The appellant must furnish for the use of the Court of Appeal, 3 copies of the official

note of the summing up and judgment, and 3 copies of the official note of the evidence; or, if the trial judge expresses the opinion that his own note will be sufficient, 3 copies of the judge's note. But the official note will not include the evidence of any witness whose evidence the trial judge has directed not to be transcribed on the ground that in his opinion it could be of no help in the Court of Appeal.

As I have said, that has no statutory or other force, but the way in which it fits into the practice under R.S.C., Ord. 58, r. 11 (b), is that, when this court knows, as it must know, that there is in existence an official shorthand note, it will require, and has in practice required, the production of that note under R.S.C., Ord. 58, r. 11 (b). Where there is in existence, to the knowledge of this court, a complete record of the evidence, this court requires that that complete record be produced instead of any less complete record which might have been accepted under the practice before the official shorthand note was introduced. Accordingly, when one looks at the powers of this court and the course which it should take in the case of an appeal, that is the practice. A

In the present case, the shorthand note is there, and, in accordance with the practice of this court, this court would require that record of the evidence, as being the proper and satisfactory method of informing this court as to what the oral evidence given at the trial was, and it could not properly, in a case such as that, allow any less satisfactory and less complete record of the evidence to be produced. That is the position with regard to the practice of this court. However, the matter with which this application is concerned has nothing to do with the practice of this court. It has to do with a totally different matter—namely, the provision to the appellant, at the expense of public funds, of that necessary record of the evidence which this court requires. In the notice issued from the Lord Chancellor's department, to which I have referred, there appears the following paragraph : B

The cost of the transcripts for use in the Court of Appeal must be borne in the first instance by the appellant, unless the judge is satisfied that the appellant is in such poor circumstances that appeal would be denied him if he had to pay for the transcript, and that there is reasonable ground for the appeal, and directs that the appellant be entitled to the transcript at the expense of public funds. D

It is quite clear that it was recognised in responsible quarters that it might be a hardship on appellants in poor circumstances if they were compelled, as a condition of appeal, to pay for transcripts of the official shorthand note. The introduction of the system of official shorthand notes has, of course, added to some extent, and in some cases to a considerable extent, to the costs of an appeal. That, no doubt, was recognised, and accordingly this provision was made. The essence of the provision, however, is that there is imposed, or there is the power in the judge to impose, upon public funds an expense which otherwise would not fall upon them. It was thought that this would be sufficient to prevent the expense of a shorthand note from being a hardship upon a poor appellant. Accordingly, the judge was given power, if he was satisfied that the appellant was in such poor circumstances that appeal would be denied him if he had to pay for transcripts, and that there E

was reasonable ground for the appeal, to direct that the cost of the transcript should be borne by public funds. In the present case, the judge was satisfied as to the first matter—namely, the circumstances of the appellant—but he was not satisfied that there was reasonable ground for the appeal. He accordingly did not give the direction, and it is from that refusal that the present appeal is brought. In order to deal with it, it is important to bear in mind what the precise nature of these provisions is. As I have said, they have no statutory force. They have not the force of rules of court. So far as regards this particular provision with which I am dealing, however, in my opinion, it is nothing more than an intimation that, if a particular direction is given by a particular person—namely, the judge—that will act (so to speak) as a voucher for the charge on public funds of the cost of the transcript. In other words, when one looks at the matter in relation to what one supposes to be the normal procedure for dealing with public accounts, the Comptroller and Auditor-General, when he found charged to public funds the cost of transcripts, would pass that charge if he had produced to him a direction by the person indicated—namely, the judge. If he did not find a direction falling within this provision, he presumably would refuse to pass the charge. In saying that, I am not concerning myself with the precise Parliamentary machinery by which such a charge is legitimately imposed upon public funds. I am assuming that this provision embodies a method of charging these sums on public funds properly arranged according to normal Parliamentary practice and procedure, and that this gives effect to that arrangement.

If that be the true view of these provisions—as, in my opinion, it clearly is—the question arises whether or not there is any right of appeal against a refusal by a judge to give that direction. In my opinion, there clearly is not. This power given to the judge is not in the nature of a judicial discretion at all. Judicial discretion is a discretion which the holder of the judicial office exercises either because it has been conferred upon him by some statute or rule of law or because it is something which is inherent in the judicial office itself. In the present case, the power of the judge to make such a direction does not fall within that description at all. It is merely an executive power by which, under proper Parliamentary and Treasury sanction, his direction is accepted as a voucher for the imposition of this charge upon public funds. That being so, there is no right of appeal to this court. The power of this court as an appellate tribunal is a statutory power, and it has no power to substitute itself for the person indicated—namely, the judge—as the appropriate person to issue that voucher by virtue of which the cost of transcripts would be paid out of public funds. That, I think, disposes of the whole matter. Whether or not the safeguard which was introduced in this paragraph is one which is sufficient in practice is a matter which may perhaps have to be considered if and when the working of this scheme of official shorthand writers is considered ripe for review. At the present

moment, we can do no more than what the rules of court tell us to do, and we cannot assume to ourselves a jurisdiction to override a direction or a decision of the judge, or to assume a power to issue a direction which is conferred upon him, and upon him alone. The application must accordingly be dismissed.

FINLAY, L.J. : I agree. A

LUXMOORE, L.J. : I also agree.

Application dismissed.

Solicitor: *W. H. Thompson* (for the appellant).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.] B

HARRIS v. JAMES HOWDEN & CO. (LAND), LTD.

[COURT OF APPEAL (MacKinnon and du Parcq, L.JJ., and Atkinson, J.),
May 23, 1939.] C

Workmen's Compensation—Claim—Time for—Widow of workman pursuing other remedy—Failure through misjoinder of parties—Further proceedings barred by lapse of time—Reasonable cause—Workmen's Compensation Act, 1925 (c. 84), s. 14.

The husband of the plaintiff had been killed in an accident due to the condition of the floor of a power station. The case in support of an action for damages was so strong that it was not then thought advisable to make a claim under the Workmen's Compensation Act, 1925, which there was little likelihood would ever be prosecuted. In the course of the action for damages, great difficulty was encountered in ascertaining who, among a number of contractors and sub-contractors, was responsible for the condition of the floor which was the cause of the accident. At the trial, it was decided that the wrong parties had been sued, and it was then too late to bring an action under the Fatal Accidents Act against the right party. Upon the action being dismissed, application was made for an assessment of compensation under the Workmen's Compensation Act, 1925. It was contended that the absence of the claim under that Act was due to mistake within the meaning of sect. 14 of that Act :— D

HELD : there had not been any mistake, but there was, on the facts, reasonable cause for not having given notice of the making of a claim under the Act, and an order should be made for assessment of compensation. E

Order of GODDARD, L.J. ([1938] 4 All E.R. 167) reversed. F

[EDITORIAL NOTE.] Although there have been a considerable number of decisions upon the question of reasonable cause for failure to make a claim for workmen's compensation, it would not appear that the particular circumstances of this case have ever before been considered by the courts. At the same time, it cannot be said to be unusual in these days that construction and repair work should be parcelled out amongst a large number of contractors and subcontractors, and therefore the decision herein must be carefully considered by those whose duty it is to advise in such cases. In the present case, the great number of contractors and subcontractors made it extremely difficult to discover the one against whom the action could be successfully brought. It is important to note that, however clear may be the negligence of some party, the action against that party may in some cases, after the lapse of only six months, be completely met by a plea that it is out of time. It therefore becomes advisable in all cases to make a claim under the G
H

Workmen's Compensation Act, even although, at the time the claim is made, it is thought that there is little or no likelihood of that claim being prosecuted.

AS TO CLAIM FOR COMPENSATION, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 180-182, paras. 385-390; and FOR CASES, see DIGEST, Vol. 34, pp. 367-375, Nos. 2971-3038. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 389-413.]

A Cases referred to :

- (1) *Hoare v. Arding & Hobbs* (1911), 5 B.W.C.C. 36; 34 Digest 362, 2932.
- (2) *Pimm v. Clement Talbot, Ltd.* (1914), 7 B.W.C.C. 565; 34 Digest 355, 2861.
- (3) *Clapp v. Carter* (1914), 110 L.T. 491; 34 Digest 363, 2941; 7 B.W.C.C. 28.
- (4) *Potter v. Welch (John) & Sons, Ltd.*, [1914] 3 K.B. 1020; 34 Digest 493, 4082; 83 L.J.K.B. 1852; 112 L.T. 7; 7 B.W.C.C. 738.
- (5) *Prophet v. Roberts* (1918), 88 L.J.K.B. 975; 34 Digest 372, 3020; 120 L.T. 239; 11 B.W.C.C. 301.
- (6) *Lingley v. Firth (Thomas) & Sons*, [1921] 1 K.B. 655; 34 Digest 374, 3035; 90 L.J.K.B. 290; 124 L.T. 442; 13 B.W.C.C. 367.
- (7) *Abel v. Estler Brothers* (1919), 89 L.J.K.B. 164; 34 Digest 374, 3034; 121 L.T. 299; 12 B.W.C.C. 184.
- (8) *King v. Port of London Authority*, [1920] A.C. 1; 34 Digest 434, 3548; 88 L.J.K.B. 889; 121 L.T. 587; 12 B.W.C.C. 260.

D APPEAL by the plaintiff from a decision of GODDARD, L.J., sitting as an additional judge of the King's Bench Division, dated Oct. 26, 1938, and reported [1938] 4 All E.R. 167. The facts of the case are fully set out in the judgment of MACKINNON, L.J.

C. S. Rewcastle, K.C., and *Geoffrey C. Hutchinson, K.C.*, for the appellant.

F. A. Sellers, K.C., and *R. M. H. Everett* for the respondents.

E *Rewcastle, K.C.*: One must look at the Act, and give the words of it their ordinary meaning. Here there was no mistake of law, but a pure mistake of fact. The appellant failed to make a claim under the Act, believing in a certain state of fact which in fact was not correct. Making a mistake means believing in a set of facts which do not exist. [Counsel referred to *Hoare v. Arding & Hobbs* (1), *Pimm v. Clement Talbot, Ltd.* (2), *Clapp v. Carter* (3) and *Potter v. Welch (John) & Sons, Ltd.* (4).]

F *Sellers, K.C.*: This was a case, not of mistake, but of negligence and inexcusable omission. The case was a most difficult one, and it was by no means certain that the plaintiff would succeed. This time limit is a matter of substance, and not a mere technical point: *Prophet v. Roberts* (5) and *Lingley v. Thomas Firth & Sons* (6). The only circumstances in which a workman can avail himself of the proviso are those existing when one can find on the facts that he thought he had no right to make a claim. There is no case where an employee knew there was a claim but did not bring it. [Counsel referred to *Abel v. Estler Brothers* (7) and *King v. Port of London Authority* (8).]

Rewcastle, K.C., was not called upon in reply.

MACKINNON, L.J.: In this case, the plaintiff is the widow of a man named Harris. In Jan., 1937, he was in the employment

of a company named James Howden & Co. (Land), Ltd. They were engaged as subcontractors to do some work on part of a very large building in Fulham. On Jan. 2, 1937, while in their employment, Harris walked across the floor of a part of the premises which had apparently been completed. The floor consisted of iron grids or sections, and he happened to tread on one of these from which the bolts on one side had been removed by someone. The result was that the section, or grid, gave way, and he was precipitated through the hole and fell to the bottom of the building and was killed. A

It is quite apparent that the plaintiff, as the man's widow, would have had a claim under the Workmen's Compensation Act, 1925, as against the employers, James Howden & Co. (Land), Ltd., in respect of an accident arising out of and in the course of the employment, but, her interests being entrusted to a solicitor, no doubt through some society or union of which her husband was a member, the solicitor was of the opinion that she had a much more profitable claim at common law against the employers or the persons otherwise responsible for the floor through which, owing to its defective condition, the man fell and was killed. Accordingly, on Mar. 25, 1937, she issued a writ against Dorman, Long & Co., Ltd., alleging that they were responsible for this floor and for the defect in it, they being the main contractors for the steel erection of this large building. Subsequently, on Nov. 19th, 1937, that writ was amended by adding another company, Allen, Kennedy & Co., Ltd., and the man's employers, James Howden & Co. (Land), Ltd. Allen, Kennedy & Co., Ltd., were added because they were the subcontractors who had been laying down this particular floor, and James Howden & Co. (Land), Ltd., were added on an admission that they were in some way responsible under the building regulations of the Factory and Workshops Act. C D E

The action constituted in that way was heard before GODDARD, L.J., sitting as an additional judge of the King's Bench Division, on Oct. 14, 1938, and it then for the first time appeared from the evidence which was called that in fact—though it was very difficult to know, owing to the multiplicity of contractors and subcontractors, and so forth—by Jan. 28, 1937, owing to some arrangement between the Fulham Borough Council, who were the building owners, and the builders, and Dorman, Long & Co., Ltd., the principal contractors, the erection of this floor had been handed over to the Fulham Borough Council, and this claim at common law for the defective condition of the floor ought, if it were to be successful, to have been brought against the Fulham Borough Council. Of course, the Fulham Borough Council would have been protected. First of all, they had not been added at all, and it was now impossible to add them because they would be protected under the Public Authorities Protection Act, 1893, more than 6 months having elapsed since the accident. The result of that was that GODDARD, L.J., held—and there is no appeal from it, for he obviously was right—that the action as constituted against F G H

these three defendants failed, and must be dismissed. However, one of the defendants present before the court by amendment in 1937 was James Howden & Co.(Land), Ltd., who in fact were the man's employers at the time when he met with the accident. As a result, after the main question in the action had been determined in favour of the defendants, A an application was made to GODDARD, L.J., under the Workmen's Compensation Act, 1925, s. 29 (2), which provides as follows :

If, within the time hereinbefore limited for taking proceedings under this Act, an action is brought to recover damages independently of this Act for injury caused by an accident, and it is determined in such action or on appeal that the injury is one for which the employer is not liable in such action, but that he would have been B liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the court in which the action is tried, or, if the determination is the determination (on an appeal by either party) by an appellate tribunal, that tribunal shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs, which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act.

C An application having been made under that section for the assessment of compensation under the Workmen's Compensation Act, 1925, against James Howden & Co. (Land), Ltd., the question arose whether the condition was fulfilled—namely :

If, within the time hereinbefore limited for taking proceedings under this Act, an D action is brought . . .

The time hereinbefore limited for taking proceedings under this Act is provided in sect. 14, and that is 6 months. That is to say, a claim for compensation must be made within 6 months from the occurrence of the accident. In this case, the accident having occurred on Jan. 28, the E writ by amendment against the employers was only served upon them on Nov. 19, more than 6 months after the occurrence of the accident. Therefore, *prima facie*, the claim had not been made under sect. 14 within the 6 months. However, that requirement that a claim for compensation shall be made within 6 months is itself subject to a proviso. That proviso F is in sect. 14 (1) (b), which provides as follows :

the failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause.

The whole question in this case is whether the plaintiff can say that the G fact that she did not make a claim under the Workmen's Compensation Act, 1925, within 6 months of the accident was occasioned by mistake or other reasonable cause, there being no question of absence from the United Kingdom. I do not think that there was any mistake. She did not make the claim because it was thought that there was a good claim, H and a better pecuniary claim, at common law, and that remained a good reason and she never was disabused as to that. There would have been a good claim if she had sued the right person. The only mistake was that, unhappily, through not being able to ascertain all the facts, she did not sue the right person. If she had sued the right person, that claim would have existed, and had always existed.

The other question is whether there was other reasonable cause for not making this claim within the 6 months. We have had a quantity of cases cited to us containing expressions of opinion about this clause or other parts of sect. 14. I want first to say this. It seems to me that a question as to whether or not there has been a mistake or other reasonable cause is primarily a question of fact, and, in the normal case when it comes on appeal from a county court judge who has found, or who has not found, that there was a mistake or other reasonable cause, the function of the Court of Appeal is only to say whether or not there was evidence on which he could make that finding. Most of the cases which have been cited to us are simply concerned with that question of fact. The present case is not an appeal from a county court judge, but from a decision of GODDARD, L.J. He is in a less favourable position than that of a county court judge, in that his finding of fact does not bind us. We are not concerned merely to say whether or not there was evidence on which he could come to that conclusion. We are in a position to differ from him if we think either that there was a mistake or that there was other reasonable cause. In my view, we are justified in finding, and I find as a fact, that there was reasonable cause for not having given notice. In my judgment, there was reasonable cause—and I differ from GODDARD, L.J., in that respect—and I think that an order should have been made for the assessment of compensation under the Workmen's Compensation Act, 1925.

DU PARCQ, L.J. : I agree. We are laying down no new principle of law. We are finding facts as in the ordinary way a county court judge sitting as an arbitrator would find them, and I do not wish to add anything to what has been said by MACKINNON, L.J.

ATKINSON, J. : I agree.

Appeal allowed. Case remitted to judge to assess the compensation.

Solicitors: *Evill & Coleman* (for the appellant); *Carpenters* (for the respondents).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

distinguished. FRANKMAN v. ANGLO-
RAGUE CREDIT BANK. [1948] 1
11 E.R. 337.

KLEINWORT, SONS & CO. v. UNGARISCHE BAUMWOLLE INDUSTRIE ACTIENGESSELLSCHAFT AND HUNGARIAN GENERAL CREDITBANK.

[COURT OF APPEAL (MacKinnon and du Parcq, L.JJ., and Atkinson, J.),
May 22, 23, 1939.]

Contract—Impossibility of performance—Foreign law—Exchange restrictions.

The plaintiffs, who are bankers in London, had up to 1931 granted credit facilities to the defendants (the Creditbank and a customer of that bank), the Creditbank sending bills drawn on the plaintiffs at 3 months by the customer of the Creditbank and indorsed by such customer of the Creditbank, accompanied by a letter from the customer

undertaking to put the plaintiffs in funds and a guarantee by the Creditbank. In July, 1931, by legislation passed in Hungary, the National Bank of Hungary was placed in control of the dealings with foreign exchange by residents in Hungary. As a result, standstill agreements were made in respect of the debts here in issue and the obligations were renewed until July 15, 1937. The plaintiffs then refused to enter into a further standstill agreement, but bills of exchange and the accompanying letters were sent every 3 months, and upon those sent in April, 1938, this action was brought:—

HELD: (i) the law applicable to these bills and documents was English law.

(ii) an accompanying letter, which had been sent on each occasion since 1932, stating that the parties would only be in a position to provide cover if the exchange restrictions were withdrawn did not, upon its proper construction, nullify the express agreement to pay at maturity in the other documents, and the liability to pay could only be suspended by a renewal of the contracts.

(iii) the law of Hungary did not make it impossible for the customer to fulfil his contract to provide cover in London, since the contract could only be made unenforceable in England if there was a forbidden act required to be done in Hungary. As the contracts might have been fulfilled by applying to them funds lying to the credit of the defendants in London or elsewhere out of Hungary, the above conditions were not fulfilled, and the plaintiffs were entitled to succeed.

Decision of BRANSON, J. ([1939] 2 All E.R. 782) affirmed.

[EDITORIAL NOTE.] It is well known that most countries have placed restrictions

upon dealings with foreign exchange, and this consideration of the position arising out of those restrictions is of obvious importance. There are two main questions, the first as to the law applicable to the standstill agreements, and the other as to the applicability of the doctrine of impossibility of performance by the supervenient law of a foreign country. The latter is the more interesting, and it is held that a letter written from a foreign country ordering payments to be made in England is not a contravention of a law forbidding payments outside the jurisdiction of that country. The matter is, of course, dependent to some extent upon the proper construction and effect of the law passed by the foreign country.

AS TO IMPOSSIBILITY OF PERFORMANCE BY FOREIGN LAW, see HALSBURY, Hailsham Edn., Vol. 7, pp. 218, 219, para. 297; and FOR CASES, see DIGEST, Vol. 12, p. 374, No. 3102 *et seq.*

F Cases referred to:

- (1) *Ralli Brothers v. Compañia Naviera Sota y Aznar*, [1920] 2 K.B. 287; 11 Digest 397, 699; 89 L.J.K.B. 999; 123 L.T. 375.
- (2) *De Beeche v. South American Stores, Ltd., and Chilean Stores, Ltd.*, [1935] A.C. 148; Digest Supp.; 104 L.J.K.B. 101; 152 L.T. 309.

G APPEAL from a decision of BRANSON, J., dated May 8, 1939, and reported [1939] 2 All E.R. 782, where the facts of the case are fully set out.

Sir Patrick Hastings, K.C., Valentine Holmes and David Hastings for the appellants.

H *A. T. Miller, K.C., and H. G. Robertson* for the respondents.

Hastings, K.C.: The words of the Hungarian enactment make it illegal for anyone to try to evade it. Thus, a man cannot take a railway ticket to another country and pay there what is owing, as that would be evading just as much as it would be if he paid in his own country. It would also be an illegal act. There is an implied term in the contract

that any act to be done under it shall not be an illegal act. [Counsel referred to *Ralli Brothers v. Compañia Naviera Sota y Aznar* (1) and *De Beeche v. South American Stores, Ltd., and Chilean Stores, Ltd.* (2).] It was illegal to cause payment to be made wherever it might be made or from wherever the money came. The judge has put too narrow a view on the authorities. This case is directly within the cases cited. **A**

The performance of this contract would involve the doing of illegal acts in Hungary, and both parties to it knew that.

Miller, K.C., was not called upon.

MACKINNON, L.J.: The plaintiffs, a firm of well-known London bankers, on Apr. 8, 1938, accepted a bill of exchange drawn by a company with a German name, which has been referred to conveniently as the woollen company, for £5,000 payable in 3 months. That was accepted by the plaintiffs, payable at the Westminster Bank, London, and it fell due on July 11, 1938. That act of the plaintiffs in accepting the bill was in accordance with the arrangements made in certain letters which passed between the parties. On Apr. 4, 1938, the other defendants, the Hungarian General Creditbank, wrote to the plaintiffs as follows : **B**

Enclosed we beg to hand you 3 months' sight drafts drawn on your goodselves by the [woollen company] for £7,000 indorsed by us, which kindly accept and discount in accordance with our previous correspondence at the rate of 1 per cent. per annum applying proceeds to retire previous acceptances for like amounts maturing on the 9th instant. Please find attached the drawers' confirmation of their liability, as well as our letter of guarantee made out in respect of the above bills, for your files . . . **C**

I should have mentioned that there were 3 bills, one for £5,000 and two for £1,000 each, all on the same terms. The two enclosed letters referred to were, first, a letter from the woollen company to Kleinwort's, as follows : **E**

We understand from the Hungarian General Creditbank, Budapest, that you are agreeable to place at our disposal credit facilities up to the amount of £7,000. We have accordingly disposed on you as follows : £7,000 at 3 months' sight, which please accept, and in consideration of your so doing, we hereby undertake to provide you with cover in pounds sterling in London for the above bills at latest one day before their maturity. **F**

The second letter was from the bank to the plaintiffs, and was as follows :

In consideration of your accepting in accordance with our request as per our to-day's separate letter drafts for £25,000 [that included another sum of £18,000 for another Hungarian drawer] at 3 months' sight drawn on your goodselves, we hereby guarantee to you that the necessary funds in sterling will be remitted to you in payment of the said bills at maturity. **G**

Under those letters, it is obvious that it was the duty of the woollen company to provide cover in pounds sterling in London one day before July 10, when the bills fell due, and, if they did not, the Hungarian General Creditbank were liable under their guarantee. The promise in those engagements was not fulfilled, and accordingly the plaintiffs brought this action against the woollen company, as drawers of the bills, and the bank, as having guaranteed their engagements. **H**

Really, upon those letters, there would appear to be no defence whatever to a claim by the plaintiffs that the woollen company had broken their promise to undertake "to provide you with cover in pounds sterling in London for the above bills at latest one day before their maturity," and that the bank were liable under their guarantee that that should be done. That claim, however, was defended by the woollen company and the bank on two grounds. The first ground is a contention that, by the terms of the contract between the plaintiffs and the woollen company, the woollen company were not liable to provide the money on July 10, as promised by their letter which I have read. That contention arises from the existence of yet another letter, which was sent by the bank to the plaintiffs along with the other three which I have read, and that letter to Kleinwort's is in the following terms :

Pursuant to our to-day's separate letter containing our guarantee in respect of the drafts drawn on your goodselfs for the amount of £25,000, we beg to draw your kind attention to the fact that both drawers and we will only be in a position to provide cover at maturity if the exchange regulations prevailing in our country at that date will enable us to do so.

It is further said that in point of fact, by reason of certain legislation and decrees made by the Hungarian government, it was declared illegal for Hungarian subjects to pay sums in sterling in London, except with the consent or permission of the National Bank, and that that consent had never been given. We have not heard counsel for the respondents as regards the effect of that legislation, but I assume, though I am not deciding it, that it is the fact that legislation to that effect had been passed in Hungary, and that in the courts in Hungary, if the transaction had been called in question, the woollen company would have been liable to penalties for having provided, if they did so provide, sterling in London in July, 1938. As I say, I assume that to be so.

This line of defence is that that letter must be read with the other two as part of the contract between the woollen company and the plaintiffs, and as part of the contract of guarantee by the defendant bank to the plaintiffs, and that, in effect, the contract by the woollen company was to this effect : "In consideration of your doing so, we hereby undertake to provide you with cover in pounds sterling in London, but only if, by the law of our country then in existence, we are allowed legally to do so." I cannot possibly construe that fourth letter sent by the bank as having that extraordinary effect. It is in terms only drawing the attention of the plaintiffs to a certain fact. They have promised to provide sterling in London, and they are intimating that, in a certain event, it may be difficult for them to fulfil that promise. It may even amount to an intimation in advance : "We shall, in this unhappy event, have to break our contract." To construe that letter as limiting and conditioning the quite clear promise contained in the earlier letter that they would provide pounds sterling in London on the maturity of the bills is, I think, an impossible contention. Therefore, that line of defence, based upon a

suggestion as to the true construction of the whole contract made between the parties fails, and it is not necessary to say more about it.

The second line of defence is a matter of law. It is suggested that, if that fourth letter had never been written, and if the three other letters I have read were alone in existence, the defendant woollen company would still have a defence to a claim for breach of contract contained A in their letter, and that the Hungarian Creditbank would have a claim by way of defence upon their guarantee. That contention is based upon a suggestion that, if a contract is entered into to do something in London, which becomes illegal by the law of one of the parties in his own country, the English court will not enforce it. For that proposition, two B authorities were relied upon, *Ralli Brothers v. Compañía Naviera Sota y Aznar* (1) and *De Beeche v. South American Stores, Ltd., and Chilean Stores, Ltd.* (2), but it is obvious, directly one looks at those cases, that they are dealing with a totally different set of facts. This is an English contract to do something in England. In those cases, it was a contract C to do something in a foreign country, and, when the law of that foreign country had made it illegal to do that act in that foreign country, it was held that the English court would not compel the performance, or make the man who had failed to do it liable in damages. The whole principle is stated in *Ralli Brothers v. Compañía Naviera Sota y Aznar* (1) by D SCRUTTON, L.J., at p. 304 :

... I should prefer to state the ground of my decision more broadly and to rest it on the ground that where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. E

That proposition seems to have no application whatever to the facts of this case. This is no contract to do anything in Budapest, or elsewhere in Hungary. It is a contract to do something in London. It was only that principle which was applied in *De Beeche's* case (2). The truth is that the principle is an application of the one stated with characteristic F lucidity and precision in that great work DICEY ON CONFLICT OF LAWS. Rule 160 is stated as follows, at p. 647 :

The material or essential validity of a contract is (subject to the exceptions hereinafter mentioned) governed by the proper law of the contract.

The proper law of this contract is English law. Then his third exception G is this, at p. 657 :

A contract (whether lawful by its proper law or not) is, in general, invalid in so far as (1) the performance of it is unlawful by the law of the country where the contract is to be performed (*lex loci solutionis*) . . .

Here it is said that to pay this money in London is unlawful by the law H of Hungary. If this contract had been to pay money in Budapest, no doubt that principle would have applied. The law of Hungary would have been the *lex loci solutionis*. In this case, however, the payment of the money was to be made in England, and English law is the *lex loci solutionis*. Therefore, the exception that the performance is unlawful

by the law of the country where the contract is to be performed does not arise or exist, and no defence can be based by the defendants upon that principle. The attempted extension of it would obviously lead to preposterous results. If we were to accede to it, it would have the result that, supposing the kingdom or legislature of Ruritania passed a law that no

- A Ruritanian subject should pay an hotel bill which he had incurred, then, when the Ruritanian subject was sued in the county court by the hotel proprietor, if that principle were correct, the county court judge would have to give judgment for the defendant. That seems to me obviously absurd, and I do not think that I need discuss the matter any further.
- B It is really hardly necessary for me to do more than to say that I entirely agree with the careful judgment of BRANSON, J., who, perhaps, more felicitously than I have done, has set out the considerations which I have been trying to express. I agree with his judgment. I think that this appeal fails, and must be dismissed with costs.

C

DU PARCQ, L.J. : I agree. I cannot resist the temptation of adding some words of my own, partly because the subject is one of some interest and partly because I confess I think we have listened to some remarkable heresies, if I may be allowed to say so, in the very able and helpful

- D argument addressed to us by counsel for the appellants.

I think that, the more one reflects upon this case, the more one sees that the real question is whether or not it must be said that, whenever the result of performing a contract would be that one party to its performance would be breaking the law of his own country, then the courts of this country will not enforce its performance by him. I say that because, when one considers the question of construction, it appears to me, for the reasons already given by MACKINNON, L.J., to be plain that it is impossible to read the first letter of Apr. 4, 1938, upon which much reliance was placed, as introducing a term into the contract. I

- E of this country will not enforce its performance by him. I say that because, when one considers the question of construction, it appears to me, for the reasons already given by MACKINNON, L.J., to be plain that it is impossible to read the first letter of Apr. 4, 1938, upon which much reliance was placed, as introducing a term into the contract. I
- F suppose the second letter of that date must be read as an offer. It is an undertaking, in other words, which will come into force if the plaintiffs, Kleinwort, Sons & Co., do accept the bills which have been drawn on them, and that is followed by the guarantee of the other defendants, the Hungarian General Creditbank. The undertaking is plain and un-
- G equivocal in its terms, and I find it impossible to say that one can read the second letter as meaning : " You are to understand that, although the principal debtor has given an undertaking quite unqualified in its terms, and we have given an equally unqualified guarantee, we do not really mean what we said in those letters, but we shall only for ourselves
- H perform our guarantee, and you must only expect the principal debtor to carry out his undertaking, if, supposing that that ever happens, the exchange regulations prevailing in our country permit us to do so." It requires, as I think BRANSON, J., said, some ingenuity to extract such a meaning from those letters, and the ordinary rule would apply, if there were any ambiguity about it, that it must be construed, not in favour of

the person putting forward an ambiguous document or ambiguous documents, but against him. I see no ambiguity about it myself. I agree with MACKINNON, L.J., that the matter is plain, and that there was no contractual term lessening the effect of the undertaking and guarantee, or dispensing with their performance.

Then comes the suggested implied term. I think that that can be answered really in a sentence. Assuming, for the moment, against the contention of counsel for the appellants, that his general proposition is unsound, then his suggested implied term would be a contradiction of the express terms of the written contract, as it has been construed by BRANSON, J., and as it has been construed by MACKINNON, L.J., in the judgment with which I agree. Thus, one comes to what would indeed be an important question if there were really any solid foundation, as I think there is not, for the contention put forward for the defendants here. I agree with what has been said already—namely, that the law is correctly stated in DICEY ON CONFLICT OF LAWS, in the third exception to r. 160, which is set out as follows at p. 647 :

The material or essential validity of a contract is . . . governed by the proper law of the contract.

There is no doubt in this case that the proper law of the contract is English law. If I may be permitted a reminiscence, I have been reminded in hearing this argument and the reference to Professor DICEY's book that, when I had the privilege of being taught by Professor DICEY, he was always anxious to insist that students of law heard so much about exceptions to rules, and, comparatively speaking, so little about the rules themselves, that they were apt to think that the law was to be found rather in the exceptions than in the rules. I think, perhaps, that in a case like this there is a danger that the rule may be somewhat submerged in argument, and forgotten. One starts with the rule that English law is the law which governs the performance of this contract. An elementary principle of English law is that people should keep their contracts and carry them out. No doubt it is also the law, as stated by DICEY ON CONFLICT OF LAWS, that a contract is in general invalid so far as the performance of it is unlawful by the law of the country where the contract is to be performed. This is not the first occasion by any means upon which that rule in those terms is being approved by this court. In *Ralli Brothers v. Compañia Naviera Sota y Aznar* (1), to which reference has been made, LORD STERNDALÉ rested his judgment upon that principle. He said, at p. 291 :

In my opinion the law is correctly stated by DICEY ON CONFLICT OF LAWS.

Then he reads the passage, which I need not read again. WARRINGTON, L.J., also, at p. 295, relies on the same passage. It is true that VISCOUNT SANKEY, L.C., in the House of Lords in *De Beeche v. South American Stores, Ltd., and Chilean Stores, Ltd.* (2) used words which, taken away from their context and read apart from it, might be

- construed as giving some support to the argument which we have heard. I refer, of course, to the passage at p. 156, which I need not read again. I think it is quite plain that VISCOUNT SANKEY, L.C. was purporting to do no more than state in words of his own the principle which is to be found set out in DICEY ON CONFLICT OF LAWS. If it
- A were the fact that VISCOUNT SANKEY, L.C. was saying something which could truly be interpreted as we have been asked to interpret it, it is plain that it would be a *dictum* in no way necessary to the decision of the case, and we should not be bound to follow it. For myself, however, I am quite convinced that LORD SANKEY had no
- B such intention in his mind as to enlarge the principle of law, which was well settled, so as to cover a case of the kind now before us, which was not before the House of Lords at all. I do wish to add this for myself, without expressing any concluded view, although I must confess that the matter is perhaps not necessary to the decision of this case—namely, that
- C I should prefer to base the rule, which, however one puts it, is the rule which governs the courts of this country, on the principle stated by DICEY ON CONFLICT OF LAWS and approved in the *Ralli Brothers'* case (1) by LORD STERNDALE and WARRINGTON, L.J., rather than on the doctrine of an implied term stated by SCRUTTON, L.J. I say that with hesitation
- D and diffidence, for this reason. Where one is dealing with the ordinary case of impossibility of performance, I quite understand that it may well be said that it is an implied term of the contract that neither party is to be regarded as having broken his contract if he does not carry it out where in truth it becomes impossible to perform it. Numbers of cases in com-
- E paratively recent times dealing with what has come to be called frustration of the contract have shown that the courts are inclined at any rate to say that there is an implied term in the contract to that effect. As has been well said, if one had said to the parties, "What is to happen if this occurs, or that occurs, so that you cannot really carry out the contract
- F in a business sense?" they would both have said: "In that case, we mean that the contract shall come to an end." I see a difficulty about talking of an implied term in a case where really the provision which is to be implied is not, as it seems to me, consensual at all. One can test it in this way. Supposing that the parties to a contract were to say: "It
- G is the law in Ruritania that nobody is to have any traffic in a certain drug which in England may be freely sold. We will contract to sell and deliver to you that drug in Ruritania, and it is expressly agreed that, although it may be illegal to do that in Ruritania, this contract is not to be affected by that illegality." There would be an express contract
- H which would negative any indication to the contrary, so that it would be difficult, if not impossible, to say that there was any implied term negating the express term. Yet, as it seems to me, the court without hesitation would say that that contract, on the principle stated by LORD STERNDALE and WARRINGTON, L.J., adopting the principle of DICEY ON CONFLICT OF LAWS, would not be enforced.

The question in this case is whether one can go very much further than any decision ever has gone and say that, if a sovereign state chooses to legislate, to the effect that, if one of its subjects obeying the law of a foreign country carries out in that foreign country a contract which he has made according to its laws, he will be committing an offence against the laws of his own country, then the courts of England must say: "We cannot compel you to keep your contract, because, if you do, you will be breaking the law of your sovereign state." I think the answer to that suggestion ought to be a very emphatic negative. I do not say for a moment that a sovereign state may not legislate to control the acts of its subjects beyond its borders. Of course it may. Nothing can prevent a sovereign state from doing so, and it is a matter with which these courts have no concern. However, it is right that it should be understood that, if a sovereign state legislates so as to interfere with the acts of its subjects outside its own territory, and in a sense its own jurisdiction, then it cannot expect, and I should suppose that no state would expect, that the courts of another country will be astute to enforce its laws which seek so to interfere with what goes on elsewhere at the expense of their own laws. Primarily, it is our business to see that English contracts are observed, and that they are carried out according to English law. It is an exception to that rule that, if, in carrying out a contract, the law of the place where it is performed will be broken, to that extent the contract is treated as invalid. Here the place where the contract is to be performed is London. For all we know, the defendants may have money due to them in London from British creditors, upon payment of which they will be in a position to pay the plaintiffs' just demand. In those circumstances, I have no doubt at all that it would be quite inconsistent with the principle to hold that the argument put forward on behalf of the defendants should prevail. For these reasons, I agree that the appeal should be dismissed.

ATKINSON, J. : I agree. It seems to me that the letter in question—of Apr. 4—merely draws attention to a fact which may affect the defendants' ability to provide cover, and that there is nothing in the letter purporting to affect their liability to provide cover.

The other point raises the question how far the defendants can rely upon certain Hungarian decrees making it illegal for them to pay their English debts without the consent of the National Bank. Beyond all question, the proper law of this contract, as defined by DICEY ON CONFLICT OF LAWS, r. 155, is English law, and, further, the particular obligations sought to be enforced in this action are absolute undertakings to make certain payments in London. The validity of those obligations depends, therefore, upon English law as the *lex loci solutionis*. Yet it is urged in effect that the validity of the obligations depends, not on English law, but upon the law of the country in which the debtors live, and that that law can relieve, and has relieved, the debtors from their contractual

obligations to pay creditors in England. It is not put quite as bluntly as that. It is said: "True, English law applies, but it is a rule of English law that it will not enforce an obligation which involves the doing in a foreign country of an act which is illegal by the law of that country."

- It seems to me that that is only another way of saying that the English courts must apply, not English law, but Hungarian law, and I think the argument is based on the fallacy of seeking to apply to obligations which are to be performed here the rule which applies to obligations which are to be performed in a foreign country. That rule is stated in DICEY ON CONFLICT OF LAWS in r. 160, exception 3, which has been read by MACKINNON, L.J. In this contract, the obligation is to pay certain money in London, and the contract is not concerned with the steps which the debtors may have to take to put themselves in a position to pay. It is concerned only with the payment itself, which is payment to be made in this country. This contractual obligation, in my view, does not come within the rule as stated in DICEY ON CONFLICT OF LAWS, or by SCRUTTON, L.J., in the *Ralli Brothers'* case (2). It would indeed be intolerable if English creditors, in respect of obligations to be performed here, could be deprived of their rights by Hungarian decrees making it unlawful for debtors to pay. I would like to add that, in my opinion, there is nothing in the agreed statement of facts which negatives the possibility of the judgment being enforced in this country without involving any act on the part of the defendants contrary to Hungarian decrees. I agree that the appeal should be dismissed with costs.

Appeal dismissed. Leave to appeal to the House of Lords.

- Solicitors: *Slaughter & May* (for the appellants); *Linklaters & Paines* (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., *Barrister-at-Law*.]

F HANSON v. WEARMOUTH COAL CO., LTD., AND SUNDERLAND GAS CO.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), April 26, 27, 28, May 11, 1939.]

- Gas—Nuisances from gas—Liability of undertakings—Breakage of main by reason of subsidence due to mining operations—Mining company entitled to let down surface.
Tort—Contribution between joint tortfeasors—No appeal against one tortfeasor—Duty of Court of Appeal—Law Reform (*Married Women and Tortfeasors*) Act, 1935 (c. 30), s. 6.

- As a result of the operations of the first defendants, the W. Coal Co., a gas main belonging to the second defendants, the S. Gas Co., and situate under a public road was broken. The gas escaped and caused an explosion in a neighbouring house occupied by the plaintiff, thereby doing serious damage to the plaintiff's furniture and effects. In this action against the coal company and the gas company alleging that one or the other or both were negligent, and guilty of creating a dangerous nuisance, it was admitted by the gas company that they had no right to claim

support for their main as against the coal company, who were working a seam some 1,600 ft. below the surface within their rights under a lease from the Ecclesiastical Commissioners. The lease permitted the lessees to let down the surface subject to payment of compensation. For some time before the explosion in question, there had been subsidences in the neighbourhood, and on previous occasions gas mains had been damaged in consequence of mining operations. The evidence was that the gas company took no steps to prevent the escape of gas in the event of a subsidence. The judge below dismissed the action against the coal company, but found for the plaintiff against the gas company, and awarded him damages, on the ground that the gas company had been negligent in not taking steps to prevent the danger resulting from the withdrawal of support for the gas main. The gas company appealed, on the ground that they had not been negligent, and it was contended by the coal company that, as the plaintiff had not appealed against the decision in their favour the Court of Appeal were not entitled to consider the question of contribution between the defendants under the Law Reform (Married Women and Tortfeasors) Act, 1935 :—

HELD : (i) the gas company were negligent in not taking such precautions as were possible to prevent the danger of the gas escaping and doing damage and in laying their main upon ground the support of which, to their knowledge, would ultimately be withdrawn.

(ii) had the Court of Appeal come to the conclusion that both defendants were liable, it would have been their duty to give effect to the right of contribution then arising, although the plaintiff was content with judgment against one defendant.

[EDITORIAL NOTE.] In this case, the coal company is held to be absolved from liability by reason of its rights under the mining lease to let down the surface. An attempt was, however, made to extend the liability of the coal company to owners and occupiers of property indirectly damaged by subsidence upon the principle laid down in *M'Alister (or Donoghue) v. Stevenson* (3). This contention was rejected, on the ground that the gas company laid down a dangerous thing on ground to which they knew not only that they had no right of support, but also that mining operations would gradually withdraw that support. Although in the present case no right to contribution could arise, having regard to the decision on the main appeal, the Court of Appeal has held that it has jurisdiction to deal with that question where there is no appeal by the plaintiff against one defendant.

AS TO NEGLIGENCE OF GAS UNDERTAKERS, see HALSBURY, Hailsham Edn., Vol. 15, p. 630-632, paras. 1104-1107; and FOR CASES, see DIGEST, Vol. 25, pp. 482-487, Nos. 71-98.

AS TO CONTRIBUTION BETWEEN JOINT TORTFEASORS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 190, 191, para. 284; and FOR CASES, see DIGEST Supp. Tort. Nos. 108a-108d.

Cases referred to :

- (1) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, 311; 37 L.J.Ex. 161; 19 L.T. 220; *affg.* (1866), L.R. 1 Exch. 265; *revsq.* (1865), 3 H. & C. 774.
- (2) *Rickards v. Lothian*, [1913] A.C. 263; 36 Digest 194, 353; 82 L.J.P.C. 42; 108 L.T. 225.
- (3) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.
- (4) *Hardaker v. Idle District Council*, [1896] 1 Q.B. 335; 25 Digest 480, 62; 65 L.J.Q.B. 363; 74 L.T. 69.
- (5) *Charing Cross, West End & City Electricity Supply Co. v. London Hydraulic Power Co.*, [1913] 3 K.B. 442; 38 Digest 50, 289; 83 L.J.K.B. 116; 109 L.T. 635; *affd.*, [1914] 3 K.B. 772.

(6) *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co., Ltd.*, [1936] A.C. 108; Digest Supp.; 105 L.J.P.C. 18; 154 L.T. 89.

(7) *Rapier v. London Tramways Co.*, [1893] 2 Ch. 588; 38 Digest 44, 258; 63 L.J.Ch. 36; 69 L.T. 361.

(8) *Smith v. Kenrick* (1849), 7 C.B. 515; 36 Digest 157, 8; 18 L.J.C.P. 172; 12 L.T.O.S. 556.

A (9) *Vanderpant v. Mayfair Hotel Co., Ltd.*, [1930] 1 Ch. 138; Digest Supp.; 99 L.J.Ch. 84; 142 L.T. 198.

(10) *Metropolitan Properties, Ltd. v. Jones*, [1939] 2 All E.R. 202; Digest Supp.

(11) *Farr v. Butlers Bros. & Co.*, [1932] 2 K.B. 606; Digest Supp.; 101 L.J.K.B. 768; 147 L.T. 427.

B (12) *Hurdman v. North Eastern Ry. Co.* (1878), 3 C.P.D. 168; 36 Digest 191, 325; 47 L.J.Q.B. 368; 38 L.T. 339.

APPEAL by the gas company from a judgment of HILBERY, J., dated Feb. 25, 1938. The facts are fully set out in the judgment of the court delivered by GODDARD, L.J.

C *C. T. Le Quesne, K.C.*, *C. Paley Scott, K.C.*, and *C. B. Fenwick* for the appellants, the Sunderland Gas Co.

F. R. Evershed, K.C., and *J. Charlesworth* for the respondents, the Wearmouth Coal Co., Ltd.

J. Willoughby Jardine, K.C., and *J. Harvey Robson* for the respondent, the plaintiff.

D *Le Quesne, K.C.*: The judge was wrong on the evidence in holding that the gas company were negligent, but, if he was right, he should have held that the coal company were also liable, on the ground either of negligence or of nuisance. The gas company are entitled to take advantage of the Law Reform (Married Women and Tortfeasors) Act, 1935. The principle of *Rylands v. Fletcher* (1) does not apply to the gas company, because the subsidence which led to the gas explosion here was caused by the deliberate act of the coal company in working the coal as they did. The method suggested at the trial by which the danger of an escape of gas might have been avoided by the gas company has not got beyond the experimental stage. The company's main was in perfectly good condition. It is not the practice of gas companies to use the devices which were suggested. There was nothing which could reasonably be done to obviate the effect of a serious subsidence. [Counsel referred to *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co., Ltd.* (6), *Charing Cross, West End & City Electricity Supply Co. v. London Hydraulic Power Co.* (5), *Hardaker v. Idle District Council* (4), *Rapier v. London Tramways Co.* (7), *Smith v. Kenrick* (8) and *Vanderpant v. Mayfair Hotel Co., Ltd.* (9).]

H *Evershed, K.C.*: The coal company are under no contractual liability to support the gas mains. The judge found that they carried out their mining operations properly. They cannot be liable for nuisances if they did only what they were entitled to do. The crucial test is whether or not the act which resulted in the damage was justified as between the coal company and the gas company. The extraction of coal is an ordinary and proper use of the land. To use care and skill in the use



of one's land may be a duty, but it cannot be that one cannot use the land at all because some damage may be done remotely. As to contribution, the appellant cannot get something from the coal company for loss he has suffered when the act which they did was one which they were entitled to do, as far as he is concerned.

Le Quesne, K.C., in reply: If the coal company caused a nuisance, it is no answer to say that there was no negligence. They are not entitled to rely as against the plaintiff on the fact that the gas company could have prevented the gas from escaping. The plaintiff had a right to succeed in his claim as based on nuisance. The question as to whether or not the gas company had a right of action against the coal company is a very different matter from that of the plaintiff's right against the coal company. On these grounds, the gas company are entitled to contribution under the statute. [Counsel referred to *Rylands v. Fletcher* (1), *M'Alister (or Donoghue) v. Stevenson* (3), *Metropolitan Properties, Ltd. v. Jones* (10), *Farr v. Butters Bros. & Co.* (11) and *Hurdman v. Northern Eastern Ry. Co.* (12).]

GODDARD, L.J. [delivering the judgment of the court]: The appellants, who were the first defendants below, are a statutory gas company operating in the town of Sunderland under the terms of the Gas Works (Clauses) Act, 1847, and local Acts and orders incorporating that Act. I will refer to them hereafter as the gas company. On Oct. 23, 1936, at 4 p.m., a violent explosion of gas occurred inside No. 22, Hendon Valley Road, Sunderland, a small house occupied under a weekly tenancy by the first respondent (who was the plaintiff below) and his wife, demolishing the house and causing damage to furniture and other articles belonging to him. The damages were agreed below at £160. The escape of gas was caused by the fracturing of a 6-inch cast-iron gas main belonging to the gas company and placed by them in 1881 along this public street about 2 ft. 7 ins. below the surface. Opposite to No. 22, it was about 20 ft. away from the front line of the house. Fortunately there was no one in the house at the time, but there was a fire in the kitchen range, and this ignited the gas. The road runs about north-west and south-east, but was spoken of at the trial as running north and south. The cause of the pipe breaking was that, a day or two before the explosion, for a length of some 20 ft. the ground below the surface of the road had dropped from under the pipe to an extent of about 5 ins. in the middle. At the south end, the pipe was left fully supported, and was held tight in the subsoil of the road. This put on the cast-iron a bending strain which it could not bear, with the result that the pipe broke right across close to where it was held, and also a few feet away, where it was bent the opposite way. The gas under pressure was thus free to escape. This local subsidence was the immediate cause of the fractures, but was in its turn merely a local and superficial manifestation of a general subsidence of the whole of the strata caused by the

workings of the Wearmouth Coal Co., Ltd., in the Maudlin coal seam at a depth of some 1,600 ft. below this part of Sunderland. This mining subsidence had already, in 1935 and earlier years, extended to the surface in the neighbourhood of the Hendon Valley Road, and breaks of this main had occurred along the road, which the gas company had been obliged to repair. In view of this fact, the plaintiff had made the Wearmouth Coal Co. (to whom I will refer as the coal company) co-defendants with the gas company, and was claiming damages in tort against each separately, and also, alternatively, against both jointly.

The coal company were mining under a lease dated Nov. 2, 1911, for a term of 68 years from Oct. 11, 1877, granted by the Ecclesiastical Commissioners. This lease allowed them to let down the surface, but purported to put them under an obligation to pay compensation for surface damage to the lessors, to the lessors' successors and assigns, and lessees and tenants, and even to "occupiers" of the surface. This compensation clause led to a faint attempt by the plaintiff to claim in contract as an "occupier," but we agree with the judge that that contention was obviously untenable.

There was one other fact which should perhaps be mentioned. The day before the explosion, the local subsidence in the road broke the water main, and the outrush of water was said to have washed away soil from under the gas main, and thereby contributed to the removal of its support. This, if it was a fact, would not, however, prevent the removal of the coal from being the effective cause of subsidence of the gas main, and we say no more about it.

The judge heard evidence in proof of the gradual subsidence of the strata up to the surface, and was completely satisfied that the gas main was broken by the coal company's workings. We entirely agree with his conclusion, and need not discuss the evidence, although we have read it. We may, however, point out that the coal company elected to call no evidence to contradict the positive evidence given against them. The gas company had pleaded in their defence that they were entitled to support from the coal company, and had served a third-party notice on the coal company on the same footing, on the ground that, if they were liable to the plaintiff, the coal company also were liable, and therefore bound to contribute under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6. At the trial, however, the gas company asked for and received leave to amend their defence by deleting this plea, announcing that they admitted the right of the coal company to let down the surface and withdraw the support of their gas mains, and the trial thereafter proceeded on this basis as between all three parties. In spite of this admission, the gas company still sought at the trial to recover contribution from the coal company in the event of both companies being held liable to the plaintiff. The coal company had likewise served a third-party notice on the gas company before the case came to trial, but, when the gas company admitted that the coal company

were entitled to let down the surface, that question naturally ceased to be a live issue. In the result, after a carefully reasoned oral judgment, the judge gave judgment with costs for the plaintiff against the gas company, but in favour of the coal company against the plaintiff. No question of contribution between the two defendant companies, therefore, arose. With the consent of counsel, the judge ordered payment by the gas company direct to the coal company of the costs which would otherwise have been payable by them to the plaintiff and would then have been recoverable by the plaintiff from the gas company. From the decision in favour of the coal company the plaintiff did not appeal. The appeal before us is by the gas company, asking that the judgment against them should be reversed, and entered for the plaintiff against the coal company for £160 and costs, with an order about the gas company's costs similar to that which had been made below about the coal company's costs, and, in the further alternative, that the coal company should make contribution to the damages payable to the plaintiff to the extent of a complete indemnity, or to such extent as to the court might seem just. They did not complain of the judge's findings that :

The plaintiff's damage was caused by an explosion resulting from the escape of gas from a fractured main pipe of the defendant gas company, and the fractures to the pipe were caused by subsidence, which in turn was caused by the mining operations of the defendant coal company.

On this appeal before us, two points were taken on behalf of the appellants the Sunderland Gas Co. First, it was said that the judge was wrong in holding that they had been guilty of any negligence or nuisance, and, secondly, it was said that he ought to have held that the coal company were liable to the plaintiff, so that, even if the gas company were liable, they could recover contribution from their co-defendants. The defendants admitted that they would be liable to the plaintiff, on the principle of *Rylands v. Fletcher* (1), unless they could bring themselves within the exception now established by *Rickards v. Lothian* (2), which they submitted that they had. In regard to their further admission that they were not entitled to support for their gas main as against the coal company, their counsel urged that the admission was only made as between the defendants, and would not affect the position of the coal company *vis-à-vis* the plaintiff. No doubt the plaintiff might have refused to accept the admission, and might have said that he would undertake to prove that the coal company were bound not to withdraw support from the gas main—that is, bound as against the gas company—but it is clear that he did not take up that position, probably for the very good reason that it made his case against the gas company all the easier, and it would not matter to the plaintiff whether he got judgment against both or against only one of the defendants. However, the case was fought throughout as between all three parties on the basis of that admission, and in this court we cannot limit it in the way suggested by counsel for the gas company.

The contention that the gas company are not liable to the plaintiff

is, in our view, almost unarguable. A person who brings a dangerous thing on to his land and allows it to escape, thereby causing damage to another, is liable to that other unless he can show that the escape was due to the conscious act of a third party, and without negligence on his own part. Obviously the burden of showing that there was no negligence is on the defendants, and it is not for the plaintiff to prove negligence affirmatively. The gas company, having, as we must assume, no right of support for their main, were in this position. They must have known that the Maudlin seam, over 6 ft. thick, was being mined in the district, and that subsidence was to be expected. Damage to surface property was no doubt notorious. Probably the results of surface levellings were common property in the town amongst people like engineers and surveyors. If the gas company remained ignorant, they were plainly to blame for not keeping themselves reasonably informed, for they were put on inquiry by the knowledge which they had, and by the absence of any right to expect support. In addition, they were actually warned by previous, and, indeed, by recent, experience of fractures of the pipe in question that subsidence was occurring, but they did nothing. Not only did they take no precautions, but, so far as the evidence went, they never tried to take any. They did not even consider the question whether or not there were any which they could take. If it be the fact that there are none which a gas company can take in any area which is affected by mining subsidence, that fact could have been proved, but it was not. The evidence on this point was wholly confined to discussing whether or not two particular devices—the use of mild steel pipes and the use of flexible joints—were precautions which might have been taken. The prominence of these two suggestions was probably due to the fact that the plaintiff alleged that the use of these materials would have prevented the explosion, a burden he need not have undertaken. The judge found that the use of these things was a precaution which the defendants should have taken, and there was evidence on which he could so find, and the court is not prepared to disturb his findings on this point. However, even if one could say he was wrong on that point, it is clear that the gas company wholly failed to prove that they were not guilty of any negligence, for, as we have already said, this case was left by the gas company in the position that there was no evidence that they did, or tried to do, anything, or even considered whether or not there was anything which they could do. This ground of appeal, therefore, fails.

There remains, then, the question whether or not the judge was right in holding that the coal company were not liable to the plaintiff so that the gas company cannot claim contribution from them. Had it not been for the admission that the gas company were not entitled to support for their mains, some interesting and difficult questions would have arisen, but that admission seems to us to conclude the matter. In carrying out their mining operations which caused the subsidence, the

coal company were committing no wrong towards the gas company. It is said, however, that they were doing something which they knew must cause a danger to persons in the neighbourhood of the main, and therefore they owed a duty to those persons to conduct their operations, lawful though they were, in such a way that no damage would occur, even if it resulted in their being forced to suspend them altogether. We have already pointed out that no duty to the plaintiff is imposed on the coal company by contract or covenant. Can it be said that any duty arises here from some "proximate" relationship due to the circumstances? The legal conception of duty due to "proximity" has been authoritatively laid down by the House of Lords in *M'Alister (or Donoghue) v. Stevenson* (3), and the modern tendency is to enlarge, and not to restrict, the ambit of that duty. The common law must expand to keep abreast of modern life and requirements. Here, however, we find the gas company laying a dangerous thing in ground where they know, not only that they have no right to support, but also that the operations of mining, which are being lawfully carried on, must gradually withdraw that support. It is for them to devise and take what precautions are necessary to keep their imported danger within bounds. *Donoghue's* case (3) shows that a manufacturer of goods may be liable to the ultimate purchaser with whom he has no contractual relationship if the circumstances are that intermediate inspection is commercially impossible between the time when the goods leave the factory and get into the hands of the consumer. In terms of legal relations, the relationship so established between manufacturer and consumer is "proximate." If an inspection by the immediate purchaser from the manufacturer would be the ordinary businesslike procedure, there is no proximate relationship between the manufacturer and the ultimate consumer, but only between the former and the immediate purchaser. Here, the duty being on the gas company to keep safe the dangerous thing which they have introduced into a place which the coal company have a right to let down, we do not see how the latter can be put under a duty to those who are injured by the failure of the gas company to perform their obligation. An entirely different position would have arisen had the coal company been bound to support the main, or had they committed some other tortious act against the gas company, as, for instance, deliberate interference with the main by digging down from the surface underneath it, because that would have been an act which the gas company could not be expected to guard against. This would bring the case within the doctrine of *Hardaker v. Idle District Council* (4), on which counsel for the gas company so strongly relied. The fact is that the gas company laid their main in a place from which, had they thought about it, they must have known that support would ultimately be withdrawn, not as a result of a tortious act, but as a result of the ordinary working of the mine, and, as they had no right to object to this withdrawal, it was for them, and no one else, to take precautions for the safety of the

neighbours. Exactly the same result follows if the case be regarded as one of nuisance. The nuisance was caused by the escape of gas which it was the duty of the company to keep safe. They laid their pipe in a place from which they knew support might be withdrawn, which is much the same as though they had laid it without any support, deliberately

A choosing to take the risk of a fracture.

Before leaving this part of the case, we think it right to say that we do not agree with the view which we understand the judge took as to *Charing Cross, West End & City Electricity Supply Co. v. London Hydraulic Power Co.* (5). We read his judgment as meaning that, even

B if the coal company had tortiously interfered with and broken the main, that case showed that the escape of gas must be regarded as proximately caused by the pressure which the gas company maintained in the pipe, and not by the fracture. We do not think that the court was there laying down any such doctrine, which would certainly appear to have

C startling results. We think that the court meant no more than that the nuisance which resulted from the fracture in that case was the escape of water at high pressure, and that, as the hydraulic company maintained this pressure, they were responsible for the resulting nuisance. They had not in mind the possible liability of another party who by a tortious

D act enabled the water to escape.

It remains only to notice the argument of counsel for the coal company that, as the plaintiff did not appeal against the judgment entered for the coal company, the appeal of the gas company, in so far as it seeks to have them held liable for contribution, is incompetent. We cannot agree.

E The gas company were entitled at the trial, by reason of the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, to show, if they could, that the coal company were liable in whole or in part for the accident so as to obtain the benefit of indemnity or contribution given by the Act. The duty of the court below was to decide on

F the rights of the parties at the date of the writ. The Court of Appeal must rehear the case and give the judgment which ought to have been given below, and, if the judgment below should have been that both defendants were liable, so that a right of contribution would arise, this court has power to enter judgment accordingly, even though the plaintiff

G be content with judgment against one defendant. The result is that no question of contribution arises, and the appeal of the gas company against both the plaintiff and the coal company accordingly fails, and is dismissed with costs.

Solicitors: *William Hurd & Son*, agents for *Molineux, McKeag &*

H *Cooper*, Newcastle-upon-Tyne (for the appellants the *Sunderland Gas Co.*); *Gregory, Rowcliffe & Co.*, agents for *Cooper & Jackson*, Newcastle-upon-Tyne (for the respondents, the *Wearmouth Coal Co., Ltd.*); *Isadore Goldman & Son*, agents for *Lionel Wolfe & Hewitt*, Newcastle-upon-Tyne (for the respondent, the plaintiff).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

GRIFFITHS *v.* HOWARD.[CHANCERY DIVISION (Simonds, J.), **May 24, 1939.**]*Practice—Shorthand note—Request by judge for transcript—Evidence of request for taxing master—Duty of counsel.*

Where a request for a transcript of the shorthand note is made by the judge out of court, counsel in the case should mention the matter to the court and ask for a direction. The matter is thus brought on to the shorthand note, and the necessary evidence of the request is available for the taxing master. Where the request is made in court, it automatically appears on the shorthand note.

[EDITORIAL NOTE.] This is a practice point, and outlines the procedure necessary to secure the inclusion in the shorthand note of the request of the judge for a transcript of the note. The cost of such a transcript has in the first place to be borne by the plaintiff, but it is ultimately costs in the cause. The taxing master, however, has to be satisfied that there has been a request, and this is effected by the request being noted in the shorthandwriter's note, if made in court, or by a note of the matter being mentioned to the court, if the request is made out of court.

AS TO COST OF SHORTHAND NOTE, see HALSBURY, Hailsham Edn., Vol. 26, p. 103, para. 193; and FOR CASES, see DIGEST, Practice, p. 929, No. 4697. See, also, YEARLY PRACTICE OF THE SUPREME COURT, 1939, pp. 1500, 1501.]

APPLICATION as to the costs of a transcript of the shorthand note supplied to the judge by reason of his requiring the same. By a notice issued from the Lord Chancellor's department, an official shorthand note is taken in the majority of cases, and was so taken in this case. The notice includes the following passage :

If the trial judge requires a transcript of any part of the evidence, the transcript required will, unless the judge otherwise directs, be provided and paid for by the plaintiff in the first instance, the cost being part of the costs in the cause.

In the present case, the solicitors for the plaintiff received a message, conveyed to them by the usher of the court, that the judge required a transcript of the note, and it was in due course supplied. The taxing master raised the question whether, in the circumstances, the judge had required a copy within the meaning of the notice.

J. Leonard Stone in support of the application.

J. V. Nesbitt for the respondent.

Stone : The common form order for taxation makes no provision for any such direction by the judge. The taxing master feels that he ought to have some direction or evidence that the judge required the transcript. I think he mentioned a certificate.

SIMONDS, J. : In the present case, it is almost certain that I required a transcript. The costs of it must be costs in the cause, and the taxing master must be so informed. He cannot have a certificate. All that he is entitled to is to be satisfied by proper evidence that the judge has required a transcript. It is desirable in these cases that reference should be made in court to the matter. If the request is made in court, it automatically goes on the shorthandwriter's note. If, as here, it is made out of court, counsel should mention the fact to the court, and

ask for a direction. It might very well be that, after the court has risen, the judge, on looking at his notebook, would consider it desirable that he should have a transcript of the evidence. He could then only communicate with the plaintiffs through his officer or the usher. In that case, it does not get on the shorthand note and it then becomes necessary for
A counsel to mention the matter to the court. The costs in the present instance will be costs in the cause.

* Solicitors: *Cubison & Christie* (for the plaintiff, the applicant); *Piper, Smith & Piper* (for the defendant, the respondent to the application).

B [Reported by T. A. DILLON, Esq., Barrister-at-Law.]

ATTORNEY-GENERAL (AT THE RELATION OF ROCHDALE CORPORATION) v. ROCHDALE CANAL CO.

C [COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.), **May 16, 1939.**]

Railways and Canals—Canals—Supply of water to railway company—Statute restricting supply to mills and works on adjoining lands—Rochdale Canal Act, 1899 (c. cclvii), s. 37.

D A canal company supplied a railway company with water at two points, within the area for which the relators were the water authority, for the purpose of raising steam for the locomotive engines of the railway company. Under the Rochdale Canal Act, 1899, s. 37, the supply of water by the canal company was permitted for the purpose of raising steam in mills or works within 100 yds. of the canal. It was
E contended that it did not matter where the raising of steam took place, provided some part of the works was within that limit, and also that a railway was a works. Alternatively, it was contended that the works consisted of that portion of the railway system which actually received the water:—

F HELD: (i) the phrase "mills and works" meant mills and works where the operation of raising and condensing steam takes place.

(ii) the limit of 100 yds. referred to the situation of the works, and not to the point of supply.

(iii) the phrase "mills or works" referred to physical things to which a local situation can be ascribed, that situation being capable of definition by reference to a measurement in yards.

Decision of BENNETT, J. ([1938] 4 All E.R. 664) affirmed.

G [EDITORIAL NOTE. The question here is purely one of construction, but the decision is of importance, owing to the fact that it is necessary for a railway company to secure an ample supply of water at many points along its line, and in many cases this decision will debar such companies from availing themselves of a very convenient source of supply.

H AS TO POWERS OF CANAL COMPANIES, see HALSBURY, Hailsham Edn., Vol. 27, pp. 334, 335, para. 749; and FOR CASES, see DIGEST, Vol. 38, pp. 401, 402, Nos. 939-941.]

Cases referred to:

(1) *Rochdale Canal Co. v. Manchester Ship Canal Co.* (1901), 85 L.T. 585; 38 Digest 405, 967; *affg.* (1899), 81 L.T. 472.

(2) *Rochdale Canal Co. v. Crawford Spinning Co.* (1908), Unreported.

- (3) *Seton v. Linlithgow Burgh Comrs.* (1900), 2 F. (Ct. of Sess.) 907; 43 Digest 1062, case g.
- (4) *A.-G. v. Liverpool Corpn.*, [1938] Ch. 76; [1937] 3 All E.R. 691; Digest Supp.; 106 L.J.Ch. 296; 157 L.T. 214.
- (5) *R. v. Midland Ry. Co.* (1855), 4 E. & B. 958; 38 Digest 534, 796; 25 L.T.O.S. 114.
- (6) *Brannigan v. Robinson*, [1892] 1 Q.B. 344; 34 Digest 224, 1880; 61 L.J.Q.B. 292; 66 L.T. 647.
- (7) *Martyn v. Williams* (1857), 1 H. & N. 817; 34 Digest 695, 869; 26 L.J.Ex. 117; 28 L.T.O.S. 321.

APPEAL by the defendants from an order of BENNETT, J., dated Nov. 24, 1938, and reported [1938] 4 All E.R. 664, by which order he declared that a certain supply of water given by the defendants to the London, Midland and Scottish Railway Co. was *ultra vires*. The defendants are incorporated under the provisions of the Rochdale Canal Act, 1794. The relators are the water authority for the Rochdale area. The defendants, in addition to their common law rights, which are not in dispute in this case, have certain statutory powers which enable them to sell their surplus water. Those powers are regulated by the Rochdale Canal Act, 1899, s. 37, and it was the true effect of this section which was the matter for decision in this case. The Rochdale Canal runs from Sowerby Bridge to Manchester, and it passes through the Rochdale area. It joins up the Calder Navigation with the Bridgewater Canal. The Bridgewater Canal was taken over by the Manchester Ship Canal Co. in 1885. The Railways Act, 1921, enabled the London, Midland and Scottish Railway Co. to take over the Lancashire and Yorkshire Railway Co. That company was the successor of the Manchester and Leeds Railway Co., and this railway was constructed under an Act of 1836. Prior to this action, the defendants had, at two places within the area of the Rochdale Corporation, been supplying water to the London, Midland and Scottish Railway Co. for the purpose of raising steam in the railway company's engines. One place of supply is near Clegg Hall, where the railway company have a system of pick-up water troughs. The other place is called Nigher Moss, where the railway bridge crosses the canal. The defendants began to give a supply at Clegg Hall in 1887, and that supply was continued until 1896, when the Manchester Ship Canal Co. brought an action to restrain the supply of water to the railway company, and others, on the ground that the Bridgewater Canal Co. was entitled, under statute, to the waste water of the defendants' canal: *Rochdale Canal Co. v. Manchester Ship Canal Co.* (1). By reason of the passing of the Rochdale Canal Act, 1899, the supply of water to the railway company was resumed at Clegg Hall, and continued until 1901, when the railway company developed a supply of their own from a disused colliery shaft. In Oct., 1935, the defendants resumed the supply of water to the railway company at Clegg Hall, and in June, 1936, they began to supply the railway company with water at Nigher Moss. There was an agreed statement of facts.

A. T. Miller, K.C., and Roger W. Turnbull for the appellants.

W. P. Spens, K.C., and Maurice FitzGerald, K.C., for the respondents.

Miller, K.C. : In this case, BENNETT, J., seems to have adopted the view that the word "works" was inadequate to cover the supply to the railway company. It is plain that the supply is intended to be preserved to mills and works for which water is wanted for the purpose of raising steam, provided the mills and works are within 100 yds. of the canal. This limitation enables a list of authorised users to be obtained. These words do not import that no part of the works of the user shall extend more than 100 yds. from the canal, provided some part of the works is within that limit. The word "works" should not be exclusively concentrated upon. The words "mills and works" are as wide as possible for words which will include all persons likely to want water for the purpose of raising steam. The word "works" can cover a railway, and, if that is so, there is no reason in this case for cutting down the wide ambit of the term. In *Rochdale Canal Co. v. Manchester Ship Canal Co.* (1), it was held that waste water meant all water not legitimately needed for the purpose of navigation. The case decided that the defendants could not continue the sale of water, by reason of their earlier obligations to the Bridgewater Canal Co. In that case, the courts had to deal with a 20-yds. limit imposed by the Rochdale Canal Act, 1794, s. 113. There is a similarity between that section and sect. 37 of the 1899 Act. In *Rochdale Canal Co. v. Crawford Spinning Co.* (2), the canal company sought to prevent the use of water by the defendants, and it was decided that the limit of 20 yds. was for the purpose of denoting the people who were entitled to use the water, not the area in which they were entitled to use it. That case is not wholly irrelevant. It shows the intention of the legislature in imposing the limit. In *Seton v. Linlithgow Burgh Comrs.* (3), a local authority was held to be entitled to supply a railway company, having a station within the burgh, with water for its engines. The judge here said that the word "works" was not apt to describe the permanent way of a railway. One has to look at a railway company's establishment as a whole, however. It is an extensive one, but every yard of it can be ascertained, and it is all included in the word "works." In the present case, the word "works" is wide enough to include the railway company. The word covers the whole system of the London, Midland and Scottish Railway Co. All that is necessary is that the works shall be in whole or in part within the limit of 100 yds. Except for the contiguity of the word "mills" in sect. 37, it is difficult to see how the meaning of the word "works" can be limited in the way suggested. [On the definition of the word "works" counsel referred to *A.-G. v. Liverpool Corpn.* (4), *R. v. Midland Ry. Co.* (5), *Brannigan v. Robinson* (6), *Martyn v. Williams* (7), the Rochdale Waterworks Act, 1866, s. 30, the Railways Clauses Consolidation Act, 1845, s. 16, and the Electricity Supply Act, 1882, s. 32.]

Counsel for the respondents were not called upon.

SIR WILFRID GREENE, M.R. : In my opinion, this is a clear case. The facts are fully stated in the statement of the agreed facts and they are summarised in the judgment of the judge, and there is no need for me to repeat them. The whole question depends upon the construction of a few words in the Rochdale Canal Act, 1899, s. 37. At the date of that Act, there was litigation proceeding, as appears from the section itself, **A** between the Manchester Ship Canal Co. and the Rochdale Canal Co. That litigation, as appears from the report of the case, *Rochdale Canal Co. v. Manchester Ship Canal Co.* (1), and the House of Lords book, related, among other things, to the sale by the canal company of waste water—the water not required for its own canal—to a railway company, **B** the predecessor of the London, Midland and Scottish Railway Co., for locomotive purposes, raising steam and so forth. An injunction had been granted which prevented that from being done. I only mention those facts because, in the argument before us, counsel for the appellants placed reliance upon the legal position as it had been ascertained in those **C** proceedings, but, in my judgment, those proceedings, and the position as it stood with regard to them at the date when this Act was passed, really throw no light at all on the question which we have to consider.

Sect. 37 empowered the canal company to supply water from the canal **D** to any person, firm or company for manufacturing, trade or other purposes, not being domestic. If the section had stopped there, I do not think that it could be disputed that the canal company would have been entitled to supply water to any manufacturing concern for manufacturing purposes, or to a railway company for railway purposes. However, the **E** section does not stop there, because it contains a proviso, put in for the purpose, or, at any rate, for the main purpose, of protecting from competition corporations or public bodies carrying on water undertakings. With that object in view, the proviso excludes from the permitted operations of the company the supply of water within the statutory **F** limits of supply of any such corporation or public body. The proviso also prohibits any supply under the powers conferred by the first part of the section which would prevent the company from having enough water for its canal. That is a thing to which I need not refer. However, in this proviso protecting the rights of water undertakings there is inserted **G** again an exception—namely, the supply of water for condensing or raising steam to mills or works within 100 yds. of the canal. The position, therefore, is that, where the canal company wishes to supply water within the area of the water authority, it can only do so if the supply can be brought within that particular exception. **H**

There have been cited to us numerous Acts of Parliament and numerous decided cases in which, in one context or another, the word "works" appears, and it is pointed out that that word is not infrequently used with reference to the physical property of a railway company. For example, in the very Act under which the Manchester and Leeds Railway,

the predecessor of the piece of railway in question here, came into existence, there are references to the railway and other works, a very natural form of words to use in a context such as that of that Act. I do not propose, however, to examine any of those Acts, or any of those authorities, because I find, myself, no help or guidance in considering matters of that kind where, in a totally different context, dealing with totally different matters, the word "works" may appear in a narrower or wider signification, as the case may be. I find the only sure guide to the decision of the present question in the actual language and context of this section itself, and to its construction, with that in mind, I will briefly address myself.

It seems to me that there are three propositions which can be asserted without hesitation with regard to the construction of these words. First of all, the phrase "mills or works" must, I think, mean, and mean only, mills or works in which the operation of condensing or raising steam by means of the water supplied takes place. It is not sufficient, for instance, that there should be mills or works within the 100 yds. That would not justify a supply. If it did, the water supplied in such a case could be taken away and used for condensing purposes miles away from the canal. It seems to me quite clear that the mills or works referred to must be limited to mills or works in which those operations take place, or one of them takes place, with the water which is supplied. The second proposition which I would venture to state in the matter of the construction of these words is that the 100-yds. limit is referable, not to the point of supply, but to the local situation of the mill or works concerned. The third proposition is that the mills or works within this language are limited to actual physical things to which a local situation can be ascribed, that situation being capable of definition by reference to a measurement in yards. Those propositions, if they be right, appear to me to point, and to point beyond possibility of doubt, to definite locally-situated concerns using the water supplied within their own ambit for the purposes indicated, and I cannot myself think of words less suitable to include such a concern as the London, Midland and Scottish Railway Co. I doubt, myself, very much whether the word "works" in its *prima facie* meaning would include such a congeries of physical articles as the London, Midland and Scottish Railway Co. concern. However that may be, counsel for the appellants, when asked what were the works to which this language could be referred in the present case, gave two alternative answers. The first answer was that the works—that is to say, the physical thing which must be found—consisted of the entire system of the London, Midland and Scottish Railway Co., and that, provided one finds, as one does find, that some part of that system is locally situated within 100 yds. of the canal, a supply for any purpose of condensing or raising steam anywhere on that system, whether or not within 100 yds., is permissible under the section. The argument involves the contention that it would be permissible for the

railway company to take into tanks loaded on trucks such water as they pleased, and use it for the purpose of condensing or raising steam on any part of their system. It is no answer to that criticism to say that nobody would do anything so extravagant. It is not necessary to bring in remote parts of the system for testing the matter. I do not apprehend that there would necessarily be anything extravagant in the idea of loading water into tanks and taking it a few miles down the line to a place where no supply was available. Such a thing might easily happen. According to the argument, the place where the condensing or raising of steam takes place need not be within any specified distance from the canal, provided there is within 100 yds. some portion of that physical thing which constitutes the system of the London, Midland and Scottish Railway. That is a construction which I find myself quite unable to accept. It appears to me to be extravagant, and not capable of being extracted from the language used.

The alternative answer which counsel for the appellants gave was to the effect that the works consist of a portion only of the system—namely, that portion which, in reference to any given moment of supply, is in fact receiving and using the water. In the present case, or one of the present cases, it would consist of the reservoir, the tanks, the troughs, the water-towers and the locomotives which use the water. That congeries of physical articles is, on this alternative construction, the works within 100 yds. of the canal to which the supply is given. There, again, a difficulty arises which appears to me to be quite insuperable, because, if counsel for the appellants treats that as the works, he is bound to agree that the act of condensation or raising steam, which takes place by means of the water supplied, need not necessarily take place within the four corners, so to speak, of those works, because the engine, having received the water, may proceed to take it away down the line, and during the course of its run may use it for raising steam the whole way. Then one would get the very curious position that there would be a supply of water for condensing purposes and for raising steam, where those operations might be completed, not within 100 yds. of the canal, but possibly 20, or 30, or 50 miles away, however long it may take for a boilerful of water to be used up. That seems to me to be quite impossible to reconcile with the conception that the mills or works, in which the operation of condensing or raising steam by means of the water supplied is to take place, must be locally situate within 100 yds. of the canal. The real fact of the matter is that the argument must necessarily endeavour to extract from language which, in its ordinary meaning to an ordinary person reading it, applies to quite a different sort of thing, a meaning which is extravagant and far-fetched. I have dealt at some little length with the case, in deference to the argument presented to us by counsel for the appellants, but I must confess that I should have been prepared to accept, without adding anything myself, the conclusion of the judge, who dealt with the matter

with admirable brevity. In my opinion, the appeal fails and must be dismissed with costs.

FINLAY, L.J. : I entirely agree.

LUXMOORE, L.J. : I also agree.

A *Appeal dismissed with costs.*

Solicitors : *Winter & Co.*, agents for *H. A. Kilner*, Rochdale (for the appellants) ; *Sharpe, Pritchard & Co.*, agents for *Harry Bann*, Town Clerk, Rochdale (for the respondents).

B [Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

MAURICE v. GOLDSBROUGH MORT & CO., LTD.

[PRIVY COUNCIL (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Romer), **March 23, 24, May 5, 1939.**]

Privy Council—Australia—New South Wales—Insurance—Fire—Insurance by bailee—Goods held in trust or on commission—Extent of insurance—Profits—Right of bailee to deduct from insurance moneys in respect of commission and charges not earned.

D The appellant, a woolgrower, consigned 123 bales of wool to the respondents, a firm of woolbrokers, and, while lying in the respondents, store, the wool was destroyed by a fire. The respondents, according to the ordinary course of business between them and their clients, were not only to receive the wool, but were also to pay the expense of the carriage to their store, prepare the wool for sale, and sell it for a commission payable by the growers to them. There was a further obligation upon the respondents to insure the wool, and this they did in their own name, insuring it along with the wool of other clients, and charging a flat rate of 1s. 6d. per cent. to the growers. The net proceeds of sale, after deduction of charges and expenses, were payable by the respondents to the growers. At the date of the fire, the respondents had paid the railway charges on the appellant's consignment, and had paid for the insurance during its transit to their store, and, in the account which they rendered after the fire, they claimed to deduct from the amount payable to the appellant, out of the moneys recovered from the insurance company in respect of his wool, in addition to the foregoing charges, two further sums, one for commission on sale and the other for receiving, weighing, lotting, and appraising value, and so forth. The appellant contended that these two sums were not payable, as the sale commission had not been, and could not be, earned, and that, in respect of the other charges, they were deductible from the insurance moneys only in so far as they were referable to receiving the wool, or any other services actually performed :—

H HELD : (i) as the subject-matter of the insurance effected by the respondents was the wool, and a condition of the policy stated that the amount of loss or damage which might be incurred did not include profit of any kind, the respondents could not deduct the sale commission or any charges not actually incurred by them in respect of the wool.

(ii) it was immaterial that, in the circumstances, the appellant received the gross selling value of the goods, whereas, if there had been no fire, he would have received only the net value. Insurance does not always give a perfect indemnity, and, in every case, the rights of the parties must depend on the terms of the contract of insurance.

[EDITORIAL NOTE.] The real contest here is whether the insurance, being in the usual form of cover for bailees and warehousemen, covered the profits on the wool or only the value of the wool. It is held that the profits cannot be covered unless expressly referred to, and in so holding the Privy Council have applied settled principles of insurance law to the facts of this case, though there appears to have been some slight conflict of authority. The concluding passage of the judgment deals with an argument which has presented some difficulty, it being alleged that indirectly the grower is gaining by the happening of the fire. He is receiving, it is said, the gross value of the wool, whereas, in the ordinary course, he would only have received the net proceeds of sale. Upon this, it is pointed out that the position must be governed by the contracts between the parties, and that it is not the function of insurance to provide a perfect indemnity to all parties in every case.

AS TO INSURANCE OF GOODS HELD IN TRUST OR ON COMMISSION, see HALSBURY, *Hailsham Edn.*, Vol. 18, pp. 492, 493, paras. 746-750; and FOR CASES, see DIGEST, Vol. 29, pp. 311-313, Nos. 2568-2579.]

Cases referred to :

- (1) *Mackenzie v. Whitworth* (1875), 1 Ex. D. 36; 29 Digest 93, 506; 45 L.J.Q.B. 233; 33 L.T. 655.
- (2) *Lucena v. Craufurd* (1806), 2 Bos. & P.N.R. 269; 29 Digest 97, 555; subsequent proceedings (1808), 1 Taunt. 325.
- (3) *North British & Mercantile Insurance Co. v. Moffatt* (1871), L.R. 7 C.P. 25; 29 Digest 316, 2602; 41 L.J.C.P. 1; 25 L.T. 662.
- (4) *Waters v. Monarch Life Assurance Co.* (1856), 5 E. & B. 870; 29 Digest 311, 2568; 25 L.J.Q.B. 102; 26 L.T.O.S. 217.
- (5) *London & North Western Ry. Co. v. Glyn* (1859), 1 E. & E. 652; 29 Digest 336, 2718; 28 L.J.Q.B. 188; 33 L.T.O.S. 199.
- (6) *Ebsworth v. Alliance Marine Insurance Co.* (1873), L.R. 8 C.P. 596; 29 Digest 113, 676; 42 L.J.C.P. 305; 29 L.T. 479; *reversd.* by consent (1874), 43 L.J.C.P. 394, n.
- (7) *De Forest v. Fulton Fire Insurance Co.* (1828), 1 Hall, 84.
- (8) *Cochran & Son v. Leckie's Trustees* (1906), 8 F. (Ct. of Sess.) 975; 3 Digest 105, case 311 ii.
- (9) *Stockdale v. Dunlop* (1840), 6 M. & W. 224; 29 Digest 107, 641; 9 L.J.Ex. 83; 7 L.T. 804.
- (10) *Anderson v. Morice* (1875), L.R. 10 C.P. 609; 29 Digest 98, 557; 44 L.J.C.P. 341; 33 L.T. 355; *affd.* (1876), 1 App. Cas. 713.
- (11) *Routh v. Thompson* (1811), 13 East, 274; 29 Digest 89, 471; *previous proceedings* (1809), 11 East, 428.
- (12) *Crowley v. Cohen* (1832), 3 B. & Ad. 478; 29 Digest 103, 609; 1 L.J.K.B. 158.

APPEALS by special leave from (i) a majority judgment of the High Court of Australia (STARKE, DIXON and McTIERNAN, JJ., LATHAM, C.J., and EVATT, J., dissenting), dated Dec. 14, 1937, allowing an appeal upon a special case from a judgment of the Full Court of the Supreme Court of New South Wales (JORDAN, C.J., HALSE ROGERS and BAVIN, JJ.), dated Mar. 9, 1937, and (ii) an order of the Supreme Court of New South Wales, dated Mar. 10, 1938, made pursuant to the decision of the High Court of Australia. The judgment of their Lordships was delivered by LORD WRIGHT.

Wilfrid Barton, K.C., and Kenelm Preedy for the appellant.

A. T. Miller, K.C., and Hon. H. L. Parker for the respondents.

Barton, K.C.: The insurance effected was an insurance of the appellant's chattels, and was not an insurance of the respondents' prospective profits or charges. The amount insured was the market or replacement value of the goods, and not the sale price of them. The respondents can say: "Pay me for what I did before the fire." They cannot say: "Pay me for what I would have done had it not been for the fire." The sale commission deducted by the respondents was never earned, and could never, in the circumstances, have become due. [Counsel referred to *Cochran & Son v. Leckie's Trustee* (8), *Lucena v. Craufurd* (2), *Stockdale v. Dunlop* (9), *Anderson v. Morice* (10), *Waters v. Monarch Life Assurance Co.* (4), *London & North Western Ry. Co. v. Glyn* (5), *North British & Mercantile Insurance Co. v. Moffatt* (3) and *Ebsworth v. Alliance Marine Insurance Co.* (6).]

Miller, K.C.: The contract was that the broker would insure the wool in his own name, and not as agent, and that, in the event of loss, he would put the owner in the same position as that in which he would have been if the sale had gone through. The appellant's real loss here is represented by, and limited to, the net return which he would have received in the ordinary course of business from the sale of his wool, and the payment which the respondents were under an obligation to make to the appellant is limited to the amount which he would have received had the wool been sold. [Counsel referred to *Waters v. Monarch Life Assurance Co.* (4), *Routh v. Thompson* (11), *Crowley v. Cohen* (12), *Mackenzie v. Whitworth* (1), *Ebsworth v. Alliance Marine Insurance Co.* (6), *De Forest v. Fulton Fire Insurance Co.* (7) and *WELFORD AND OTTER-BARRY ON FIRE INSURANCE*, 1911 Edn., p. 30, sect. 5.]

Barton, K.C., in reply, referred to *Ebsworth v. Alliance Marine Insurance Co.* (6).

LORD WRIGHT: The question in this appeal is what are the rights of the appellant as woolgrower and the respondents as woolbrokers in respect of moneys collected by the brokers under insurance policies effected by them on the appellant's wool, which the respondents held in their store at the time when it was destroyed by fire. The respondents as brokers claim to make certain deductions, partly for expenses incurred and services rendered before the fire and partly for prospective profits, such as commission on sale lost by them in consequence of the fire, and for charges or expenses which, but for the fire, would have been earned or expended, and would have been deductible from the proceeds if the wool had been sold in the normal course, instead of being destroyed. The facts are set out in a special case, to which are appended certain questions for the opinion of the court. The Supreme Court of New South Wales answered these questions in the appellant's favour. That decision was reversed by the High Court of Australia by a majority, **LATHAM, C.J.**, and **EVATT, J.**, dissenting.

The wool in question, 123 bales in all, was consigned by the appellant

to the respondents during Sept., 1935, and was lying in the respondents' store when it was destroyed by fire on Sept. 25, 1935. According to the ordinary course of business between the respondents and their clients, the respondents were not only to receive the wool into their store, but were also to pay the expense of the road and rail carriage to the store, to prepare the wool for sale by weighing, lotting, valuing it, and so forth, and to sell the wool for a commission payable by the growers to the respondents. The net proceeds of sale after such deductions of charges and expenses were to be paid by the respondents to the growers. The special case does not in terms say that the respondents were bound to insure the wool, but it is clear, and has been assumed throughout these proceedings, that there was this obligation. The case states that the respondents, in their own name, had insured the appellant's wool and the wool of other clients, charging a flat rate of 1s. 6d. per cent. to the growers. This charge was not based on the actual rate payable under the policies to the insurance companies. A specimen of the ordinary policies effected by the respondents was appended to the case. It was issued by the Western Assurance Co. in favour of the respondents as the insured for the sum of £5,000 for one year, and was against loss or damage by fire or lightning of the property described in the schedule. The description in the schedule was :

... on merchandise the assureds' own property or held by them in trust or on commission for which they may be liable in the event of loss or damage by fire [while it was lying in the respondents' store in Sydney].

The course of business followed by the respondents in these insurances was not to cover specifically any particular lot or lots of wool, but to have a number of policies, each for a lump sum, covering all the wool which the respondents held from time to time, the total cover being reduced or diminished according to requirements at the close of each day. The total amount of the insurance was divided by mutual arrangement between the Western Assurance Co. and other companies, by way of direct insurance and not by way of reinsurance. When the fire occurred, the respondents had expended moneys in respect of the appellant's wool for transport from the station to the store and for insurance in transit, and had charged for insurance at the rate of 1s. 6d. per cent., less 10 per cent. However, in the account which the respondents after the fire rendered to the appellant, headed "Account sales of realisation by insurance," they claimed to deduct from the insurance moneys which they had received in respect of the wool two further sums—namely, £24 15s. for commission on sale, and £36 11s. 10d. for receiving, weighing, lotting, appraising value, etc. These two further sums were disputed by the appellant on the ground, as to the sale commission, that it had not been, and could not be, earned, and, as to the other charges, that they were only deductible from the insurance moneys so far as they were referable to receiving the wool or any other services actually performed. This view was accepted by the Supreme Court. The amount which the

- respondents collected on the insurance policies was £1,980 0s. 7d., which was the figure as estimated by appraisers appointed for the purpose of appraising and valuing the wool, as on the basis of the gross selling price realisable by auction at the date of the fire. The issue in the action was as to the deductions which the respondents were entitled to make from the insurance moneys in settling with the appellant. The policy contained a usual reinstatement clause, and also made it a condition that a claim should be made within 15 days of loss, stating in particular the amount of loss or damage, having regard to the value of the goods at the time of loss or damage, "not including profit of any kind."
- It is convenient first to determine the position between the respondents, as insured, and the Western Assurance Co., as insurers. What that is must depend on the contractual terms embodied in the policies. That the wool was covered by the policies was not in dispute, though there had been no appropriation of the particular parcels as between any of the lump sum or block policies. The sample policy, exhibited to the special case, defines the scope of the insurance. It is necessary, however, in examining the policy, to distinguish between the subject-matter which is insured and the assured's interest in the subject-matter. The subject-matter, for the purposes of the present policy, is the merchandise—that is, the wool—which is insured against the risk of physical loss or damage by fire. While, however, the subject-matter of the insurance is the chattel, the basis of the insurance is that the assured stands in such relation to the chattel that he may be prejudiced by its loss or damage, in accordance with the various principles which have been settled for regulating what constitutes insurable interest. The subject-matter of an insurance must be properly described. Thus, if the subject-matter is a ship, the policy must so describe it, and, conversely, if it is freight which is insured, that must be so described as the subject-matter of the insurance. Similarly—by English law, at least—an insurance described as an insurance on goods, does not cover profits. In *Mackenzie v. Whitworth* (1), BLACKBURN, J., reading the judgment of the court (LORD CAIRNS, L.C., BLACKBURN and BRETT, JJ.), said, at p. 43 :

- Lucena v. Craufurd* (2) has always been treated as deciding that, though profits may be insured, they must be described as such, and we took time in this case, principally with a view to see what were the reasons for this decision, and whether they were applicable to such a case as the present.

- The policy there was a policy of reinsurance. The subject-matter was the ship, which was properly defined. It was held to be unnecessary to define the nature of the assured's interest. The contract was a contract by way of reinsurance. The assured's liability under the original policy gave him an insurable interest in the ship, which was the subject-matter of the insurance. The contract was to indemnify the reassured against all the damage sustained by the ship in consequence of any of the perils insured against, his interest being that he was himself liable to indemnify the original assured. In the policy here in question, the

subject-matter is described as merchandise, and the condition quoted above specifically states that the insured value is not to include profits of any kind. Hence it is the wool, not any profits, which the policy insures. The policy, however, also describes the interest of the assured which is covered as being the assured's own property in the wool, and also wool held by the respondents in trust or on commission, for which they may be liable in the event of loss or damage by fire while lying in the specified stores. That form of cover for the use of warehousemen and other bailees has long been familiar. Its history was discussed in *North British & Mercantile Insurance Co. v. Moffatt* (3). It was there stated in the judgment of the court, at p. 31, that *Waters v. Monarch Life Assurance Co.* (4) and *London & North Western Ry. Co. v. Glyn* (5) were cases in which :

... goods held by the plaintiffs as bailees were insured by them under policies the conditions of which provided that goods held in trust would not be covered by the policies unless they were insured as such. The goods accordingly were insured expressly as goods held in trust by the assured. The offices contended, that as the plaintiffs, as bailees, had no insurable interest in the goods beyond their liens respectively, they could only recover to the amount of such liens. But the court held in each case that the plaintiffs were entitled to recover to the full amount insured, and intimated that the excess beyond the personal interest of the assured would probably be held in trust for the parties really interested, though unaware of the insurance having been effected.

After this, insurance companies limited, as in the present policy, the extent of the risk they were taking. A warehouseman who has assumed the obligation to insure the goods while in his possession has an insurable interest, because he will be bound to answer in damages to the bailor if he has not insured and the goods have been destroyed or damaged, though, apart from the special contract, the warehouseman would not be responsible in respect of goods accidentally destroyed or damaged by fire while in his warehouse. So far as concerns the respondents' claim against the insurers, there was no need to distinguish between the respective interests of the appellant and the respondents in the wool. The respondents were entitled to recover in full from the insurers for the insured value of the wool, which was determined by appraisalment in accordance with the policy as being £1,980 0s. 7d., as stated above. The correctness of that appraisalment being accepted by all parties, the position is for practical purposes the same as if the wool had been originally valued at that figure in the policy. The respondents did not insure as agents for the appellant. They insured the subject-matter, the wool, on account of their own insurable interest in that subject-matter.

The respondents have not disputed the right of the appellant to claim from the respondents an account of the moneys collected under the policy. The dispute, as already stated, is as to what share of these moneys the respondents are entitled to retain. One possible view, suggested by EVATT, J., is that, as the respondents have agreed to insure the appellant's wool, the appellant is entitled to the whole of the moneys collected

- on the policy, though the respondents are entitled to set off, simply as a debt, whatever may be due to them from the appellant. The special case, however, does not set out the bargain as to insurance, and that way of looking at the matter may be disregarded, especially as, in their Lordships' opinion, for reasons to be stated, it would in this case make
- A no practical difference. The appellant rests his case on the ground that the respondents are not entitled to deduct any part of the proceeds of the policy, except to the extent that, at the date of the fire, they had a lien for services rendered or expenses paid. On the other hand, the respondents claim that they are also entitled to deduct the commission
- B which they would have earned and the charges which they would have been entitled to make for receiving, weighing, lotting, valuing, and so forth, just as if the wool had not been destroyed by the fire. They claim that these are profits which they have lost by the fire, and that they had an insurable interest in these profits. That they had an insurable interest
- C in their prospective profits on the wool in store may be conceded, but it was an insurable interest in a different subject-matter—namely, in profits, and not in the wool itself. The policy, as already stated, did not insure profits. If the respondents had desired to insure profits, they might have insured them by an insurance on the profits so described.
- D Perhaps they did, though whether they did or not is immaterial. In a policy such as this, on merchandise, the right to recover must be based on an insurable interest in the goods themselves, whether a special property, like a lien, or the general property, or some other insurable interest, such as liability in case of loss of the goods. The position of
- E the warehousemen is well stated by CROMPTON, J., in *Waters'* case (4), at p. 882 :

I cannot entertain the least doubt that in these policies the words "in trust" are used without any reference to a *subpœna* in chancery. The parties meant to insure those goods with which the plaintiffs were entrusted, and in every part of which they had an interest, both in respect of their lien and in respect of their responsibility to their bailors. What the surplus after satisfying their own claim might be, could only be ascertained after the loss, when the amount of their lien at that time was determined ; but they were persons interested in every particle of the goods.

In the same case, WIGHTMAN, J., says, at p. 881 :

... they [the bailees] had a lien on them [the goods], subject to which they were accountable to the owners who had entrusted them with the goods.

- G These judges are upholding the right of the assured to recover the whole value from the insurers, because of their insurable interest on the ground of either lien or responsibility, the apportionment of what is recovered being left to be settled between bailor and bailees, the bailees' interest
- H being defined by their lien. That this is so in the present case is also confirmed by the terms of the policy, which insures the wool so far as it is the assureds' own property—that is, to the extent of their lien or special property—and, as to the residue, refers to the property as held on trust. In effect, in a policy of this nature, the policy moneys represent the goods when the goods are destroyed by fire, and the rights in

these moneys are apportionable accordingly to the respective interests or property rights in the goods themselves.

The respondents, however, strongly relied on certain observations in *Ebsworth v. Alliance Marine Insurance Co.* (6). In that case, the plaintiffs claimed on a policy on cotton from Bombay to London. The cotton was totally lost by sea perils. The plaintiffs were consignees for sale, and had advanced £3,000 on the security of the cotton, but had insured the whole value, which was £5,000. The jury found a verdict for £5,000, subject to leave reserved to reduce the damages to £3,000 in the event of the court being of opinion that the interest proved and the plaintiffs' right to recover were limited to £3,000. The court was equally divided, BOVILL, C.J., and DENMAN, J., being of opinion that the verdict was right, the plaintiffs not being limited to their own beneficial interest in the goods, KEATING and BRETT, JJ., being of opinion that the plaintiffs were not entitled to recover anything beyond £3,000, being their actual advance. As the court was equally divided, the case was inconclusive, and does not become less so when it is remembered that, when the case came to the Exchequer Chamber, the parties by arrangement agreed that the judgment should be reversed, and the damages entered for the plaintiffs should be reduced to a sum representing the personal pecuniary interest of the plaintiffs, and no other person. How this arrangement came to be made does not appear, nor does it appear how the personal pecuniary interest of the plaintiffs was assessed. It is, however, clear that no question was raised in the case whether the plaintiffs could recover anything beyond their advances, if they were limited to their own beneficial interest. Counsel for the respondents, however, strongly relied on a passage in the judgment of KEATING and BRETT, JJ., at p. 637 :

The next question is, what was the amount of the plaintiffs' insurable interest. If they had any, it would seem to be at least to the extent of £3,000 their advance, and their expenses and expected commission.

As the report shows, however, the only contest was whether they were to recover £3,000 or £5,000. Indeed, two years before, BRETT and KEATING, JJ., along with WILLES, J., had in *Moffat's* case (3) treated the parties' personal interest as limited to their liens on the goods. Counsel for the respondents also relied on a passage from the judgment of BOVILL, C.J., and DENMAN, J., in *Ebsworth's* case (6), at p. 628, quoting from PARSONS ON INSURANCE, 1868 Edn., p. 50, to the effect that the bailee can recover, not only to the extent of his lien for charges, commission, and so forth, but to the full value of the goods, and the balance will be held in trust for the owner of the goods. This cannot mean that he will recover beyond the full value, by adding to it charges and commission. In any case, the statement is expressly limited to liens. Again, at p. 201, the same author is quoted to the same effect. Reference was also made to *De Forest v. Fulton Fire Insurance Co.* (7), a case in the New York court, where the allowance, not only of the bailee's

advances, but also of mercantile commission and charges, was only based on an admission, and was not the subject of decision. Their Lordships find it impossible to recognise these citations as outweighing the authorities quoted above, or as overriding the terms of the policy in this particular case. In America, it seems to have been held in certain cases that a policy on property might cover a right to a certain share in a cargo as profits. However, PHILLIPS ON INSURANCE, sect. 462, states that an insurance on ship or goods specifically, without any indication that another subject is intended, cannot be applied to expected profits. ARNOULD ON MARINE INSURANCE, sect. 241, stated the English rule in the same terms. In their Lordships' opinion, the policy in question here does not cover profits.

It was, however, contended by the respondents that the decision of the Supreme Court of New South Wales would infringe the principle of indemnity, which is the fundamental principle of insurance law. It was said that the appellant was awarded by that decision more than an indemnity, because he got the gross selling value of the goods, whereas, if the goods had not been lost by the fire, the appellant would have received no more than the net proceeds, after deduction of the respondents' charges and commission. There are many answers to this objection. In the first place, insurance does not necessarily give a perfect indemnity, but gives sometimes more and sometimes less. This may happen in several cases, but particularly in the case of a valued policy, where the measure of indemnity is fixed by the value, which is in effect the position under the present policy, as already pointed out. In fact, if there had been no fire, but the wool had been sold in the usual course, the amounts realised might have been either greater or less than the appraisal made actually as at the date of the fire. Again, if it is said that the respondents have, by reason of the fire, lost their commission and charges without being indemnified, the answer is that the policy provided no indemnity for that loss. It is outside the purview of this insurance. Further, if it is said that the appellant gets a sum for the goods which includes the value of the brokers' services, for which he has not paid, but without paying for which he could not have realised the selling price by an actual sale, the answer is that what the policy covers is the agreed value of the wool, and it is immaterial what costs, whether of production or of marketing, go into that value. Thus, for instance, the appraised value is not affected by considering that one lot may have cost more to produce than another. The position, in the event of the loss, must depend on the terms of the contract, and on the value as appraised as determined by the terms of the contract, and, similarly, the apportionment of that value between the appellant and the respondents must depend on the respective rights of property which the parties had in the wool at the date of the fire. In the result, their Lordships are of opinion that the appeal should be allowed and the judgment of the Supreme Court of New South Wales, dated Mar. 9, 1937, should be restored. The

appellant will have the costs of this appeal, and also his costs in the courts in Australia. They will humbly so advise His Majesty.

Appeal allowed with costs.

Solicitors: *Waterhouse & Co.* (for the appellant); *Linklaters & Paines* (for the respondents).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

HILL v. WOLVERHAMPTON CORRUGATED IRON CO., LTD.

[COURT OF APPEAL (MacKinnon and Luxmoore, L.JJ., and Macnaghten, J.), April 26, May 15, 1939.]

Workmen's Compensation—Compensation—Increase in basic rate of wages—Application for review—Increase of more than 20 per cent.—Whether fact that less work available should be considered—Workmen's Compensation Act, 1925 (c. 84), s. 11 (3).

The applicant had been employed by the respondents as a crane-driver. On Mar. 8, 1934, he was seriously injured in an accident, with the result that his right hand was deformed, and he was no longer able to follow his old employment. Before the accident, his average weekly earnings were £2 7s. 7d. After the accident, he was paid compensation of £1 4s. 5d. per week from Mar. 8, 1934, until Nov. 16, 1935. The respondents then employed him on light work, for which he was paid £2 per week, and, in addition, 4s. per week compensation. Since Oct. 25, 1937, they paid him £2 8s. per week and no compensation. On Aug. 29, 1938, the applicant claimed a review of the weekly payments, and contended that, as the weekly wages of crane-drivers throughout the country had been increased by 40 per cent. on June 7, 1937, and by a further 10 per cent. on Aug. 9, 1937, his average earnings during the 12 months preceding the review, had he remained uninjured, would have exceeded his pre-accident average earnings by more than 20 per cent., and that he was, therefore, entitled to a review by virtue of sect. 11 (3) of the Act of 1925. The employers contended that, owing to the fact that there had been less work available for crane-drivers during the 12 months preceding the review, the average earnings of a crane-driver would not have increased by more than 20 per cent. In support of this, they called evidence to show that the average earnings during the 12 months preceding the review of A., who was operating the same crane as that which the applicant had operated, were £2 12s. 8d., and argued that, as this sum did not exceed £2 7s. 7d. by as much as 20 per cent., the applicant was, therefore, not entitled to a review:—

HELD: (i) for the purposes of the review, the applicant must be supposed to have had, during the 12 months before the review, exactly the same amount of employment—whether he was paid by time-rates or by piece-rates—as he in fact had during the 12 months preceding the accident.

(ii) the evidence as to A.'s average earnings was, therefore, entirely irrelevant, and should have been rejected.

[EDITORIAL NOTE.] This question arising under the Workmen's Compensation Act, 1925, s. 11 (3) has not been litigated before, and the matter is decided purely as a question of construction of the section and apart from any decided cases. Where a review is sought by reason of an increase of wages in the employment followed by a workman prior to his accident, the amount that the workman, working the hours that he did then work, would have earned at the higher rate in the 12 months prior to the accident have to be considered and not the amount a work-

man on the same job has earned during the 12 months immediately preceding the date of review.

AS TO REVIEW ON FLUCTUATION OF WAGES, see WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 344, 345; and FOR CASES, see DIGEST, Vol. 34, p. 415, Nos. 3371-3373.]

Cases referred to :

- A (1) *Harris v. Associated Portland Cement Manufacturers, Ltd.*, [1939] A.C. 71; [1938] 4 All E.R. 831; Digest Supp.; 108 L.J.K.B. 145; 160 L.T. 187; 31 B.W.C.C. 434.
- (2) *Anslow v. Cannock Chase Colliery Co., Ltd.*, [1909] A.C. 435; 34 Digest 422, 3431; 78 L.J.K.B. 679; 100 L.T. 786; 2 B.W.C.C. 365.
- B (3) *Jones v. International Anthracite Collieries Co.*, [1919] 1 K.B. 156; 34 Digest 422, 3427; 88 L.J.K.B. 361; 120 L.T. 165; 11 B.W.C.C. 274.
- (4) *Briggs v. Dryden (T.) & Sons, Talbot v. Vickers, Ltd.*, [1925] 2 K.B. 667; 34 Digest 458, 3752; 95 L.J.K.B. 275; 133 L.T. 409; 18 B.W.C.C. 163.

C APPEAL from a decision of His Honour Judge WHITMORE RICHARDS at the Birkenhead County Court, dated Jan. 20, 1939. The facts are fully set out in the judgments.

J. Alun Pugh for the appellant.

R. H. Norris for the respondents.

Pugh : The evidence of the present driver of this crane was irrelevant.

D He was not earning the basic rate because he had been unemployed for 2 weeks and sick for a week. The employers are really bringing in the trade conditions to operate against the workman. They are not entitled to do that. The words "other things being equal" must be read into sect. 11 (3) between the word "have" and the words "been

E greater or less by more than 20 per cent." Otherwise, if a man were employed in a works which was later shut down, he could never get a review at all.

Norris : Those words are not in the section, and ought not to be inserted by the court. The clear object of the section is to compensate

F the workman. Had it not been for this accident, the applicant would have been doing Adams' work. That is why Adams was called. If the court puts in the words asked for, it will be doing what it was said in *Anslow v. Cannock Chase Colliery Co., Ltd.* (2), should not be done. There is no definition of "rates of remuneration" in the Act. It has

G nothing to do with any rate per hour or per piece of work. A man may have to pay something out of his earnings—for example, for help or for explosives. He may get extras—for example, a porter may get tips, or a man may get given a ticket: *Jones v. International Amalgamated Anthracite Collieries Co.* (3). There is nothing in the section

H which entitles the applicant to back-payments, which he is also claiming.

Pugh, in reply : The question of when the higher payments started is dealt with in *Talbot v. Vickers, Ltd.* (4). On July 7, 1938, the applicant could say that for the last 12 months he should have had more, and the increase would date back to July 7, 1937. On Aug. 9, 1937, there was another increase, and he would have to wait till Aug. 9, 1938, until

he could claim. If the rate goes down, the employers can recover the excess. The rate of remuneration which must be considered is that of the whole industry.

MACKINNON, L.J.: In this case, I have had the advantage of reading the judgments prepared by LUXMOORE, L.J., and MACNAGHTEN, J. A I agree with their conclusions, and I do not think it is necessary for me to add anything.

LUXMOORE, L.J.; This is an appeal from a decision of His Honour Judge WHITMORE RICHARDS, dated Feb. 6, 1939. The decision was B given in arbitration proceedings instituted by the applicant workman under the Workmen's Compensation Act, 1925, for the review under sect. 11 (3) of that Act of the weekly payment to be made to him in respect of an accident arising out of and in the course of his employment. The judge refused to review the payment, and dismissed the application. C The applicant has appealed from this refusal, and asks that an award in his favour may be made by this court, or, in the alternative, that the order of the county court judge shall be discharged and the matter remitted to the county court for a re-hearing.

The answer to the question whether the applicant is entitled to have the D weekly payment reviewed depends solely on the true construction of the subsection. It is agreed that the question is novel, in that there is no reported decision dealing with it.

The material facts are as follow. At the date of the accident, the applicant was, and had for some years previous thereto been, in the E employment of the employers as a crane-driver. He was incapacitated by an accident which occurred on Mar. 8, 1934. This accident resulted in deformity of his right hand, so that the applicant is no longer able to follow his old employment. He was paid compensation in respect of his accident at the rate of £1 4s. 5d. per week from Mar. 8, 1934, until F Nov. 16, 1935, and from the last-mentioned date until Oct. 25, 1937, at the rate of 4s. per week. The latter sum was fixed with reference to the work the applicant was then able to perform and the wages actually earned in such work. Both sums were based on the agreed pre-accident average weekly earnings of £2 7s. 7d. per week. Since Oct. 25, 1937, G the applicant has been employed at a weekly wage of £2 8s., and nothing has been paid to him by way of compensation. On Aug. 29, 1938, the applicant instituted proceedings claiming the review of the weekly payment made to him under the Act and its increase upon the basis of the schedule annexed to his application, but this basis was not relied on H in its entirety, the claim put forward at the hearing and in this court being for (i) an increase in respect of the period from June 7, 1938, to Aug. 9, 1938, and (ii) a further increase from Aug. 9, 1938, until further order.

The facts on which the applicant relied as justifying the respective

increases are that on June 7, 1937, the board which regulates the weekly wages of crane-drivers throughout the country increased those wages by the addition of 40 per cent. to the basic rate of £2 8s. 3d. which obtained on Mar. 8, 1934, the date of the accident, and that on Aug. 9, 1937, there was a further increase by the board of the basic rate obtaining at the date

- A of the accident by an additional 10 per cent. making the total increase from Aug. 9, 1937, 50 per cent. of the basic rate. It was contended on behalf of the applicant that, for the purposes of review under sect. 11 (3) of the Act, the actual periods during which the applicant worked in the 12 months preceding his accident should be taken into consideration,
- B the wages earned in those periods being adjusted by substituting for the actual amounts earned (i) for the purpose of the first period of claim—namely, June 7, 1938, to Aug. 9, 1938—sums ascertained on the basis of adding the 40 per cent. increase, and (ii) for the second period of the claim—namely, from Aug. 9, 1938, until further order—sums ascertained
- C on the basis of the 50 per cent. increase.

The employers challenged the propriety of this contention. They claimed that the applicant was not, on the facts, proved entitled to any increased compensation, because the question whether there had been an increase in the applicant's average weekly earnings sufficient to justify

- D the review could only be ascertained by contrasting the applicant's average weekly earnings during the period of 12 months previous to the accident with what his average weekly earnings during the period of 12 months immediately preceding the review would have been having regard to the amount of work available during the last-mentioned period for a crane-driver doing the same class of work as that which the applicant had done during the pre-accident period. In support of this contention,
- E the employers put in evidence to prove the work actually done and the moneys earned by a crane-driver named Adams during a period of 12 months from Sept. 25, 1937, to Sept. 24, 1938. This man was employed
- F by the employers to operate the same crane which had been operated by the applicant during the pre-accident period. Although the higher rates of wages already referred to operated during this last-mentioned period, the average weekly earnings of Adams for the period taken, ascertained in the same manner as were the average weekly earnings of
- G the applicant during the pre-accident period, worked out at £2 12s. 8d. per week. That the average was not higher was due to the fact that less work, from the point of view of time occupied, was done by Adams in the period selected than was done by the applicant in the pre-accident period, although the standard rate of wages had, in the period selected,
- H increased by 40 per cent. and 50 per cent., as already stated. The employers claimed that, as the applicant was not in fact employed in his old employment during the period immediately preceding the review, his average weekly earnings for that period could only be fixed by ascertaining the average weekly earnings of a person in the same grade employed at the same work by the same employer during the pre-review period.

The county court judge accepted the employers' contention as to the proper construction of sect. 11 (3). The question is whether or not he was right in so doing.

The Workmen's Compensation Act, 1925, sect. 11 (3), provides as follows :

Where the review takes place more than 6 months after the accident, and it is claimed and proved that, had the workman remained uninjured and continued in the same class of employment as that in which he was employed at the date of the accident, his average weekly earnings during the 12 months immediately preceding the review would, as a result of fluctuations in rates of remuneration, have been greater or less by more than 20 per cent. than his average weekly earnings during the 12 months previous to the accident (or if the weekly payment has been previously varied on a review during the 12 months previous to that review or the last of such reviews), the weekly payment shall be varied so as to make it such as it would have been if the rates of remuneration obtaining during the 12 months previous to the review had obtained during the 12 months previous to the accident. For the purposes of this subsection "review" includes a review under the provision of any Act repealed by this Act corresponding to this section.

It is true that the subsection provides that two things should be contrasted—namely, (i) the applicant's average weekly earnings during the period immediately preceding the review, and (ii) his average weekly earnings during the 12 months previous to the accident, but it is essential to ascertain on what basis "his average weekly earnings" are to be ascertained. Sect. 9 of the Act provides by subsect. (1) that the compensation, where total or partial incapacity for work results from an injury, shall be by way of weekly payment, and that the amount of such weekly payment shall be calculated in accordance with "rules hereinafter contained," subject to certain provisos to which it is material to refer. The rules with regard to total and partial incapacity are set out in the following subsections. It is not necessary to read these subsections. It is sufficient to say that the calculation in each case is based on the injured workman's "average weekly earnings" during the previous 12 months—that is, the 12 months preceding the accident—if the workman was so long employed, but, if not, then on his earnings for any less period during which he was in the employment of the same employer. Sect. 10 of the Act lays down rules for the computation of "earnings" and "average weekly earnings" "for the purpose of the provisions of this Act." The first rule is in general terms :

... average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated.

This is followed by a proviso that, where, by reason of the shortness of the time during which the workman was employed by his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to other methods of computation. There are two alternative methods. The first is to ascertain :

... the average weekly amount which, during the 12 months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer ...

The second method comes into operation only if there is no person in the

same grade employed at the same work by the same employer. In that case, it is necessary to ascertain, and to have regard to, the "average weekly amount" earned by a person in the same grade as the injured workman employed in the same class of employment in the same district.

- By whatever method the average weekly earnings are to be ascertained,
- A however, the two decisive factors in arriving at the average are the wages earned and the number of weeks worked, omitting weeks where no work was done, owing to absence due to illness or other unavoidable cause. If during the 12 months no work was done for part of the period because there was no work available during that part of the period, this
- B part is not excluded in arriving at the average, and consequently there may be no obvious relationship between the rates of weekly wages obtaining during the 12 months and the average weekly earnings during the same period. The average weekly earnings ascertained under sect. 10 of the Act vary in relation to the actual period during which work was
- C done, including periods when no work was done because none was available. Sect. 11 (3), while directing that two particular periods shall be contrasted, provides that the difference in the average weekly earnings in those periods is to be the result "of fluctuations in the rates of remuneration." This appears to me to exclude from consideration any alteration
- D due to the time factor. On this construction, the phrase "rates of remuneration" requires to be read as being equivalent to rates of wages. It was argued on behalf of the employers that this was not the correct construction, because, although the phrase is not actually used in any other part of the Act, there are to be found in sect. 10 references to "the
- E rate per week at which the workman was being remunerated" and to "the rates of remuneration," and that such references are synonymous with "average weekly earnings." In considering the meaning of this phrase, it is, I think, legitimate and proper to bear in mind that a general rise or fall in wages has always been held to constitute a change of cir-
- F cumstances within the meaning of the Workmen's Compensation Act, 1906: see WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., p. 333, and the cases there cited. Bearing this in mind, I think that it is impossible in the subsection under consideration to construe the phrase "rates of remuneration" as equivalent to "average weekly earnings,"
- G and this is made reasonably clear from the direction contained in the last sentence of the subsection—namely, that the weekly payment (that is the weekly payment to the workman based on the pre-accident average weekly earnings) shall be varied so as to make it such as it would have been if the rates of remuneration (that is, the rates of wages obtaining
- H during the 12 months previous to the review) had obtained during the 12 months previous to the accident. This direction, in conjunction with the direction that the increase or decrease in the average weekly earnings, as the case may be, is to be the result of fluctuations in rates of remuneration, excludes from the consideration any alteration in the average weekly earnings resulting from a difference in the time factor which

would otherwise be applied in ascertaining the average weekly earnings during the two periods of time to be contrasted. It appears to me that the construction contended for by the employers and accepted by the county court judge gives no meaning to the last sentence of the subsection, and ignores it.

In my judgment, the order of the county court judge must be discharged. A
On the construction which I have placed on the subsection, the matter is really one of arithmetic. I am not sure that the necessary material for making the calculations was before the county court. If the necessary material is available, no doubt the parties will be able to agree as to the figures. If they can do so, they should be inserted in the order of this court, and there will be no necessity for the case to be remitted to the county court. If, however, the figures cannot be agreed, the case must be sent back to the county court for the proper order to be made on the footing of the construction placed on sect. 11 (3) by this court. The respondents must pay the costs here and below. B C

MACNAGHTEN, J. : On Mar. 8, 1934, the applicant Albert Victor Hill, who was employed by the respondents, the Wolverhampton Corrugated Iron Co., Ltd., as a crane-driver at their Mersey iron works, Ellesmere Port, Wirral, in Cheshire, and had been so employed for a number of years, was so seriously injured by an accident arising out of and in the course of his employment that he is permanently disabled from doing work as a crane-driver. His pre-accident average weekly earnings were £2 7s. 7d. From the date of the accident—namely, Mar. 8, 1934—to Nov. 16, 1935, the respondents paid him compensation at the rate of £1 4s. 5d. per week. From Nov. 16, 1935, to Oct. 25, 1937, the respondents employed him on light work at a weekly wage of £2, and gave him in addition 4s. per week by way of compensation. Since Oct. 25, 1937, the respondents have employed him on light work at a weekly wage of £2 8s., and have made no payment at all by way of compensation, because that sum exceeds his pre-accident average weekly wage of £2 7s. 7d. D E F

From time to time since the date of the accident, increases in the rates of wages payable to crane-drivers have taken place, such increases amounting altogether to no less than 50 per cent. on the basic wage obtaining in that occupation. Accordingly, on Aug. 29, 1938, Hill applied to the Birkenhead County Court for a review of the weekly payment to which he was entitled as compensation for the disability caused by the accident. The application was made under the Workmen's Compensation Act, 1925, s. 11. Sect. 11 (1) provides that any weekly payment may be reviewed at the request of either the employer or the workman, and that, on such review, it may be ended, diminished or increased. Sect. 11 (3) provides that, when the review takes place more than 6 months after the accident, then, subject to the conditions set out in that subsection, the weekly payment shall be varied so as to make it such as it would have been if the rates of remuneration obtaining during the 12 G H

months previous to the review had obtained during the 12 months previous to the accident. The county court judge dismissed the application with costs, and this is an appeal by Hill against his decision. The question at issue on the appeal is the true construction of sect. 11 (3) of the Act.

- The Act of 1925 codified the law relating to workmen's compensation
- A which was then in force, and sect. 11 (3) re-enacts, with immaterial verbal alterations, the provisions contained in the Workmen's Compensation Act, 1923, s. 15. Those provisions were not the first which Parliament made for the case where changes had taken place in rates of wages after an accident had happened and a right to compensation had arisen. Fluctuations in rates of wages due to the War had come to an end, and in many trades, and especially in what were called the unsheltered trades, rates of wages had fallen very considerably. It was in these circumstances that the War Addition Acts were repealed and the provisions now contained in the Workmen's Compensation Act, 1925, s. 11 (3),
- C were enacted. It was said in the course of the argument on behalf of the respondents that the provisions of sect. 11 (3) are hard to understand, and that their meaning is obscure, but I venture to think that, if the advice recently given in *Harris v. Associated Portland Cement Manufacturers, Ltd.* (1), at p. 89 ([1938] 4 All E.R. at p. 842), by LORD WRIGHT be followed,
- D and attention be directed to the words of the Act itself, the meaning of this particular subsection—whatever may be said in criticism of other provisions of the Act—is quite plain and simple.

- Sect. 1 of the Act confers on a workman who suffers injury by accident arising out of and in the course of his employment the right to compensation from his employer. Sect. 9 provides that the compensation is to be a weekly payment, the amount of such payment depending on the workman's average weekly earnings during the 12 months previous to the accident. Sect. 10 sets out the rules for determining his pre-accident average weekly earnings. In view of the provisions of those sections,
- F there seems to be no difficulty in understanding the meaning of sect. 11 (3). That subsection deals with the case where there has been a considerable change since the date of the accident in the rates of remuneration paid to workmen engaged in the same class of employment as that of the injured workman, and it provides that, if the workman had remained uninjured,
- G and had continued in the same class of employment as that in which he was employed at the date of the accident, and if in that case his average earnings during that 12 months immediately preceding the review would, as a result of fluctuations in rates of remuneration, have been greater or less by more than 20 per cent. than his pre-accident average weekly
- H earnings, the weekly payment is to be varied :

. . . so as to make it such as it would have been if the rates of remuneration obtaining during the 12 months previous to the review had obtained during the 12 months previous to the accident.

The fluctuations may be upward or they may be downward. If the rates rise sufficiently, the workman can obtain an increase of the weekly

payment. If they fall sufficiently, the employer can obtain a diminution of it. It is difficult, I think, to misunderstand these provisions. We were told that, copious as the litigation about other provisions of the Workmen's Compensation Acts has been, this particular subsection has never before been the subject of any litigation at all, and it may be that this is the first time that anyone has been able to misunderstand it. The subsection requires that the pre-accident average weekly earnings of the injured workman should be compared with what would have been his average weekly earnings during the 12 months preceding the review if, during that period, he had been employed in the same class of employment as that in which he was employed at the date of this accident. This comparison must be made in order to ascertain whether or not the latter would be greater or less than the former by more than 20 per cent. as a result of fluctuations in the rates of the remuneration of workmen engaged in that class of employment.

It was said in argument for the respondents that the subsection is obscure because it does not state in express terms the amount of employment which the disabled workman is to be supposed to have had during the 12 months preceding the review. It seems obvious, however, that he must be supposed to have had during the 12 months preceding the review exactly the same amount of employment—no more and no less—as that which he in fact had during the 12 months preceding the accident. Unless that supposition be made, it would not be possible to ascertain the result of the fluctuations in the rates of the remuneration. When, as in this case, the workman was paid by time-rates, he must be supposed to have worked for the same amount of time during the 12 months preceding the review as that for which he had in fact worked during the 12 months preceding the accident. Where the workman is paid by piece-rates he must be supposed to have done the same amount of work during the pre-review 12 months as that which he in fact did during the pre-accident period of 12 months. This simple and—as it seems to me—obvious meaning of the subsection did not, however, commend itself to the county court judge. It so happened that, during the 12 months ending Sept. 17, 1938, a man named Adams operated the crane which was driven by Hill at the date of the accident, and that the wages of Adams during that period amounted to £136 17s. 2d., giving an average weekly wage of £2 12s. 8d. It was urged before the county court judge, as it was urged before us, that the pre-accident average weekly earnings of Hill—namely, £2 7s. 7d.—ought to be compared with the average weekly earnings of Adams during the 12 months ending Sept. 17, 1938—namely, £2 12s. 8d.—and that, since £2 12s. 8d. does not exceed £2 7s. 7d. by as much as 20 per cent., Hill's claim for a review of his weekly payment failed. This contention was accepted by the county court judge. In my opinion, the wages actually earned by Adams have no bearing on the matter at all, and the evidence as to his average earnings ought to have been rejected as wholly irrelevant. In view of the evidence given as to the rise in the

rates of remuneration of crane-drivers between the date of the accident and the date of the application for a review, it seems clear that Adams must have worked for less time during the 12 months previous to Sept. 17, 1938, than Hill worked during the 12 months previous to his accident. I therefore agree that the appeal must be allowed, and the case must go
 A back to the county court judge for him to make the several variations of the weekly payment to which Hill is entitled in accordance with the proved fluctuations of the rates of remuneration, unless the parties agree between themselves what those variations should be.

Appeal allowed with costs.

B Solicitors: *Pattinson & Brewer* (for the appellant); *Berrymans* (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

C *Re* MACLENNAN, FEW v. BYRNE.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.J.J.), **May 23, 24, 1939.**]

D *Annuities—Annuity of clear sum after “deduction of income tax”—No reference to standard or current rate of tax—Rate computed in relation to reliefs and allowances.*

E Under the will of the testator, the appellants were entitled to an annuity of £250 each. Under the same will, the testator's widow was entitled to an annuity of £3,000, and was also entitled for her life to the residue of the income of the testator's estate. By a deed, dated Oct. 16, 1930, entered into by way of family arrangement pursuant to an order of the court, the testator's widow charged the residue or balance of the annual income of the testator's residuary estate, after providing for the annuities bequeathed by the will, including her own, with the payment of such an annual sum as, together with the amount of the annuity of £250, would, after deduction of income tax but not sur-tax, leave in the hands of each of the annuitants the sum of £500 clear of all deductions for income tax but not sur-tax. It was contended that, in ascertaining the sum which the annuitants were entitled to receive under the deed, no account should be taken of any reliefs to which they might be entitled under the Income Tax Acts, but that they were entitled to retain for their own use any sums so recovered :—

G **HELD** : the requirement of leaving in the hands of each annuitant the sum of £500 pointed to a final result, and the sum to which the annuitants were entitled was a clear sum of £500 after deduction of income tax and after the repayment by them of any reliefs recovered.

Decision of BENNETT, J. ([1939] 1 All E.R. 587) affirmed.

[**EDITORIAL NOTE.** The form of clause generally used in the case of a grant of an annuity free of tax is well-known, and refers to deduction of tax at the current
 H rate for the time being or at the standard rate. In the present case, the clause has no reference to the current or standard rate, and the question was asked whether the deduction was computable in relation to all reliefs and allowances to which the annuitant was entitled. This question is answered in the affirmative.

AS TO TAX-FREE ANNUITIES, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-217, paras. 386-389; and FOR CASES, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.]

Cases referred to :

- (1) *Re Pettit, Le Fevre v. Pettit*, [1922] 2 Ch. 765; 39 Digest 167, 587; 91 L.J.Ch. 732; 127 L.T. 491.
- (2) *Re Jones, Jones v. Jones*, [1933] Ch. 842; Digest Supp.; 102 L.J.Ch. 303; 149 L.T. 417.

APPEAL by the defendants J. E. B. Boyd and D. J. H. MacLennan from an order made by BENNETT, J., dated Feb. 17, 1939, and reported [1939] 1 All E.R. 587. The notice of appeal asked that the judgment be reversed or varied so far as it declared that, upon the true construction of the deed of charge, each of the defendants Juanita Elaine Baird Boyd and Donald James Henry MacLennan is entitled to be paid such a gross sum as, when added to the annuity of £250 given to her and him by the will and codicils of the testator Donald MacLennan, will leave in his or her hands a clear sum of £500 after payment of the income tax to which he or she is assessable in respect of a gross annual sum which, after deduction therefrom of income tax (calculated in accordance with the decision in *Re Pettit, Le Fevre v. Pettit* (1)), will leave a net sum of £500, and that instead it may be declared that, upon the true construction of the deed, each of the defendants Juanita Elaine Baird Boyd and Donald James Henry MacLennan is entitled to be paid such a gross annual sum as, when added to the annuity of £250 given to her and him by the will and codicils of the testator, will leave a net sum of £500 after deduction of income tax at the standard rate from the gross annual sum and the annuity of £250.

Raymond Needham, K.C., and *H. O. Danckwerts* for the appellants.

A. H. Droop for the trustees.

R. F. Roxburgh, K.C., and *B. G. Burnett-Hall* for Lady Byrne and a mortgagee.

E. B. Stamp for two other mortgagees.

Needham, K.C.: This is a different case from *Re Pettit, Le Fevre v. Pettit* (1). It comes within r. 23 of the income tax rules. There was to be a basic payment, and, on the authorities, and according to the practice, it would be paid after deduction of tax. In such a case, the annuitant would not be liable to make a payment back. The mistake is in treating the present case as a free-of-tax case. It cannot be a free-of-tax case, because r. 23 (2) precludes that altogether. When one gets the conception of a gross sum as the dominating factor, one is outside the case of *Re Pettit, Le Fevre v. Pettit* (1). The present case involves the construing of a deed, and not a will. One gathers that a will is construed a little more widely than a deed is. In construing a deed, one is struck at once by r. 23 (2) of the income tax rules. The point is a short one, and it is whether or not the draftsman has created a free-of-tax provision. It is important to bear in mind the whole of the operative provisions. What is charged with the payment of the annuities is the balance of the annual income arising or accruing during the lifetime of Lady Byrne. That provision clearly points to what the trustees have

to do to meet the various obligations which arise. A free-of-tax provision can be created only by plain words. The words "but not sur-tax" do not alter the meaning of the earlier words. They merely emphasise the fact that the income should be there after deduction of income tax but not sur-tax, and the words do not mean that there shall be any repayment. The words mean that there shall be £500 in cash in the hands of the annuitants. In *Re Jones, Jones v. Jones* (2), the question was whether or not the will provided a free-of-tax income.

A *Danckwerts*: The case depends upon the construction of the provisions in the deed. In the case of a will, by using the words "free of income tax," one gets the result which was held good in *Re Pettit, Le Fevre v. Pettit* (1). In construing these provisions, the meaning depends to some extent where one puts the emphasis. If the emphasis is put upon the words "leave in her hands," it means the sum with which the annuitant will be left after all deductions have been made. It is not permissible, however, to adopt that construction. "Deduction" must refer to the annuity, and it must refer to what is done by those who pay the annuity. If the word "sur-tax" were not there, no difficulty would have arisen. The word "deductions" means deductions made when the annuity is paid, and the words cannot be construed so as to bring in something which is allowed to the recipient afterwards by a different procedure.

D *Roxburgh, K.C.*: On behalf of the appellants, the court has been invited to put a certain construction upon the deed because of r. 23 of the income tax rules. That, however, is a fallacious rule of construction. It is a method which has been attempted many times in cases in which the rule against perpetuities has been in question. There is the highest authority for saying that it is a wrong rule of construction. In the present case, the deed must be construed without any reference to r. 23. Although r. 23 may operate to reduce the burden resting upon the persons who make the payment, it can never operate to increase that burden. So far as construction is concerned, I am entitled to the principle of construction which is applicable to a will and to a deed of family arrangement. There are three reasons why, as a matter of construction, this deed means that the sum to be considered is the sum which is left in the hands of the recipient after all adjustments have been made between the annuitant and the revenue authorities with regard to income tax. First, there is the reference to sur-tax and its bearing upon the meaning of the word "deduction." It is inconceivable that the trustees could deduct the sur-tax. The word "deduction" points to the final result. Secondly, there is the use of the words "at the standard rate." This cannot refer to sur-tax, because sur-tax is personal, and there is no standard rate. The third reason is found in the plain words "leave in her hands the sum of £500 clear of all deductions" in respect of income tax. If the annuitant receives £500, and is in a position to recover tax from the Inland Revenue authorities, there is left in her hands more than £500. That is the basis of the judgment of ROMER, J., in *Re Pettit*,

Le Fevre v. Pettit (1). BENNETT, J., held that the reasons in that case covered the present case. That is right as being the plain signification of the words which have been used.

Needham, K.C., in reply.

SIR WILFRID GREENE, M.R. : The question raised by this appeal is A
a question of construction arising under a deed dated Oct. 16, 1930. Its decision necessarily depends, as so often happens in cases of this kind, upon rather fine distinctions of language, but that is inevitable, because, in construing documents, each word used by the settlor—or B
the testator, as the case may be—must be given its true and proper meaning in the context, and it is not legitimate for the purpose of construction to treat phrases used in the document as though they had been differently expressed. Accordingly, what we have to do is to examine the precise language of this document and place upon it the proper construction in relation to the particular subject-matter with which it deals. C

Under the will of the late Mr. Donald MacLennan, whom I will call the testator, his children—the appellants, Mrs. Boyd and her brother—were D
entitled to an annuity of £250 each. These annuities were not given free of income tax; and, accordingly, the trustees of the will, on paying them, would on ordinary principles pay them less tax, which they would deduct. Under the same will, the testator's widow, now Lady Byrne, was entitled to an annuity of £3,000, and was also entitled for her life to the residue of the income of the testator's estate.

The deed of Oct. 16, 1930, was entered into by way of family arrangement pursuant to an order of the Chancery Division of Oct. 1, 1930. I need not refer at any length to the deed. It is sufficient if I read the E
covenant in the case of one of the annuitants, Mrs. Boyd, on which the present question arises. The covenant in respect of the other annuitant, Mr. MacLennan, is to the same effect. Under the deed, Lady Byrne charges the residue or balance of the annual income of the testator's residuary estate, after providing for the annuities bequeathed by his will, including her own, with the payment by the will trustees, in priority F
to all other payments thereout, and as a first charge thereon, of the following sums to rank *pari passu* for the benefit of Mrs. Boyd and Mr. MacLennan. That is to say, the provision with regard to Mrs. Boyd G
is this :

First such an annual sum as together with the amount of the annuity of £250 payable to or for the benefit of Mrs. Boyd under the will of the testator would (if such annual sum and annuity respectively were payable to Mrs. Boyd absolutely) after deduction of income tax but not sur-tax leave in her hands the sum of £500 clear of all deductions for income tax but not sur-tax.

The substance of the controversy which now arises between those two H
annuitants and Lady Byrne, who is entitled to the rest of the income, is as follows. It is said on behalf of the annuitants that, in ascertaining the sum which they are entitled to receive under this deed, no account is to be taken of the circumstance that, under the provisions of the

Income Tax Acts, they are entitled to certain reliefs. In other words, when they come to claim those reliefs, and the repayment of tax to which they are entitled in respect thereof, they are entitled to keep for their own use any sums so recovered from the Inland Revenue. On behalf of Lady Byrne, it is said that any sums so recovered must go back to the trustees in order to prevent the annuitants from receiving more than what it is said they were entitled to receive—namely, an ultimate clear sum of £500, after all income tax liability as between them and the Revenue has been cleared up and settled. BENNETT, J., answered the question in favour of Lady Byrne, and, in my opinion, the answer which he gave was the correct one. The question, as I have said, is a question of construction of a few words in this deed, but, before I come to examine those words, it is necessary to make a few observations as to the relevant subject-matter with which those words are concerned, in so far as it is to be found in the provisions of the Income Tax Acts.

At the date when the deed was executed, the Finance Act, 1927, was in force. That Act, as is well known, introduced certain new principles into income tax law. For the present purposes, only two matters need be mentioned. The first is that the sum which the payer of an annual sum out of income brought into charge is entitled to deduct from the annual payments which he makes is thenceforward to be a sum equal to income tax at the standard rate which was first introduced by the Act of 1927. That, then, since 1927, is the right of the payer of such an annual sum—namely, to make a deduction at the standard rate.

The other matter which it is perhaps important to have in mind—although it may be that the change is not, for a purpose such as the present, really one of substance—is that the relief which persons entitled to relief under the Acts may claim is to be provided for them, not, as previously was the case, by means of deduction from assessable income, but by means of relief from income tax by way of a deduction from the amount of income tax which the individual is chargeable. The position therefore is that, although the payer of an annual sum to which the All Schedules Rules, r. 19, applies is *prima facie* entitled to make the deduction at the standard rate, the amount so deducted (which, of course, is deducted in respect of the recipient's tax) is not the amount which the recipient has to pay for tax, because he is entitled, under the provisions of the Finance Act, 1927, s. 40, to have his income-tax liability brought to its proper figure by finding out what deduction from the tax to which he is liable should be made in respect of the relief to which he is entitled. The ultimate settlement, therefore, of the income-tax liability of a payee under a covenant to pay an annual sum is only reached when the reliefs have been allowed and the amount has been quantified and the ultimate settlement of the amount of tax to which he is in law liable has been ascertained.

One more matter must be borne in mind in approaching the words in question. It is, of course, a truism, but it is well to state it—namely,

that, in the matter of sur-tax, there is no question, and never can be a question, under the present system, of any deduction being made by the person making an annual payment. Sur-tax is a matter which rests entirely between the taxpayer and the Revenue. I have not thought it necessary to read the All Schedules Rules, r. 19. All that I need say about it is that the words which are used therein to describe the permitted action of the payer are the words "deduct and retain thereout"—that is to say, out of the gross sum which falls to be paid. A

Bearing those considerations in mind, I turn to consider the actual language of this document. In the simple case of a covenant to pay an annuity, with nothing more, the payer is not concerned with the tax liability of the recipient, save in the sense that in making the payment, he is entitled to deduct tax at the standard rate, and the recipient is then at liberty to claim relief from the Revenue and keep whatever sum he may recover. The language of any particular provision, however, may alter that state of affairs. In order to avoid the difficulty and inconvenience caused by the provision in r. 23 (2) which prohibits agreements for payment of annual payments in full without allowing deductions, the well-known device has been used, in the case of documents *inter vivos*, of providing for payment of such a sum as, after deduction of income tax at the standard rate, will leave a clear sum of a stated amount. Such a covenant is in truth nothing more nor less than a covenant to pay a gross sum. It is only a covenant to pay a gross sum which is permissible, in view of r. 23 (2). The only difference between such a case and the case of a covenant to pay a named sum is that the gross sum can only be ascertained by taking into account the factor stated. It is really a covenant to pay $\text{£}x$, and the value of x has to be ascertained by taking the net figure which is mentioned in the covenant and applying the standard rate of tax at the relevant time, and by that method the actual gross sum is ascertained. In such a case, where the language used is what I have described, the directions given for the purpose of ascertaining what that gross sum is to be make quite clear what factors are to be taken into account in arriving at it, and the tax factor which is to be taken into account in such a case is the standard rate of tax, and nothing else. It is clear, however, that a covenantor, if he is so minded, may go a step further, and, by appropriate language, may provide that the sum of $\text{£}x$ shall be arrived at by taking into account, not merely the factor of the standard rate of income tax, but that factor adjusted by bringing into account also any recoveries which the payee, as a person entitled to relief, may be able to claim. If language of that character has been used, effect must be given to it. The real question in the present case is whether or not, in arriving at the figure of a gross sum of $\text{£}x$ which this document is contemplating, the reliefs to which the payee is entitled are to be brought in as a figure in ascertaining the amount of x . B C D E F G H

With those preliminary observations, what I have to say on the actual

language used can be said quite shortly. It is perfectly true that the word "deduction," taken by itself, would appear to point to the act of deduction as the only relevant matter to be taken into account, and, if that were the true view, the result would be that the only tax factor which would come into calculation would be the factor of standard rate of tax, but I find it quite impossible to give to the word "deduction" that limited meaning. First of all, the phrase used is "after deduction of income tax" (I may say in passing it does not say "income tax at the standard rate") "but not sur-tax." It is clear, therefore, from those words, that the parties to this document are contemplating an annual sum in respect of which, but for the provisions made, it would be possible to say that it is liable to be diminished by reason of the income tax and sur-tax liability of the recipient, and the language shows that, of those two possible methods of diminution, the only one to which regard is to be paid is that relating to income tax. The phrase "deduction of income tax but not sur-tax" is repeated in a different form at the conclusion of the paragraph, because the sum of £500 is to be a sum clear of all deductions for income tax but not sur-tax. That language again appears to me to show that, in deciding whether the annuitant has received what is due to her under the deed, her liability to income tax is to be regarded, but not her liability in respect of sur-tax. The only way in which her income can be said to be liable to deduction in respect of sur-tax is by reading the word "deduction," not as counsel for the appellants would have us read it—namely, as an echo of the word which appears in r. 19—but as referring to the diminution of the recipient's income to which she is liable by reason of these taxes.

A further matter which appears to me to confirm what I have said is the use of the words "leave in her hands." Those words, coupled with the following words—"clear of all deductions for income tax but not sur-tax"—seem to me to contemplate the final result of the transaction, and to be speaking of the sum which is left in her hands and which she can use after all income tax, but not all sur-tax, claims which may arise in connection with it have been satisfied. The words "leave in her hands" seem to me to point to a final result. There can be no question that, if the contention of the annuitants is right, the sum which will be left in their hands after the income-tax questions have been decided and finally settled and adjusted will be in excess of the stated £500, because they will have received £500 clear from the trustees and they will then have recovered from the Revenue that part of the tax already paid by the trustees in respect of their annuities which, in the result, turns out to be an over-payment. As I have already pointed out, if a payer of income tax has suffered tax by deduction, and is entitled to relief, it means that he has borne more tax than he is liable to pay. If, by the machinery of the Income Tax Act, the Revenue gets a flat rate of tax by deduction, it does not alter the circumstance that, when it does so as between itself and the payee, it is getting more than it is

entitled to. However, that is mere machinery, and the adjustment is made and the tax brought back to its proper level by means of claims to relief, and consequential repayment. Taking the language of this deed, and giving, as I have endeavoured to give, full effect to every word which the parties have used, I have come quite clearly to the opinion that the construction adopted by the judge was the right one. A

I cannot conclude without making reference to two authorities which have a bearing on this matter. The first one is a decision of ROMER, J., as he then was, in *Re Pettit, Le Fevre v. Pettit* (1). That was a case of an annuity given under a will free of income tax, and the question arose as to whether the relief to which the annuitant was entitled enured for the benefit of the trustees or whether she was entitled to keep the proceeds of it herself. With regard to the nature of the claim to relief, ROMER, J., stated the effect of the right to relief at that date (this was before the Act of 1927) to be that the annuitant was not liable, in respect of her income, to the full rate of income tax. In substance, therefore, he was treating the provisions as to reliefs which then existed as being to the same effect—at any rate for his purposes—as those which at present exist under the Act of 1927. However, the reasoning by which he arrived at the conclusion he did—namely, that the annuitant was bound to account to the estate for the sum recovered—was reasoning which, in my judgment, applies equally to the present case. He treats the direction in the will as a direction to the trustees to ascertain what is the gross sum which will give the net annuity specified, a clear sum of £1,000. He points out that, in calculating that gross sum, it will lead to an inaccurate result if the trustees merely calculate it by reference to the deduction which it was permissible for them to make, without reference to the recoveries which the annuitant may obtain. He says that the true calculation which the trustees ought to make is to ascertain a sum which, after taking not merely the initial deduction but also the matter of the relief into account, will produce the net sum specified. If I may say so with respect, that reasoning appears to me to be as satisfying as any reasoning can be. The case, of course, was the case of a will, and the phrase used was “free of income tax.” In the case of a deed, the result desired cannot be obtained by phraseology such as that, by reason of r. 23, and it is for that reason, as I have already said, that, when it is desired to produce a similar result in the case of a deed, the formula which must be adopted is the formula which gives you the sum which I have described as £x. The interesting thing about the decision of ROMER, J., is that, in analysing the language of that will, he treats it as though it were an instruction to arrive at a sum £x by means of a formula of that character, and that is the meaning which he attributes to the words “free of income tax” in a will. B C D E F G H

The other case was *Re Jones, Jones v. Jones* (2), a decision of EVE, J., in which, on the language of the particular will before him, he distinguished *Re Pettit, Le Fevre v. Pettit* (1) and came to the appropriate

conclusion on that basis. The language of the will there was as follows :

. . . to pay . . . such an annuity as after deducting therefrom income tax at the current rate for the time being would amount to the clear yearly sum of £350.

A The judge distinguished *Re Pettit, Le Fevre v. Pettit* (1). He first of all construed the words "at the current rate" as meaning the standard rate, that being the appropriate phrase under the Act of 1927, and, having so construed those words, he pointed out that the formula for arriving at the relevant gross sum—and here I am not using his language but expressing what I think is the basis of his decision—was one in
B which the only tax factor to be taken into account was the actual figure of deduction at the current rate, and that it was not legitimate to import the further factor of recoveries in respect of relief. There again, if I may say so, it does not seem to me that, on the language which the judge had before him in that case, any other conclusion was possible.
C The use of the phrase "deducting income tax at the current rate" can in that context only have referred to the act of deduction which, under the All Schedules Rules, r. 19, as amended by the Finance Act, 1927, s. 39, is contemplated. That was the only thing which had to be regarded in that case. I am unable to take the view presented to us
D by counsel for the appellants—namely, that the case is one which resembles *Re Jones, Jones v. Jones* (2), and does not resemble *Re Pettit, Le Fevre v. Pettit* (1). In my opinion, the conclusion of the judge was perfectly right, and the appeal must be dismissed.

E FINLAY, L.J. : I agree.

LUXMOORE, L.J. : I also agree.

Appeal dismissed.

Solicitors : *J. E. Lickfold & Sons* (for the appellants) ; *Few & Co.* (for the trustees) ; *E. B. V. Christian & Co.* (for Lady Byrne and a
F mortgagee) ; *Warren & Warren* (for two other mortgagees).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

GREEN v. GREEN (BY HIS GUARDIAN).

G [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.),
May 18, 19, 1939.]

H *Divorce—Insanity—"Persons under care and treatment"—Respondent's absence on trial—House maintained by Mental After-Care Association—Whether period of detention interrupted—Lunacy Act, 1890 (c. 5), s. 55—Matrimonial Causes Act, 1937 (c. 57), ss. 2 (d), 3.*

The respondent husband had been confined in a mental institution under a reception order since 1907. On several occasions, however, he had been released on trial, and, in particular, he was released from Banstead Hospital for a fortnight within the period of 5 years immediately preceding the presentation of the petition, being sent to a house at Whitstable belonging to the Mental After-Care Association. This

house was inspected by the London County Council and approved by them for the reception of patients released on trial, and evidence was given by an officer of the council to the effect that, although there were at this house a greater element of liberty and absence of restriction than was possible in Banstead Hospital, a patient was, while there, under the control and observation of the association and its officers, as agents for the council, and that any patient who lapsed from good conduct would immediately be returned to Banstead Hospital. By reason of certain administrative difficulties, the association did not make use of the provisions of the Lunacy Act, 1890, s. 55 :—

HELD : there had been no interruption in the period of detention, and the petitioner was entitled to a decree *nisi*.

[EDITORIAL NOTE. The importance of this case is that the case of *Shipman v. Shipman* (1) is distinguished on the facts. It is here held that the absences of the patient from the institution did not amount to an interruption of the detention, because, although only subject to a modified restraint, the patient remained subject to discipline and was in the care of persons who were agents of the authority maintaining the hospital.

AS TO DIVORCE ON GROUND OF INSANITY, see HALSBURY, Supp., Divorce, para. 981.]

Case referred to :

- (1) *Shipman v. Shipman*, [1939] P. 147 ; [1938] 4 All E.R. 732 ; Digest Supp.; 160 L.T. 299.

PETITION by wife for dissolution of marriage on the ground that the respondent was incurably of unsound mind and had been continuously under care and treatment for 5 years and upwards immediately preceding the presentation of the petition. The facts are fully set out in the judgment.

W. A. B. Goss for the petitioner.

Theodore Turner for the guardian *ad litem*.

SIR BOYD MERRIMAN, P. : This is a petition by a wife for dissolution of marriage on the ground that her husband is incurably of unsound mind, and has been under the care and treatment required by the Matrimonial Causes Act, 1937, for at least 5 years preceding the presentation of the petition. I am satisfied beyond any doubt whatever that the husband is of incurably unsound mind. The wife was compelled to ask for the exercise of the discretion of the court in circumstances which I need not go into. Having regard to the fact that she had no married life at all for the last 30 years, her husband having been confined under a reception order since Nov., 1907, I have no hesitation in saying that it is a proper case in which the wife should be granted relief, notwithstanding her own adultery. Through counsel for the guardian *ad litem*, the Official Solicitor very rightly and properly called my attention to the fact that in this case there had been from time to time, and in particular during the last 5 years, certain periods of absence from the Banstead Hospital, where the husband is at present confined, which come under two heads. There have been occasional absences on parole for week-end periods, not very frequent. That is authorised under the rules made

under the Lunacy Act, 1890, s. 275, whereby regulations may provide for the absence for a period not exceeding 4 days of a patient from the asylum by permission of the management without any formality. I do not think that it is necessary to refer more particularly to the week-end absences. I dealt with infrequent absences of that character in *Shipman v. Shipman* (1), and I indicated then that, unless they were frequent, it might not be necessary to regard them as interrupting the detention. Obviously, however, these absences for a fortnight at a time, and in particular the fortnight in 1938 within the period of 5 years, raise more difficult questions, and, as it was presented to me at the original hearing, it was made to appear that this absence was of a holiday character, with little, if any, element of restraint or detention on the part of the London County Council. I therefore adjourned the case in order that I might be informed as to the nature of the arrangements made for these absences, and the particular statutory authority under which the arrangements were made.

I have now had the advantage of hearing the evidence of Mr. Curtiss, the chief officer of the London County Council responsible for the administration of these matters. As the result of hearing his evidence, I find the facts to be as follow. This particular patient was sent to Whitstable for a fortnight from May 31, 1938, to June 14, 1938, on trial under the provisions of sect. 55 (1). He was sent to a house which belongs to a voluntary association known as the Mental After-Care Association. This house had been inspected and approved by the London County Council for the reception of parties of patients so released on trial, and for the exclusive occupation during a time when any London County Council patients were there. There is no question whatever of the house or grounds being used as a holiday camp by people unconnected with mental institutions, nor is there any question of reception in this house, while the London County Council party meet there, of mental patients from any other institution.

I have not seen the actual correspondence between the London County Council and the After-Care Association, and, having regard to Mr. Curtiss' evidence, I do not think that it is necessary to adjourn the case in order to have copies of the correspondence put in. Mr. Curtiss has made it clear to me, however, that, apart from the fact that the particular house to which the party is sent by arrangement is inspected and approved, there is also a final arrangement by which 23s. 4d. is paid for every patient, —as I understand it that is a weekly charge—and 2s. 6d. for pocket-money for the use of the patient. Mr. Curtiss has also made it clear to me that the party is escorted from the Banstead Hospital to this particular house by an appropriate escort from the hospital, that during the stay of the patients at this house they are inspected by inspectors provided by the After-Care Association, and sometimes by the London County Council, or both, that the authorities in charge of the house are in constant communication with the hospital, and that, in the event of any lapse from good

conduct, the matter would instantly be reported to Banstead, and the offending patient would at once be escorted back to Banstead. In a word, Mr. Curtiss told me that, though there is intended to be a greater element of liberty and a greater absence of restriction than is possible in Banstead Hospital itself, the party of patients during the time when they are at this house are under careful control and observation by the Mental After-Care Association and its officers as agents of the London County Council. A

I do not propose to make, or rather to repeat, the elaborate review of the statutory provisions which I made in *Shipman v. Shipman* (1). It is clear that, so far as the reality of the matter is concerned, this arrangement could have been made under sect. 57—the arrangement for the boarding-out of lunatics, when the patient is delivered over to the custody of relatives or friends—and in that case there would be no question whatever, in my opinion, of any break in the detention, and any use of the word “custody” would imply that, assuming that there really was custody. Mr. Curtiss has explained, however, that there are administrative difficulties, one of which appears on the face of the section itself, by reason of the fact that the place at which the lunatic is boarded out may be in a different county from that of the authority which is responsible, and other things of that sort, which have induced them not to use the provisions of that particular section. B C D

I must not be taken to be dealing with the much more difficult case of release on trial, where these elements of restraint, to which I have referred, are absent, and where there is no element of agency on the part of the person to whom the patient is sent on trial. Each case will have to be dealt with on its own merits. I am dealing simply with the facts of this particular case, and other cases in which precisely the same arrangements apply, and I have come to the conclusion that in this case there has been no break in the detention which is required by the statute. Mr. Curtiss has explained to me that it is right and proper, and I think his explanation entirely satisfies me, that I may regard this particular arrangement as an absence on trial under sect. 55 (1) of the Act, but it is not—to put it in another way—a very special sort of absence on trial. There is no question here of release preparatory to discharge. Still more is there no question of after-care after discharge. It was for those two purposes that this voluntary association, the Mental After-Care Association was originally formed. Here they are acting as agents of the London County Council for rather a different sort of trial, where the element of discharge, or even of potential discharge, does not enter into the matter at all. Mr. Curtiss explained to me that these patients have been in hospital for a very long time, and that with regard to them there is no prospect of discharge at any time—they have become stabilised. Their conduct is good within the limits of the hospital. They are well-conducted, amenable to discipline, good workers, and so forth, and they are regarded as fit to be subjected to the test, or trial, of their capacity to conduct themselves in the same way out of the stricter hospital en- E F G H

vironment. In that sense, they are released on trial, though they are still subject to discipline and to modified restraint. By arrangement with the London County Council in the manner which I have described, the After-Care Association—though the question is not strictly one of after care at all—has undertaken the conduct of these trials on behalf of the London County Council.

Now that I am satisfied about the particular arrangements applicable to this case, I think that I can properly hold, and counsel for the guardian *ad litem* does not dispute that I can properly hold, that there is no interruption of the detention. In these circumstances, I pronounce a decree *nisi* in this case.

Decree nisi granted.

Solicitors : *Morrish, Strode & Searle* (for the petitioner) ; *Official Solicitor* (for the guardian *ad litem*).

[*Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.*]

PEARSON v. WANDSWORTH STADIUM, LTD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Lewis, JJ.), **May 3, 1939.**]

Gaming and Wagering—Bookmakers—Charge to bookmakers on tracks for betting facilities—Not exceeding five times amount of highest charge made to public—Basis of calculation—Betting and Lotteries Act, 1934 (c. 58), s. 13 (1), (2).

The respondents' charge to members of the public for admission to their dog-track was 1s. 6d., including 3d. for a race card and 2½d. entertainment tax. The appellant, a bookmaker, was charged 6s. 3d., which represented five times the admission fee less the cost of the race card, but he maintained that the actual admission fee, after deducting price of race card and entertainment tax, was 1s. 0½d., and that he should not have been charged more than five times that sum, plus one entertainment tax of 2½d. and one race card, making a total of 5s. 8d. The figure returned to the revenue authorities, for the purpose of the Finance (New Duties) Act, 1916, s. 1, as the payment for admission to the track was 1s. 3½d. In assessing entertainments duty, the authorities allowed 3d. in respect of the race card, and assessed duty on a net figure of 1s. 0½d. An information against the respondents alleging that they had contravened sect. 13 of the Act of 1934 was dismissed by the magistrate. Thereupon this appeal was brought :—

HELD : the charge made to the appellant was correctly based on the highest sum paid by members of the public, as provided by sect. 13 (1) of the Act of 1934, without reference to how that sum was made up, and the position of the respondents with regard to the revenue authorities was irrelevant to the present case.

[EDITORIAL NOTE.] The statute fixes the maximum charge which may be made to bookmakers at five times the highest charge made to members of the public. Here the charge to members of the public was a composite one, being partly for admission proper, partly for a race card, and partly in respect of entertainment tax. In fixing the price to be charged to bookmakers, the occupiers of the licensed track properly deducted the charge in respect of the race card and properly included the entertainment tax.

AS TO ADMISSION FEES TO BOOKMAKERS, see HALSBURY, Hailsham Edn., Supp., Gaming and Wagering, para. 927; and FOR THE BETTING AND LOTTERIES ACT, 1934, s. 13, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 27, p. 284.]

APPEAL by way of case stated from a decision of one of the magistrates for the metropolis. The facts and the arguments are fully set out in the judgment of LORD HEWART, L.C.J. A

Ernest Ould for the appellant.

G. B. McClure for the respondents.

LORD HEWART, L.C.J. : This is a case stated by one of the stipendiary magistrates for the metropolis, and it arises from an information preferred by the present appellant against the present respondents : B

. . . for that they the respondents on Oct. 20, 1938, at Wandsworth aforesaid (then being the occupiers of a licensed greyhound track there situate and known as Wandsworth Stadium) did make to one Frank Pearson a bookmaker a charge other than a charge authorised by the Betting and Lotteries Act, 1934, s. 13 (1), contrary to sect. 13 of the said Act. C

The magistrate, having heard evidence in the case for the appellant, the respondents calling no evidence, and having heard the arguments, dismissed the information, and the question for this court is whether in so doing he came to a correct determination in point of law. The relevant section is the Betting and Lotteries Act, 1934, s. 13, and the purpose and scope of this Act are clearly and concisely stated in the title of the Act : D

An Act to amend the law with respect to betting on tracks where sporting events take place, including the law with respect to totalisators on horse racecourses; to authorise, subject to restrictions, the establishment of totalisators on dog racecourses; to prohibit betting on tracks with young persons and *pari mutuel* betting except by authorised totalisators; to amend the law with respect to lotteries and certain prize competitions; and for purposes connected with the matters aforesaid. E

When one comes to sect. 11 of the statute, there are provisions for the establishment of totalisators on dog racecourses, and sect. 12, with regard to facilities for bookmaking on tracks, provides as follows : F

Nothing in the Betting Act, 1853, shall apply to anything done on any licensed track by a bookmaker on any day on which bookmaking may lawfully be carried on on the track. . . .

Then sect. 13 provides as follows :

(1) The occupier of any licensed track may make to a bookmaker, or to any assistant accompanying a bookmaker to the track for the purpose of his business, any charge for admission to any particular part of the track not exceeding, in the case of a bookmaker, five times the amount, or, in the case of an assistant, the amount, of the highest charge made to members of the public for admission to that part of the track. G

Here the appellant, being a bookmaker, was charged for admission on Oct. 20, 1938, to that part of the track where the price charged to other members of the public was 1s. 6d., and the price, including the race card and entertainment duty, was a sum of 6s. 3d. He alleges that the amount of entertainment duty in the price charged to members of the public was 2½d., and, as a matter of fact, so the case finds. The figure H

returned to the customs and excise authorities as payment for admission for the purposes of this section of the Act of 1916 was 1s. 3½d., and, in assessing entertainment duty, the authorities allowed 3d. in respect of the race card and assessed duty upon a net figure of 1s. 0½d. The case finds as follows :

A The amount of entertainment duty on an admission charge of 1s. 3½d. would be 3d. No member of the public would have been admitted to the part of the stadium in question except on payment of 1s. 6d. No member of the public could claim to pay 1s. 3d. being the ordinary price of admission less the price of the race card.

The case further finds as follows :

B That in the case of a bookmaker to whom the occupiers of the track make an increased charge under the Betting and Lotteries Act, 1934, s. 13 (1), the Commissioners of Customs and Excise levy entertainment duty on one admission charge only precisely as paid by an ordinary member of the public. They do not levy any duty on the remainder of the amount paid by the bookmaker.

In that state of affairs, it was contended on behalf of the bookmaker,

C the appellant :

... that in law the words "charge made to members of the public for admission" [in the first part of sect. 13] referred to such part of the amount paid by members of the public as was exclusively for admission and did not include payments for any other incidental matters such as entertainment duty or race cards . . . the correct charge to the appellant should not have exceeded 5s. 8d. being five times 1s. 0½d. plus 3d.

D On the contrary, it was contended on behalf of the respondents that the words in the section "charge made to members of the public for admission" meant the gross sum paid by members of the public, without reference to how that sum was made up, and that, accordingly, the
E respondents, in charging the appellant 6s. 3d. for admission, had not exceeded five times the amount of the highest charge made to members of the public for admission—namely, 1s. 6d.—and that :

... in law the respondents were entitled to make a charge of 7s. 6d. (five times 1s. 6d.) to the appellant.

F The magistrate held on the facts as follows :

... that the contentions of the respondents were correct and that in making to the appellant a charge of 6s. 3d. the respondents had not exceeded five times the amount of the highest charge made to members of the public for admission.

He accordingly dismissed the information. In my opinion, the
G magistrate was clearly right. The ingenious argument which we have heard on behalf of the appellant seems to me to mix up different things. This section is dealing, and dealing solely, with charges to be made to bookmakers on tracks where what are called betting facilities are lawfully provided, and the section is looking at three persons. There is, first, the
H occupier of the licensed track, secondly, the bookmaker or his assistant, and, thirdly, the public. The amount of the highest charge made to members of the public for admission is the standard, the criterion or the basis of the charge made to the bookmaker, and the statute has provided for the limit of a maximum. The occupier of a track may make to a bookmaker a charge not exceeding a certain maximum—that is to say,

not exceeding five times the amount of the highest charge made to members of the public. The statute does not say that the occupier of the track must make to a bookmaker that amount of charge. That is the maximum which is permitted. The whole argument on the part of the appellant has proceeded on the view that, because, when one comes to analyse the charge made to members of the public, one finds wrapped up in it or concealed in it something more than a notional payment for the actual physical admission to the racecourse, and one finds also something paid, or believed to have been paid, in respect of the race card, and something calculated to be paid, or to have been paid, in respect of entertainment duty, therefore the charge which ought to be made to the bookmaker is something less than that which this case discloses. We have nothing to do with that question. This is not a question as between the bookmaker or the occupier and the Revenue authorities. We are dealing simply with the position of the occupier and the charge which he may make in this case to a bookmaker or a bookmaker's assistant. I fail to follow the argument that, by a process of analysis, one may detect or disengage an element in the total charge and say that that is referable to entertainment duty, and, therefore, that that which is paid by the bookmaker ought to be proportionally less. The section is dealing with no such doctrine. It is merely providing the maximum amount which the occupier may charge to a bookmaker, and the basis of that calculation is the highest charge made—in fact made—to members of the public for admission. It seems to me to have nothing to do with the point to say that in that charge so made to the public there is involved or contained some ingredient which is connected with a Finance Act. The argument which we have heard really amounts to a contention that the highest charge here ought to be less than it is, and that, because of the contents into which the total charge is capable of being analysed, therefore, in fairness to the bookmaker, a calculation different from that which is provided for in the statute ought to be substituted. The magistrate has no power, and this court has no power, to make any such substitution. The section seems to me to speak in plain terms, and I think that the conclusions of the magistrate were manifestly correct. I think, therefore, that this appeal ought to be dismissed.

HUMPHREYS, J.: I agree. The magistrate in this case was dealing with a criminal prosecution. It was alleged that the respondents to this appeal, the Wandsworth Stadium, Ltd., had committed an offence, and the offence was that they had charged bookmakers for admission to their premises a greater sum than that which they were entitled to charge under the terms of the Betting and Lotteries Act, 1934, s. 13. In effect, the question which the magistrate had to decide was this. Having seen from his reading of the section that the proper charge to a bookmaker was to be calculated upon the highest charge made to members of the public for admission to the dog race track, he had to ask himself: "What

is the charge, or, if there is more than one charge, what is the highest charge, made to members of the public for admission to that part of the dog racecourse ? ” I think that any ordinary sensible person who asked himself that question would answer it in the way the magistrate did, and would say : “ I want to know the sum which it is necessary to pay in order to get into that racecourse. What is the sum without the payment of which nobody can get into that racecourse ? ” The answer is, “ The sum is 1s. 6d., ” and so he decided. Why is it said that he is wrong in that simple finding upon the evidence that 1s. 6d. was in fact the charge for admission to members of the public ? It is said that he ought to have taken into consideration the fact that, 18 years before this Act was passed, there had been passed by Parliament, a Finance Act, which had nothing whatever to do with betting or lotteries, but which provided that certain sums should be paid for what was called entertainment tax, and that those sums should depend to some extent upon payment for admission to the entertainment. However, when one looks at the terms of that Act—quite apart from that which, in my judgment, is quite sufficient to dispose of this case, that is to say, that the Finance (New Duties) Act, 1916, had nothing whatever to do with this question—the expression “ payment for admission to the entertainment ” is defined and explained for the purposes of that Act. In sect. 1 (4) of that Act, it is explained that in certain cases :

... where the commissioners are of opinion that the payment . . . for a ticket represents payment for other privileges, rights or purposes besides the admission to an entertainment . . . duty shall be charged on such amount as appears to the commissioners to represent the right of admission to entertainments in respect of which entertainments duty is payable.

That is for the purposes of that Act, and, in my opinion, it has no relation whatever to an Act passed for a totally different purpose, which uses perfectly plain language, and which, as counsel for the appellant is anxious to argue before us, must have been passed by Parliament with perfect knowledge that 18 years before they had passed the earlier Act.

I think that this is a plain case, and not only do I agree with the view taken by the magistrate, but I also think that it was the only reasonable view which he could have taken.

LEWIS, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Hamblins, Grammer & Hamlin* (for the appellant) ;
Wilkinson, Houlett & Moorhouse (for the respondents).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

LADORE AND OTHERS v. BENNETT AND OTHERS.

[PRIVY COUNCIL (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Romer), **March 20, 21, May 8, 1939.**]

Privy Council—Canada—Dominion and provincial legislation—Insolvent local government bodies—Right of province to amalgamate and make consequential provisions—British North America Act, 1867 (c. 3), ss. 91 (19) (21), 92 (8)—City of Windsor (Amalgamation) Act, 1935 (S.O., c. 74 of 1935)—City of Windsor (Amalgamation) Amendment Act, 1936 (S.O., c. 66 of 1936)—Ontario Municipal Board Act, 1932 (S.O., c. 27 of 1932 and c. 51 of 1935), Part VI—Department of Municipal Affairs Act, 1935 (S.O., c. 18 of 1935).

Prior to 1935, four adjoining municipalities, the cities of Windsor and East Windsor and the towns of Sandwich and Walkerville, in the province of Ontario, were independent municipalities exercising local government over their inhabitants. In that year, following on financial difficulties, they were amalgamated into one municipality, which was incorporated under the name of the city of Windsor, by the City of Windsor (Amalgamation) Act, 1935, and a special body, entitled the Windsor Finance Commission, was constituted, with interim powers of administering the affairs of the new city. In 1936, an amending Act was passed which abolished the Windsor Finance Commission and transferred its duties to the department of municipal affairs for Ontario, sects. 5, 6, 7 and 9 of the principal Act being repealed. By the provisions of the Department of Municipal Affairs Act, 1935, Part III, which was applied by the foregoing Acts to the new city, the Ontario Municipal Board were empowered, if satisfied after request upon inquiry that a municipality had failed to meet its liabilities when due owing to financial difficulties affecting the municipality, to exercise control over all the affairs of the corporation, including (i) powers in regard to debenture debt of consolidation, (ii) the issue of debentures in satisfaction of the whole or any part of the indebtedness, and compulsory acceptance of such issue, (iii) conditions for exchange of the new debentures for those outstanding, and (iv) conditions for postponement or variation in the terms, times and places for payment of the whole or any portion of the debenture debt and outstanding debentures and other indebtedness and interest thereon and variation in the rate of interest. A plan prepared by the Windsor Finance Commission for the funding and refunding of the debt was taken into consideration by the Municipal Board, which subsequently made an order, which received the consent of the new city and the majority of the creditors, approving the final scheme. Under the scheme, former creditors received debentures of the new city of equal nominal amount to those formerly held, but the interest was scaled down in various classes of debentures, arrears of interest being dealt with by the payment of a composition in cash. The appellants contended that the whole of the proceedings in connection with these municipalities, the relevant statutes and the authorities which they purported to give were *ultra vires* the legislature of Ontario because they invaded the field of the Dominion as to (i) bankruptcy and insolvency (sect. 91 (21)), and (ii) interest (sect. 91 (19)), and (iii) were not within the exclusive powers of the province because they affected private rights outside the province:—

HELD: (i) the province had exclusive legislative power in relation to (sect. 92 (8)) municipal institutions in the province, and the pith and substance of both the Amalgamation Acts, the Ontario Municipal Board Act, 1932, and the Department of Municipal Affairs Act, 1935, were that the Acts were passed in relation to municipal institutions in the province. The Acts and the scheme did not infringe the Dominion's exclusive power relating to bankruptcy or insolvency, or civil rights outside the province. The statutes were not directed to insolvency legislation.

They picked out insolvency as one reason for dealing in a particular way with unsuccessful institutions, and, though they affected rights outside the province, they only so affected them collaterally, as a necessary incident to their lawful powers of good government within the province.

(ii) as part of the above legislation, the province had power to vary the rate of interest on the debentures and of compounding for accrued interest.

A

B

D

E

F

G

H

[EDITORIAL NOTE.] The question here is whether certain Acts of a provincial legislature infringe the exclusive power of the Dominion. These Acts were passed to provide for the situation arising on the insolvency of certain local government bodies within the province. In Canada, the Dominion has an exclusive power to legislate in respect of bankruptcy and insolvency and the province has an exclusive right to legislate in respect of municipal and other local government institutions within the province. It is held that the matter was purely one of local government, and no question affecting legislation relating to insolvency arose.

AS TO POWER OF PROVINCIAL LEGISLATURES, see HALSBURY, Hailsham Edn., Vol. 11, pp. 92, 93, para. 157; and FOR CASES, see DIGEST, Vol. 17, pp. 434-445, Nos. 131-180.]

Cases referred to :

- (1) *Royal Bank of Canada v. R.*, [1913] A.C. 283; 17 Digest 442, 175; 82 L.J.P.C. 33; 108 L.T. 129.
- (2) *A.-G. for Ontario v. A.-G. for the Dominion*, [1896] A.C. 348; 17 Digest 430, 106; 65 L.J.P.C. 26; 74 L.T. 533.
- (3) *Royal Trust Co. (Judicial Trustee of Shell Estate) v. A.-G. for Alberta*, [1937] 1 W.W.R. 376.
- (4) *A.-G. for Dominion of Canada v. A.-G. for Provinces of Ontario, Quebec and Nova Scotia, A.-G. for Province of Ontario v. A.-G. for Dominion of Canada, A.-G. for Provinces of Quebec and Nova Scotia v. A.-G. for Dominion of Canada*, [1898] A.C. 700; 17 Digest 431, 119; 67 L.J.P.C. 90; 78 L.T. 697.
- (5) *Valin v. Langlois* (1879), 5 App. Cas. 115; 17 Digest 431, 111; 49 L.J.P.C. 37; 41 L.T. 662.
- (6) *Tennant v. Union Bank of Canada*, [1894] A.C. 31; 17 Digest 429, 99; 63 L.J.P.C. 25; 69 L.T. 774.
- (7) *John Deere Plow Co., Ltd. v. Wharton*, [1915] A.C. 330; 17 Digest 431, 117; 84 L.J.P.C. 64; 112 L.T. 183.
- (8) *Proprietary Articles Trade Assn. v. A.-G. for Canada*, [1931] A.C. 310; Digest Supp.; 100 L.J.P.C. 84; 144 L.T. 577.
- (9) *A.-G. for British Columbia v. A.-G. for Canada, Re Criminal Code, Sect. 498a*, [1937] A.C. 368; Digest Supp.; 106 L.J.P.C. 34; 156 L.T. 308.
- (10) *Ottawa Valley Power Co. v. A.-G. for Ontario*, [1936] 4 D.L.R. 594; Digest Supp.
- (11) *Beauharnois Light, Heat & Power Co. v. Hydro-Electric Power Commission*, [1937] 3 D.L.R. 458; Digest Supp.
- (12) *Crédit Foncier Franco-Canadien v. Ross & A.-G. for Alberta, Netherlands Investment Co. of Canada, Ltd. v. Fife & A.-G. for Alberta*, [1937] 2 W.W.R. 353; Digest Supp.; affg. S.C. sub nom. *Royal Trust Co. v. A.-G. for Alberta*, [1937] 1 D.L.R. 709.
- (13) *Independent Order of Foresters v. R.*, [1939] 1 W.W.R. 275.
- (14) *Bonanza Creek Gold Mining Co., Ltd. v. R.*, [1916] 1 A.C. 566; 17 Digest 441, 171; 85 L.J.P.C. 114; 114 L.T. 765.
- (15) *Shoolbred v. Clarke* (1890), 17 S.C.R. 265; 17 Digest 434, case bb.
- (16) *Toronto Corp. v. York Corp. & A.-G. for Ontario*, [1938] A.C. 415; [1938] 1 All E.R. 601; Digest Supp.; 107 L.J.P.C. 43.

APPEAL from a judgment of the Court of Appeal for Ontario (LATCHFORD, C.J.A., MASTEN and HENDERSON, J.J.A.), dated May 17, 1938, affirming a judgment of the Supreme Court of Ontario (HOGG, J.), dated July 26, 1937. The facts are fully set out in the judgment of their Lordships delivered by LORD ATKIN.

M. L. Gordon, K.C., and *Charles Sale* for the appellants. A

J. C. McRuer, K.C., for the respondent, the Attorney-General for Ontario.

John H. Rodd, K.C., for the other respondents.

Gordon, K.C. : The legislation in question here is insolvency legislation, and, together with the plan based thereon, is *ultra vires* the provincial legislature. The rate of interest provided in the debentures held by the appellants has been voided by the provision, both in the original and in the amended scheme of funding and refunding, for reduced rates of interest. It is not competent for the provincial legislature to enact these sections. The Acts and the plan thereon cancel and otherwise deal with debentures payable outside the province, and are *ultra vires* the legislature. [Counsel referred to *Royal Bank of Canada v. R.* (1), *A.-G. for Ontario v. A.-G. for the Dominion* (2), *Royal Trust Co. (Judicial Trustee of the Shell Estate) v. A.-G. for Alberta* (3), *A.-G. for Dominion of Canada v. A.-G. for Provinces of Ontario, Quebec & Nova Scotia* (4), *Valin v. Langlois* (5), *Tennant v. Union Bank of Canada* (6), *John Deere Plow Co., Ltd. v. Wharton* (7), *Proprietary Articles Trade Assocn. v. A.-G. for Canada* (8), *A.-G. for British Columbia v. A.-G. for Canada, Re Criminal Code, Sect. 498a* (9), *Ottawa Valley Power Co. v. A.-G. for Ontario* (10), *Beauharnois Light, Heat & Power Co. v. Hydro-Electric Power Commission* (11), *Crédit Foncier Franco-Canadien v. Ross & A.-G. for Alberta* (12), *Independent Order of Foresters v. R.* (13), *Bonanza Creek Gold Mining Co., Ltd. v. R.* (14) and *Shoolbred v. Clarke* (15).] D

Sale referred to *Toronto Corpn. v. York Corpn. & A.-G. for Ontario* (16).

McRuer, K.C., and *Rodd, K.C.*, were not called upon. F

LORD ATKIN : This is an appeal from a decision of the Court of Appeal of Ontario affirming a decision of HOGG, J., who dismissed the plaintiffs' action. The plaintiffs' claim was for a declaration that two statutes of Ontario providing for the amalgamation of certain municipalities in Ontario were *ultra vires* the legislature of Ontario, and that the corporations created in pursuance of those statutes were not valid or subsisting and a declaration that parts of other Ontario statutes—namely, the Ontario Municipal Board Act, 1932, and the Department of Municipal Affairs Act, 1935, and amendments thereto—were also *ultra vires*. The plaintiffs also claimed further and alternative relief. The questions raised in the case arise out of the affairs of four adjoining municipalities, the city of Windsor, the city of East Windsor, the town of Sandwich and the town of Walkerville. Before 1935, each was an independent municipality exercising local government over its inhabitants. They G H

had each of them raised loans for local purposes amounting in the aggregate to many millions of dollars, which were represented by debentures. These debentures were simple acknowledgments of debt, and gave no charge upon municipal property. In the case of East Windsor, some of them were made payable outside the province of Ontario—that is to say, A in Montreal, in the province of Quebec, and in New York. Large amounts were held by holders resident outside the province. Closely associated with the affairs of the municipalities were various public utility corporations, the Walkerville-East Windsor Water Commission, the Walkerville Hydro-Electric Commission, and the Essex Borders Utilities Commission, B whose functions need not be particularly described. They had each issued debentures which, in the case of the Essex Borders Utilities Commission and of the Walkerville-East Windsor Water Commission, for instance, purported to create a charge upon properties named therein. These debentures were in many cases held by persons resident outside the C province. These commissions had all been incorporated pursuant to statutes of the Ontario legislature. By 1935, financial difficulties of these municipalities and their commissions had become acute. In Oct., 1931, East Windsor defaulted in payment of debenture interest and maturing principal. In Mar., 1932, and Dec., 1932, they were D followed by Sandwich and the city of Windsor, and in Dec., 1934, by Walkerville. Meanwhile, in 1933, the Essex Borders Commission had defaulted, while in June, 1936, the Walkerville-East Windsor Water Commission stopped payment of interest. In Dec., 1934, by order in council a Royal Commission was appointed to inquire into the municipal E and other local affairs of the four municipalities in question, particularly with regard to acts to be done and steps to be taken in connection with their amalgamation. The commission reported in Apr., 1935. In the courts in Canada, the report, when tendered in evidence by the plaintiffs, was objected to by the defendants, and the objection was upheld. Before F the Board, the objection was withdrawn, and, by consent of both parties, the report was placed before their Lordships. The report disclosed a serious financial position. Commercial conditions have so changed in recent years that in 1934 29 per cent. of the total population was, on a daily average, in receipt of relief. Assessments had fallen in value by G 38 per cent. of the peak value in 1930. Taxation was at breaking point, and something like total default was threatened. The provision for maintenance in every department was entirely inadequate, while, if adequate maintenance was received in existing conditions, the credit of the area, both public and private, would be destroyed. Neither public H money for improvements nor mortgage money for private building would be obtainable, nor would present mortgages be renewable, unless under some form of government compulsion.

Their Lordships do not cite this report as evidence of the facts there found, but as indicating the materials which the government of the province had before them before promoting in the legislature, the statute

now impugned, the City of Windsor (Amalgamation) Act, 1935, an Act to amalgamate the city of East Windsor, the town of Walkerville, the city of Windsor and the town of Sandwich. The Act amalgamated the four municipalities into one municipality which was incorporated under the name of the corporation of the city of Windsor. As from a named date, the existing municipal corporations were dissolved. A special body entitled the Windsor Finance Commission was constituted, with interim powers of administering the affairs of the new city. By sect. 6 (1), it was to have and exercise the same rights, authorities, powers and duties as, by the provisions of Part III of the Department of Municipal Affairs Act, are conferred upon the department, and the provisions of Part III were to apply to the new city. The Finance Commission by sect. 7 (c) were to undertake the preparation and submission of a plan for funding and refunding the debts of the amalgamated municipalities upon the general basis that the debt of each of the amalgamated municipalities should be discharged by the imposition of rates upon the rateable property in that area of the new city which formerly comprised such municipality. As far as the public utility commissions were concerned, a new commission was constituted by sect. 12 (1) entitled the Windsor Utilities Commission. Certain powers were confided to it by sect. 12 (1) and sect. 16. The Essex Border Utilities Commission, the Waterworks Commission and Hydro-Electric Commission of the amalgamated municipalities, including the Walkerville-East Windsor Water Commission, were dissolved, and ceased to exist. In pursuance of the Act, the Finance Commission prepared a plan for submission to the Ontario Municipal Board. In 1936, however, an amending Act was passed which did away with the Windsor Finance Commission and transferred its duties to the Department of Municipal Affairs for Ontario. Sects. 5, 6, 7 and 9 of the principal Act were repealed. The plan prepared by the Finance Commission for funding and refunding the debt was taken under consideration by the Municipal Board. After formulating what appears to have been an interim decision in Dec., 1936, the Board heard objections from creditors and others, and eventually, on June 15, 1937, made an order, which had received the consent of the new city and the majority of creditors, approving the final scheme. It is unnecessary to state the details of the scheme. Generally it may be said that the former creditors received debentures of the new city of equal nominal amount to those formerly held, but the interest is scaled down in various classes of debentures. Arrears of interest were dealt with by paying a composition in cash. It is not quite clear whether the scheme derives its statutory power from the provisions of the Amalgamation Acts of 1935 and 1936 or from the provisions of Part III of the Department of Municipal Affairs Act, 1935, or from both sources. It was prepared under sect. 7 of the Amalgamation Act of 1935, but that section was repealed by the Act of 1936. It becomes necessary, in any case, to discuss the provisions of the Department of Municipal Affairs Act, 1935, Part III, for that part

is attacked by the plaintiffs as invalid, and it is expressly applied by the Amalgamation Acts to the new city and its affairs.

The Department of Municipal Affairs Act, 1935, is a general Act setting up a department of municipal affairs whose duty it was to administer all acts in respect of municipal institutions and affairs. By an Act of the same date, an Act to amend the Ontario Municipal Board Act, 1932, 1935, c. 51, the Ontario Municipal Board Act, 1932, Part IV, the heading of which is "Special Jurisdiction over Defaulting Municipalities," was repealed, and the Act in question of 1935 contained in Part III corresponding provisions under the same heading. In substance, the provisions are that, if the Ontario Municipal Board is satisfied after request upon inquiry that a municipality has failed to meet its debentures or interest when due, or failed to meet any of its other debts or liabilities when due, owing to financial difficulties affecting the municipality, or has or may become financially involved or embarrassed so that default or unusual difficulty in meeting debts or obligations may ensue (as amended by the Department of Municipal Affairs Amendment Act, 1936), the board may exercise the special jurisdiction and powers conferred by the Act. The powers extend to control over all the affairs of the corporation (sect. 27 (2)), and include in sect. 33 powers in respect of the debenture debt and debentures of the municipality, and interest thereon, and also other indebtedness. These powers include power to order (a) the consolidation of the whole or any portion, (b) the issue of debentures in payment and satisfaction of the whole or any portion of such other indebtedness, and compulsory acceptance of such debentures in payment and satisfaction thereof, (c) the terms, conditions, places and times for exchange of new debentures for outstanding debentures, and (d) the postponement of, or variation in the terms, times and places for, payment of the whole or any portion of the debenture debt and outstanding debentures and other indebtedness, and interest thereon, and variation in the rates of such interest. It should be noticed that, by sect. 2 (f) of the Act, municipality includes any local board thereof, and by the Ontario Municipal Board Act, 1932, s. 2 (b), "local board" includes any public utility commission. Counsel for the plaintiffs attacked the whole of the proceedings in connection with these municipalities on three grounds. He said that the relevant statutes and the authorities which they purported to give were *ultra vires* the legislature of Ontario because they invaded the field of the Dominion as to (i) bankruptcy and insolvency (sect. 91 (21)), and (ii) interest (sect. 91 (19)), and were not within the exclusive powers of the province because (iii) they affected private rights outside the province.

Before dealing with these contentions, it is convenient to state that in the courts in Canada objection was taken that the action which asks for declaratory relief was premature, inasmuch as the scheme of refunding the debts which it is the object of the action to defeat had not come into operation at the date of the writ. Before their Lordships, this objection

was wisely waived, as it was of importance to both parties to get a final decision on all the substantial points in issue.

It appears to their Lordships that the provincial legislation cannot be attacked on the ground that it encroaches on the exclusive legislative power of the Dominion in relation to this class of subject. Their Lordships cannot agree with the opinion of HENDERSON, J.A., that there is no evidence that these municipalities are insolvent. Insolvency is the inability to pay debts in the ordinary course as they become due, and there appears to be no doubt that this was the condition of these corporations. It does not follow, however, that, because a municipality is insolvent, the provincial legislature may not legislate to provide remedies for that condition of affairs. The province has exclusive legislative power in relation to municipal institutions in the province (sect. 92 (8)). Sovereign within its constitutional powers, the province is charged with the local government of its inhabitants by means of municipal institutions. If local government in any particular area becomes ineffective or non-existent because of the financial difficulties of one or more municipal institutions, or for any other reason, it is not only the right, but it would appear to be the duty, of the provincial legislature to provide the necessary remedy, so that the health of the inhabitants, and the necessities of organised life in communities, should be preserved. If corporation A or B or C is unable to function satisfactorily, it would appear to be elementary that the legislature must have power to provide that the functions of one or all should be transferred to some other body or corporation. For this purpose, as the corporation could be created by the province, so it could be dissolved, and a new corporation created as a municipal institution to perform the duties performed by the old. The result of dissolution is that the debts of the dissolved corporation disappear. Amalgamation of municipalities for the purpose of more effective administration, whether for financial or other reasons, is a common incident of local government. It is necessarily accompanied by an adjustment of financial relations. Where the former bodies are dissolved, it is inevitable that the old debts disappear, to be replaced by new obligations of the new body. Moreover, in creating the new corporation, with the powers of assuming new obligations, it is implicit in the powers of the legislature (sovereign in this respect) that it should place restrictions and qualifications on the obligations to be assumed. Efficient local government could not be provided in similar circumstances unless the province were armed with these very powers, and, if, for strictly provincial purposes, debts may be destroyed and new debts created, it is inevitable that debtors should be affected, whether the original creditors reside within or without the province. They took for their debtor a corporation which, at the will of the province, could lawfully be dissolved, and of its destruction they took the risk. That for the purpose of keeping control over municipal institutions the legislature provided that a department of the provincial government

should have the means of ascertaining whether a particular municipal body was solvent or insolvent does not make its legislative provision in that regard an encroachment on the general powers of the Dominion over bankruptcy and insolvency. It is of the essence of its control over local government administered by municipalities that it should have these powers of inquiry and decision. In other words, the pith and substance of both the Amalgamation Acts and the Municipal Board Act, 1932, and the Department of Municipal Affairs Act, 1935, are that the Acts are passed in relation to municipal institutions in the province. They would also, so far as the public utility commissions are concerned, be justified as having been passed in relation to local works and undertakings under the British North America Act, 1867, s. 92 (10).

It was suggested in argument that the impugned provisions should be declared invalid because they sought to do indirectly what could not be done directly—namely, to facilitate repudiation by provincial municipalities of obligations incurred outside the province. It is unnecessary to repeat what has been said many times by the courts in Canada and by the Board—namely, that the courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail. In the present case, however, nothing has emerged even to suggest that the legislature of Ontario at the respective dates had any purpose in view other than to legislate in times of difficulty in relation to the class of subject which was its special care—namely, municipal institutions. For the reasons given, the attack upon the Acts and scheme, on the ground either that they infringe the Dominion's exclusive power relating to bankruptcy and insolvency or that they deal with civil rights outside the province, breaks down. The statutes are not directed to insolvency legislation. They pick out insolvency as one reason for so dealing with unsuccessful institutions, and they only affect rights outside the province collaterally, as a necessary incident to their lawful powers of good government within the province.

The question of interest does not present difficulties. The above reasoning sufficiently disposes of the objection. If the provincial legislature can dissolve a municipal corporation and create a new one to take its place, it can invest the new corporation with such powers of incurring obligations as it pleases, and, incidentally, may define the amount of interest which such obligations may bear. Such legislation, if directed *bona fide* to the effective creation and control of municipal institutions, is in no way an encroachment upon the general exclusive power of the Dominion legislature over interest. For these reasons, their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

Solicitors : *Lee & Pembertons* (for the appellants) ; *Blake & Redden* (for all the respondents).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

Intoxicating Liquors—Licensing—Permitted hours—Extension—“Special requirements of the district”—Licensing Act, 1921 (c. 42), s. 1 (1).

Certain licensing justices made an order under the Licensing Act, 1921, s. 1, directing that with regard to licensed premises within their jurisdiction the permitted hours should be extended during the summer months as specified in the order. Before making the order, the justices heard evidence which satisfied them that the special requirements of the district rendered the order desirable. The evidence was to the effect that during the summer months many inhabitants, by reason of recreation and hours of work, could not obtain reasonable refreshment before 10 p.m. The applicant sought to have the order quashed, on the ground that it was made without jurisdiction, in that there was no evidence before the justices of any “special requirements of the district” within the meaning of sect. 1 of the Act of 1921 :—

HELD : quite apart from the weight of the evidence, which was essentially a matter for the justices themselves, there was a mass of evidence of “special requirements of the district” upon which the justices were entitled to make the order, and there was no usurpation of jurisdiction.

Decision of the Divisional Court ([1938] 4 All E.R. 48) affirmed.

[EDITORIAL NOTE.] The policy of the Licensing Act, 1921, s. 1 (1), which allows licensing justices to extend the permitted hours, is that the effect of the evidence is a question to be determined by the justices themselves, and, if there is any evidence whatever before them with regard to the special requirements of the particular locality, it is not possible to question their decision by way of a writ of *certiorari*. The matter is left to the discretion of the local justices, and their decision can only be made the subject of an appeal if they have acted without, or in excess of, their jurisdiction.

AS TO PERMITTED HOURS, see HALSBURY, *Hailsham Edn.*, Vol. 19, pp. 103, 104, para. 247 ; and FOR CASES, see DIGEST, Supp., *Intoxicating Liquors*, Nos. 582a-582d.]

Case referred to :

(1) *R. v. Sussex Licensing JJ., Ex p. Bubb* (1934), 50 T.L.R. 410 ; Digest Supp.

APPEAL by the applicants from an order of the Divisional Court, dated Oct. 20, 1938, and reported [1938] 4 All E.R. 48, discharging a rule *nisi* which had been granted by the Divisional Court on May 13, 1938, for the purpose of considering an application for a writ of *certiorari* to bring up an order of the licensing justices of the city of Bradford made under the Licensing Act, 1921, s. 1, as affected by the Licensing Act, 1934, extending the hours for public-houses and clubs for May, June and July.

Neil Lawson for the appellant, in support of the rule.

Christmas Humphreys for the respondents, the justices.

Sidney H. Lamb for the representative of the local licensing association.

Lawson : The conditions on which the justices acted existed throughout the whole country. They were really conditions arising out of summer time. The Divisional Court were wrong in law in limiting their consideration to the requirements of the particular locality and disregarding

the conditions prevailing over the whole country. They have interpreted the section in question as though the word "special" had been left out. There are no abnormal or unusual features at Bradford to distinguish it from other industrial towns. On several previous occasions the justices have held that there were no special circumstances in the case of Bradford. They have power to extend the hours only when there is something which distinguishes the requirements of their particular district. They must have regard to the requirements of the community outside their own to enable them to determine the special requirements of their own district. The evidence that numerous people require to drink after 10 p.m. is not anything which the law recognises as a "special requirement."

Humphreys and *Lamb* were not called upon.

SCOTT, L.J. : Under the Licensing Act, 1921, there was the decision in *R. v. Sussex Licensing JJ., Ex p. Bubb* (1) which held that sect. 1 of the Act of 1921 did not authorise the justices to make an extension for a part of the year, but only for the whole year. The Act of 1934 enabled justices to make an order varying the hours for a part of the year.

In this particular case, an application was made on behalf of the licensing trade of the city of Bradford for an order altering the total number of hours from 8 to 8½, and the closing hour from 10 p.m. to 10.30 p.m. Sect. 1 of the Act of 1921 enables that to be done by the justices where, in their opinion, the special requirements of their district render it desirable.

It was contended, when the rule *nisi* was applied for, that there was no evidence to support the decision of the justices, that they had no jurisdiction to make the order, and that the judgment they gave was a judgment given without evidence entitling them to exercise their discretion.

On the rule *nisi* coming up for argument on Oct. 20, evidence was considered in detail on each side, and LORD HEWART, L.C.J., delivered a judgment, which was concurred in by the other two members of the court, saying that the court had come to the conclusion, on the materials in the case, that the licensing justices had acted within their jurisdiction and that there was ample evidence upon which they could arrive at the conclusion which they did, and, consequently, the court discharged the rule.

From that judgment of the Divisional Court the appellant comes to us. We have heard the judgment of LORD HEWART, L.C.J., read to us, and, as far as I am concerned, I do not wish to add a word to what LORD HEWART, L.C.J., says. I agree with the whole of his judgment, and I do not desire to alter what he has said in any way whatever. I think that he expresses the position very clearly, and, in a case like this, it is not desirable for a Court of Appeal, in dismissing an appeal, to use different language to express its views, even although it may mean

precisely the same thing. It only gives rise to discussion as to whether the court had any differences of view, and it confuses what is a plain position. I therefore adopt the judgment of LORD HEWART, L.C.J., and, in my view, the appeal should be dismissed with costs.

CLAUSON, L.J. : I agree.

GODDARD, L.J. : I also agree.

Appeal dismissed with costs.

Solicitors : *Neave & Neave*, agents for *Heap & Heap*, Bradford (for the appellant, in support of the rule) ; *Ridsdale & Son*, agents for *H. M. Dawson*, Bradford (for the respondents, the justices) ; *Godden, Holme & Ward*, agents for *Pullan, Davies & Co.*, Leeds (for the representative of the local licensing association).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

PARKINSON v. PARKINSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **May 24, 26, 1939.**]

Divorce—Presumption of death—Onus of proof—Analogy to bigamy prosecutions—Offences against the Person Act, 1861 (c. 100), s. 57—Matrimonial Causes Act, 1937 (c. 57), s. 8 (2).

The petitioner and respondent were married in 1919, and in 1922 the respondent left her husband, saying that she was going to Blackpool and did not intend to return to him. Shortly afterwards the parties entered into a deed of separation in the usual form. Thereafter the petitioner once met his wife by accident during 1928, and had then a few minutes, casual conversation with her, but, from the time of that meeting, he neither saw her, nor had any news of her, although he made inquiries in Blackpool, and in other places where it was possible that she might be living. Advertisements as to her whereabouts were inserted in the *Daily Telegraph* and *News Chronicle*, but without result. The petitioner filed this petition asking for a decree of presumption of his wife's death and for dissolution of marriage. Affidavits were filed by two relations of the parties stating that they had not seen the respondent for over 8 years:—

HELD : (i) the fact that the respondent was continually absent from the petitioner under a deed of separation did not debar the petitioner from claiming the advantage of the Matrimonial Causes Act, 1937, s. 8 (2).

(ii) it was for the petitioner to satisfy the court that he had no reason to believe that his wife was living within the last 7 years. In this case the matter was one of pure speculation, and the court was entitled to hold that there was in fact no reason for the petitioner to believe that his wife was living within that time.

(iii) the petitioner had brought himself within the subsection. There was no evidence that the respondent was alive, and the court on that evidence was satisfied that reasonable ground existed for supposing that she was dead. The petitioner was, therefore, entitled to a decree of presumption of death and a decree *nisi*.

[EDITORIAL NOTE. This is the first case to be reported on the construction of the Matrimonial Causes Act, 1937, s. 8 (2), which provides for the dissolution of

marriage on the ground of the presumed death of a spouse. The presumption of death may be made where the petitioner has no reason to believe that the other party has been living within a period of 7 years or upwards. The similar cases dealing with charges of bigamy are considered, the point mainly discussed being the burden of proof under the subsection.

A AS TO DECREE OF PRESUMPTION OF DEATH AND DISSOLUTION OF MARRIAGE, see HALSBURY, Hailsham Edn., Supp., Divorce, para. 987 A; and FOR THE SUBSECTION, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 30, p. 340.]

Cases referred to :

- B (1) *Jones v. Jones* (1938), November, Unreported.
(2) *R. v. Faulkes* (1903), 19 T.L.R. 250; 15 Digest 742, 8017.
(3) *R. v. Curgerwen* (1865), L.R.1 C.C.R. 1; 15 Digest 742, 8015; 35 L.J.M.C. 58; 13 L.T. 383.

C UNDEFENDED PETITION by husband for a decree of presumption of his wife's death and dissolution of marriage. The facts are fully set out in the judgment.

W. Latey for the petitioner.

D BUCKNILL, J.: This is a case which perplexed me a little, and I have had great assistance from counsel for the petitioner in the case.
E The petitioner, Fred Parkinson, is asking for the dissolution of his marriage to Alice Parkinson, his wife, on the ground that there are reasonable grounds for supposing that she is dead. The substantive case made on behalf of the petitioner is that his wife left him about the end of May, 1922, that he has not seen her since about the end of 1928, and that she was last heard of about 1930, and he relies upon the Matrimonial Causes Act, 1937, s. 8 (2).

F The facts lie in a small compass, because the petition is undefended. The parties were married in 1919, and at that time the husband, the petitioner, was 24 years old, and the wife was 20 years old. They both lived in Lancashire. She was a cotton-weaver, and he was at that time a tram-driver. In 1922, the wife left the husband, saying that she was going to Blackpool and was going for good. In July, 1922, the parties entered into a deed of separation, which recited that unhappy differences had arisen between the husband and the wife by reason whereof they had G agreed to live separate and apart, and which then took the usual course. The husband agreed that his wife should live separate and apart, free from his control and authority, and she agreed to live apart from him and not to seek restitution of conjugal rights, or in any way to annoy or interfere with him.

H Of course, the deed has the effect of preventing the husband from asking for a decree of dissolution of the marriage on the ground that his wife deserted him, because during the material time they were living apart under the deed. The husband said in his evidence, and I see no reason to doubt the truth of his evidence, that he last saw his wife, by accident, in Burnley, that he had a few casual words with her and went

away, and that he saw no more of her at all until he started these proceedings. He made a few inquiries about her in Blackpool in 1937. The petition in this case was filed on June 24, 1938. They told him at Blackpool that she had gone to Cleavers, at Cleavers they said she had gone to Lancaster, at Lancaster they said she had gone to Salford, and at Salford they said she had left very hurriedly. In the meantime, he himself had been on a visit to Ireland for a year, in 1925 and 1926. He also lived for a time with another woman, but they parted in 1925. A

That is all the evidence, and is as far as the petitioner could go. He has obtained leave, however, to file an affidavit by the father of his wife, Mr. Frank Palmer, at Briarfield, near Burnley, in which Mr. Frank Palmer swore that he once saw the respondent, over 8 years ago, at Briarfield. He really knows no more about her than that. There is another affidavit by Margaret Slater, the aunt of the wife in this case, which stated that she had not seen the respondent for more than 8 years, that she had brought her up since the respondent was 8 years old, and that the last time she saw the respondent was about 8 years ago, in a public-house at Briarfield. Advertisements, which have been filed and exhibited to an order, were placed in the DAILY TELEGRAPH and NEWS CHRONICLE at the beginning of this year in these terms : B C D

If anyone knowing the whereabouts of Alice Parkinson the wife of Fred Parkinson . . . 5, Manchester Road, Burnley.

No information of any kind has been received as the result of these advertisements. That is all the evidence in the case.

One now has to look at the section of the Act, to see what the law is. The new provision of the Act grants to a spouse the right to a dissolution of his marriage if he can satisfy the court that there are reasonable grounds for supposing that his wife is dead. It is quite clear that "disappearance" is not synonymous with "death." Indeed, it may be that a person disappears in order to avoid the risk of death, and that, where a woman, apparently in good health, and under 40 years of age, is married, and not heard of in her native town for a period of time, no court could say that they were satisfied that there were reasonable grounds for supposing that she was dead. E F

In order to get over the difficulty which exists of proving death where the party has merely disappeared, sect. 8 (2) has been enacted, and it is on this subsection that counsel for the petitioner bases his case. The subsection provides as follows : G

In any such proceedings [for dissolution of the marriage on the ground of the death of the party], the fact that for a period of 7 years or upwards the other party to the marriage has been continually absent from the petitioner and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead until the contrary is proved. H

It is important to mention at first that continual absence from the petitioner, in a case where the wife has bound herself to live separate and apart from him, proves very little, and that therefore it is rather

difficult to say that in a case of this kind the subsection applies. However, the researches by counsel for the petitioner brought to my notice, first of all, that this section follows very closely the wording of the Offences against the Person Act, 1861, s. 57, dealing with the offence of bigamy, which has the following proviso :

A Provided, that nothing in this section contained shall extend to any second marriage . . . or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of 7 years then last past, and shall not have been known by such person to be living within that time . . .

The first part of that proviso is identical with sect. 8 (2), and uses the
B precise words—"shall have been continually absent from such person for the space of seven years"—and counsel argued that, whereas a continual absence for 7 years since 1861 provided a defence to a charge of bigamy, the new Act of 1937 now gives the petitioner a substantive right to get his marriage dissolved, and he informed me that SIR BOYD
C MERRIMAN, P., in *Jones v. Jones* (1), which I think was decided in Nov., 1938, pointed out the similarity between the two sections to which I have referred, and indicated that it was his view that the new Act was intended to provide a substantive remedy, on proof of facts which have hitherto provided a defence to a charge of bigamy. The words
D certainly are most general in their terms. All that the petitioner has to prove is that his wife has been continually absent from him. There is no limiting word dealing with a case where there has been a deed of separation. Indeed, the words are so wide that they would seem to cover even the case where the petitioning husband has himself deserted
E the wife and left her for 7 years.

That that is the law under the Act of 1861 is clear, I think, from *R. v. Faulkes* (2), where the husband was charged with bigamy and it appeared from the facts proved that he had, in fact, deserted his wife, and that that was the reason why she had been continually absent
F from him for the space of 7 years then last past. It was argued in that case that the proviso about criminal absence did not apply in a case where the man had deserted his wife. KENNEDY, J., directed the jury to find a verdict of acquittal, and said, as to the first contention put forward by the prosecution, that he could not make the legislature say
G what he thought it did not intend to say. In his opinion, "absent" meant "not with," and the proviso applied equally both to those who might be called innocent parties and to wilful deserters. Thus, on the first point I am satisfied now that the fact that the wife was continually absent from the petitioner under a deed of separation does not debar the petitioner
H from claiming the advantages of this subsection.

Then there was a second point which troubled me, and that was whether or not the burden lay on the petitioner to satisfy the court, in a case of this kind, that he had no reason to believe that his wife was living within those 7 years. Counsel for the petitioner argued that here again the same rule applied as that which applied in the Act of 1861,

and he invoked the decision of *R. v. Curgerwen* (3), where the court laid down that it was for the prosecution to satisfy the court that the man charged knew that his wife was living within the 7 years, and that it was not for the husband, the man charged, to satisfy the court that he did not know. Counsel for the petitioner argued that that was so also in this case and that there was no burden on the petitioner, under subsect. (2), to satisfy the court that he had no reason to believe that his wife was living within the 7 years. A

One important thing to notice, when one compares the two sections, is that, although the first part of sect. 57 has been carefully followed in sect. 8 (2) of the Act of 1937, the latter part of the section has not been followed. Sect. 57 goes on to say: "and shall not have been known by such person to be living within that time." On the other hand, sect. 8 (2) says: "and the petitioner has no reason to believe that the other party has been living within that time." B

I have got to ask myself how it is possible for the court to know whether the petitioner has any reason to believe that his wife has been living within the 7 years, unless the petitioner himself gives evidence on the point. It is quite impossible for the court to delve into the undisclosed mind of a man and satisfy itself that he has no reason for the belief of a particular fact. In my view, the marked difference in the language in the second part of the subsection indicates that under subsect. (2) it is for the petitioner to give evidence as to whether he had no reason to believe that his wife was living within that time. C D

That brings me to the last point, which caused me some perplexity—namely, whether or not, in a case of this kind, on these facts, the court could say that the petitioner had no reason to believe that his wife was living within the last 7 years. It seems to me that the facts as disclosed here leave the matter one of pure speculation. There is no reason to say that the wife has been alive within that time, any more than there is any reason to say that she has died. It is a matter of pure speculation, and, if it is a matter of pure speculation, I think that the court is entitled to hold that there is, in fact, no reason to believe that the wife has been living within that time. Therefore, it seems to me that the petitioner has brought himself under sect. 8 (2), that there is evidence that the wife is dead, and that on that evidence the court ought to be satisfied, and is satisfied, in this case that reasonable ground exists for supposing that the wife is dead. That being so, I grant the decree of presumption of death, and a decree *nisi*. E F G

Decree of presumption of wife's death and decree nisi granted.

Solicitors: *Kinch & Richardson*, agents for *Donald Race*, Burnley (for the petitioner). H

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

PERRY v. ST. HELENS LAND & CONSTRUCTION CO., LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.J.J.), **May 22, 1939.**]

Practice—Judgment by default—Discovery of mistake—Motion to set aside order—Inherent jurisdiction of court not to be invoked where alternative remedy available.

A

A former director of a company commenced an action to recover a sum alleged to be due as director's remuneration. The statement of claim alleged that the company had passed a resolution fixing the amount of the directors' remuneration. The defendant company allowed judgment to be signed by default, as there was apparently no defence to the claim. Subsequent examination of the minute book showed that no such resolution had been passed by the company in general meeting, as required by the company's articles, and that the resolution had been passed at a directors' meeting, and was, therefore, a nullity. Application was thereupon made to set aside the order and for leave to defend the action. The defendant company relied upon the inherent jurisdiction of the court. It was contended for the plaintiff that the proper course was to move to discharge the order, by asking for leave to bring such motion, notwithstanding that the time had expired, and also to read evidence relating to the discovery of the mistake :—

B

C

HELD : (i) when an order has been made in chambers and no certificate has been given, the proper practice is to move in court to discharge the order, and the court should not be asked to use its inherent jurisdiction when there is an alternative remedy available.

D

(ii) the order made by the master, on default, must be discharged, and the defendant company was to be at liberty to defend the claim,

[EDITORIAL NOTE.] The importance of the present decision is that it emphasises that in matters of procedure it is not proper to invoke the inherent jurisdiction of the court where any other remedy is available. The inherent jurisdiction is to be regarded as a last resort in such cases.

E

AS TO SETTING ASIDE JUDGMENTS BY DEFAULT, see HALSBURY, Hailsham Edn., Vol. 19, pp. 263-266, paras. 562-563; and FOR CASES, see DIGEST, PRACTICE, pp. 160, 161, Nos. 1423-1434. See also YEARLY PRACTICE OF THE SUPREME COURT, 1939, p. 426.

Cases referred to :

F

(1) *Beale v. Macgregor* (1886), 2 T.L.R. 311; Digest, Pleading, 160, 1424.

(2) *Evans v. Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; 157 L.T. 311.

(3) *Hayes & Harlington Urban District Council v. Williams Trustee*, [1936] Ch. 315; Digest Supp.; 105 L.J.Ch. 312; 154 L.T. 695.

(4) *Re Rouse, Rouse v. Tribble* (1889), 59 L.T. 887; Digest, Practice, 738, 3201.

G

(5) *Re Munns & Longden*, [1884] W. N. 117; Digest, Practice, 738, 3200; 50 L.T. 356.

APPEAL by the defendants from an order of CROSSMAN, J., dated Feb. 14, 1939, refusing an application to set aside a judgment obtained under R.S.C., Ord. 14, and to give leave to defend the action.

H

J. Wolfe for the appellants.

R. F. Roxburgh, K.C., and *R. S. Lazarus* for the respondent.

Wolfe : At the time when judgment by default was signed, the defendant company's solicitors were not aware that the resolution fixing the directors' remuneration was *ultra vires*. The resolution had not been passed by the company in general meeting, as required by art. 65 of

Table A, which governs the company. This fact was not ascertained until it became possible to examine the minute book. In the circumstances, it would be a great hardship if the judgment were allowed to stand. The plaintiff has stated, in the statement of claim, that the resolution was passed by the company, and that was at first believed to be correct. The court has an inherent right to set aside a judgment A when the circumstances are such as those which exist in the present case. In *Beale v. Macgregor* (1), it was held that a judgment would be set aside, although the applicant was out of time, if the circumstances of the case required it. That may have been a stronger case than the present, but the inherent jurisdiction exists, and the present case is sufficiently B strong. *Evans v. Bartlam* (2) has some analogy to the present case, and that case shows on what principle the court will act under R.S.C., Ord. 27, r. 15, in setting aside a judgment obtained by default.

Roxburgh, K.C. : Further evidence would, *prima facie*, not be admissible, but the court has power to admit further evidence if the defendants C could not, by the exercise of reasonable diligence, have produced such evidence. The defendants could have asked for an adjournment. As they did not take that step, they could have moved in court to discharge the order. They were out of time, but the court has power to extend the time. The difficulty is that the evidence which they desired to adduce D was all the time in their own possession. The evidence, in answer to our statement of claim, was their own minute book. They did not, however, think it necessary to verify the information of the plaintiff. That was not taking reasonable steps to get the evidence. *Beale v. Macgregor* (1) was a case in which there was a finding that the process E of the court had been abused. The evidence of the receiver was not that he was put off his guard, but that he was relying upon his personal knowledge, as is shown by his second affidavit. His explanation is that he relied upon his instructions and personal knowledge. The correct procedure in this case is to move for the discharge of the order. The F Supreme Court of Judicature (Consolidation) Act, 1925, s. 62, applies in this case. Once the order has been entered, it must be a final order, because it makes a complete end of the litigation, subject only to appeal. The order fulfils the condition required by sect. 62 of the Act of 1925. That view was taken in *Hayes & Harlington Urban District Council v. G Williams' Trustee* (3). The right procedure is to ask the master to adjourn the matter to the judge. If, however, that course is not taken, the procedure is to move in court to have the order discharged under sect. 62. There is no ground for introducing the question of the inherent jurisdiction of the court. There is a remedy provided by statute and by the H rules : *Re Rouse, Rouse v. Tribble* (4) and *Re Munns & Longden* (5). In the court below, the attention of the judge was not called to the procedure for discharging the order. The appellants' case has been put upon a wrong basis, and they should bear the costs.

Wolfe, in reply : It is not disputed that the procedure mentioned on

behalf of the respondent is the ordinary procedure. The appellants were out of time. It would also have been necessary to ask for leave to file further evidence. There was some doubt, having regard to the circumstances, whether or not leave would be granted. It would be necessary for the appellants to show that they could not by due diligence have obtained the evidence earlier. The road of the inherent jurisdiction of the court was open to the appellants, and they took that road. The peculiar circumstances of the case justified the taking of that course. Alternatively, I ask for leave to amend my notice of motion by asking for leave to amend, notwithstanding that the appellants are out of time, and that I may be at liberty to ask the court to discharge the order made by CROSSMAN, J. I also ask for leave to amend and to read the affidavits of Jan. 30 and Feb. 3. If I am wrong in the course I have taken, the other road would have led to the same goal. The costs would have been the same.

SIR WILFRID GREENE, M.R. : This appeal raises a curious point. The writ in the action claimed the payment of a sum of £35 alleged to be due to the plaintiff by way of dividend on shares held by him in the defendant company. There is no dispute as to that sum. The defendant company has no defence. The other claim related to arrears of director's remuneration, and a sum of £135 10s. was claimed, or, alternatively, an account. By the statement of claim, the relevant matters with regard to that claim for remuneration consisted of an extract from the articles of association, which incorporated Table A to the following effect :

The remuneration of the directors shall from time to time be determined by the company in general meeting.

There was also a statement to the effect that, at the first general meeting of the defendant company held on the date stated, a resolution was passed in the following terms. Then there is set out the resolution fixing the remuneration of the directors at 30s. per week. The statement of claim proceeds as follows :

No resolution was at any material time passed by the defendant company rescinding or varying the said resolution.

On Nov. 9, 1938, the writ having been issued on Oct. 19, 1938, an application was made by the plaintiff for leave to sign final judgment for the £35 and the £135 10s., or, alternatively, for an account to be taken under R.S.C., Ord. 15. That application was supported by an affidavit sworn by the plaintiff to the following effect. After dealing with the £35, to which I need not further refer, it stated that the defendant company was indebted to the plaintiff in the sum of £135 10s. :

... the particulars of which claim, so far as I am able to give them, also appear in the said statement of claim herein.

That is, of course, a statement under oath that the allegations contained in the statement of claim are true, including in particular the allegation

that a resolution fixing the remuneration of the directors had been passed by the company in general meeting. The defendants' advisers, faced with that statement, and assuming that it was correct, did not attempt to obtain leave to defend. Indeed, if the statement had been correct, leave to defend could not have been granted, because there would have been no defence to the action. Accordingly, on Nov. 23, 1938, an order was made by Master HAWKINS that the defendants do pay to the plaintiff the sum of £175 10s., being the aggregate of the £35 dividends and £135 10s. arrears of remuneration, and costs. It follows from what I have said that no steps were taken by the defendants to attack that order, because, upon the footing upon which they were acting, that order was unassailable. A B

It now becomes necessary to refer to one or two more facts in relation to the company. On Feb. 12, 1938, the secretary of the defendant company died suddenly, and there appears to have been confusion in the affairs of the company, and subsequently another secretary was appointed, Mr. Jones, who was in fact a partner of the late secretary. In June, 1938, the plaintiff's solicitors asked for the production of the defendant company's minute book. That book was at that time, with other records of the company, untraced, but it was subsequently traced. On June 21, 1938, the Manchester agents of the plaintiff's solicitors examined the minute book on behalf of the plaintiff. As the result of that examination, the statement to which I have referred found its way into the statement of claim. That statement was in a vital particular inaccurate, because the resolution dealing with the directors' remuneration had not been passed, as the articles required, by the company in general meeting, but had been passed, or purported to have been passed, at a meeting of the board. That resolution of the board was a nullity, of course, so far as remuneration was concerned. The board had no power whatsoever to vote remuneration to themselves. Accordingly, as there is no resolution of the company—it is not suggested that there was—which fixed remuneration for the directors, or authorised its payment, the plaintiff's claim must necessarily fail. Accordingly, the position stood thus. I should say that no suggestion is made, or could be made, that either the plaintiff or his advisers acted in anything but perfect good faith in putting forward and vouching for the crucial statement in the statement of claim to which I have referred. Obviously, somebody made a blunder, and the plaintiff and his advisers in London were entirely misled. C D E F G

The defendants' advisers were also misled, and they were misled, as I read the evidence, in this way. Knowing that the Manchester agents of the plaintiff's solicitors had made an inspection of the minute book at the secretary's office, the defendants' advisers drew the natural inference that the simple matter of taking an extract from that minute book was a matter with regard to which there was no real possibility of error, and accepted at its face value the oath of the plaintiff verifying the H

correctness of that extract. The defendants' advisers, as I say, on that basis did not themselves get possession of the minute book and verify the accuracy of the statement. It is a pity that they did not, but, nevertheless, it seems to me that, on the true view of the facts deposed to by Mr. Bieber, the defendants were misled by the plaintiff's own oath with regard to what is now admittedly an incorrect statement, and were thrown off their guard.

The case in that respect is a very special one, and falls to be decided in reference to its own very special facts. In addition to the facts which I have just mentioned, there is what appears to me to be also a very important fact, which differentiates this application from others which might be made in other circumstances—namely, that this application does not refer to something affecting a case which has been tried. This relates to a case which has never been tried. No evidence has been called before the court. In substance, what has happened is that the defendants' advisers, misled by the oath of the plaintiff, have been induced not to take the steps which would have led inevitably, if those steps had been taken before, to their obtaining leave to defend. In those circumstances, it seems to me that the justice of the case, looking at the matter quite apart from any technicality, demands that a summary judgment, obtained in circumstances like that, is one which the court ought not to allow to stand. The application which is made in relation to it is an application based upon what is said to be the inherent jurisdiction of the court. The notice of motion was, as we are told by counsel for the defendants, framed in this way quite deliberately—for an order that the judgment might be set aside, and that the defendants might be at liberty to defend this action. The judge took the view that he was extremely doubtful whether there existed any such inherent jurisdiction as was stated to exist. However that may be, he was not prepared to exercise the discretion which he might be assumed to have in favour of the application, and he accordingly dismissed it. On appeal to this court, the case was argued by counsel for the appellants in opening entirely on the footing of inherent jurisdiction. Counsel for the plaintiff, however, took the point that the proper course for the defendants to pursue was to move to discharge the order of Master HAWKINS, and for that purpose to make the two-fold application which would have been necessary (i) for leave to bring such motion notwithstanding that the time had expired, and (ii) for leave to read evidence which was of necessity not available before Master HAWKINS—namely, the evidence relating to the discovery of this mistake. Counsel for the plaintiff, now the respondent, points out that, under sect. 62 of the Judicature Act, the procedure for dealing with orders made in chambers is to be by application to discharge made to the judge sitting in court, according to the practice of the Division to which the cause or matter in which the order was made is assigned. In the Chancery Division, when an order has been made in chambers, the proper course is to move in court to discharge the order. In practice,

that is a procedure which it only seldom becomes necessary to follow, because the judge, when a matter comes before him in chambers which he thinks suitable for argument in court, will adjourn it into court, whereas, if he does not adjourn it into court, but the matter is fully argued before him in chambers, he gives a certificate that he requires no further argument, and, armed with that certificate, the unsuccessful party can go to the Court of Appeal without the necessity of moving the judge to discharge the order. The normal and proper practice, however, where the order has been made in chambers, and no certificate has been asked for or obtained, is to move the judge in court to discharge the order. That procedure, in a case like the present case, where the order was not made by the judge, but was made by the master, without any request being made for adjournment to the judge, applies equally, and the normal procedure would have been to move to discharge the order of Master HAWKINS. A B

In my opinion, the point taken by counsel for the respondent is correct. By that I mean this. That procedure being open to the defendants, and being the normal procedure of the court in the Chancery Division, the defendants cannot come to this court and ask for the exercise of the inherent jurisdiction of the court when that other remedy is open to them. I do not wish to say anything with regard to the inherent jurisdiction of the court. It is extremely undesirable that any words should be used which might be thought to suggest an increase or diminution of the court's inherent jurisdiction. If this other procedure were not open, or if for some reason it were impossible to take advantage of it, I do not know what the position might be. I prefer to express no opinion on this question whether or not the court in such circumstances would have in reserve a power under its inherent jurisdiction. I say nothing on that subject at all. Whatever the position may be with regard to that, however, I think that the court, even assuming that it has that jurisdiction, ought not to exercise it where the proper course is pointed out by the rules of court. C D E F

It is said by counsel for the appellants in answer to that argument that the other course of moving to discharge the order was not fairly open to him for two reasons, (i) because he could only make such an application successfully if he had obtained leave to move out of time, and (ii) because in any event he would have required leave to read further evidence, and it was not certain that either or both of those applications would be granted. I fully appreciate the difficult position in which any adviser of the defendants' was placed. It is no criticism of the course which they were advised to take that it turns out, on examination in this court, to be a wrong one. That is a misfortune which the defendants have to endure. However, as I have said, in my opinion, the proper course was to move to discharge, and to ask for the necessary leave to move out of time and read the further evidence. If such an application had been made, sitting in this court I may say that, in my opinion, it is an applica- G H

tion which ought to have been granted. If it had been made in that form, the right course for the judge to take would have been to grant the necessary leave and to discharge the order. We have all the facts before us here, and, if the judge had not done that, I cannot think for one moment that this court would have allowed his decision to stand.

- A Therefore, the position is that the order was one which the defendants could have had discharged if they had taken that course, but they did not do so. The question arises as to what this court is to do. It would obviously be unfortunate if the only course open to this court were to dismiss the appeal and leave the defendants to start all over again
- B making the application which they ought to have made in the first instance, thus incurring further costs, only to achieve the same result as that which they are seeking to achieve by their present motion. As I have said, with all the facts before us, I take the view, and take it quite clearly, that an order to discharge is one to which the defendants, if they
- C had taken the right course, would have been entitled. Is this court to send the defendants by that roundabout road for no useful purpose? I think that it would be a grave misfortune if the powers of this court were not adequate to prevent such a result. The court has all the facts before it. It is confronted by one difficulty—namely, that the notice of
- D motion does not in terms ask for relief on the basis of discharging the order in accordance with the ordinary practice. Nevertheless, the powers of this court to order amendments, to receive evidence, and generally to make such orders as are necessary to produce a just result extend, in my judgment, to allowing the necessary amendments of the notice of
- E motion to enable the appellants to be put in the same position in this court as that in which they would have been if the application had in the first instance been framed on the basis which I hold to be the correct one. Accordingly, the proper order, in my judgment, is on the applica-
- F tion of the appellants, because counsel for the appellants, as an alternative to his claim on the ground of inherent jurisdiction, asks for leave to amend his notice of motion, to direct the notice of motion to be amended by inserting the necessary request that, notwithstanding that the appellants are out of time, they may be at liberty to move the court to discharge the order, and that on that application new evidence may be read. The
- G notice of motion being amended in accordance with that direction, the order of the court will be that the order of Master HAWKINS be discharged, and that the defendants be at liberty to defend the action, and counter-claim therein.

- So far as the costs are concerned, the costs of the application before the
- H judge must, in any event, remain to be borne by the defendants. If they had taken the right procedure, they would have had to bear those costs, because they were coming to the court for an indulgence, and there is no reason why the ordinary rule should not be followed. A more difficult question arises in connection with the costs of this appeal. When the motion was dealt with by the judge, it was not put by the

defendants on any basis except that of inherent jurisdiction. It was not resisted by the plaintiff on any ground save that such inherent jurisdiction did not exist. In this court, the plaintiff has shifted his ground, because the argument of his counsel has been that, whether or not the inherent jurisdiction is there in reserve to be used if necessary, it ought not to be used in a case where there is another form of procedure laid down A in the rules, and his argument on that ground is accepted. As I say, if, in the court below, the substantial point had been taken upon which the respondent succeeds on the motion as originally framed before this court, I cannot help thinking that the judge would have given all the leave necessary by way of amendment, notwithstanding the lapse of B time, and leave for the reading of further evidence to enable the defendants' application to be put on the alternative ground. However, the point was not taken, and the result was that the matter before CROSSMAN, J., came to be decided on lines different from those upon which it has been decided in this court. C

In that state of affairs, I think it is not wrong to remember that the whole of this unfortunate litigation—by which I refer to the present motion in relation to which the appeal is brought—might have been avoided, or, at any rate, the initial part of it could have been avoided, if the plaintiff had acted in a different way. After all, he had succeeded D in obtaining from the court an order which in effect precluded the defendants from ever putting up a defence to the action. When he discovered that that order had been obtained, and the action of the defendants in submitting to it had been brought about, by a perfectly innocent misstatement on his part, one would have thought that the reasonable course E to take would have been to facilitate by every means the putting right of an injustice of which one would have thought that he would not have desired to avail himself. Instead of that, he preferred to stand on a highly technical position. The question is whether or not, in considering the matter of costs, one ought to bear that in mind. In my opinion, F the court is entitled to bear that circumstance in mind. On consideration of all the relevant matters, I think that the proper order with regard to the costs of the appeal will be that neither party shall have costs. In other words, there will be no order as to the costs of this appeal. G

FINLAY, L.J. : I agree.

LUXMOORE, L.J. : I also agree.

Solicitors : *Lionel Lazarus & Leighton*, agents for *Alfred Bieber & Bieber*, Liverpool (for the appellants); *Wrentmore & Son*, agents for *George T. Richards & Evans*, Bournemouth (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

BUTLER v. R.

[PRIVY COUNCIL (Lord Russell of Killowen, Lord Romer and Sir George Rankin), **April 24, May 12, 1939.**]

Privy Council—Trinidad and Tobago—Colonial courts—Judges—Appointment as acting judge of Supreme Court—Whether puisne judge and as such entitled to sit in Court of Criminal Appeal—Judicature Ordinance, 1880 (c. 35), s. 7 (1) (3)—Judicature (Amendment) Ordinance (No. 24 of 1936), s. 4 (1)—Criminal Appeal Ordinance (No. 31 of 1931), s. 3 (1)—Interpretation Ordinance (No. 19 of 1933), ss. 17, 20.

Under the provisions of the Judicature Ordinance, 1880, as amended by the Judicature (Amendment) Ordinance, 1936, the Supreme Court of the colony of Trinidad and Tobago consists of 4 judges—namely, the chief justice and the first, second and third puisne judges. Provision is made under sect. 7 of the main ordinance for the office of any judge of the court when vacant, or whenever any judge is absent from the colony or for any other reason is incapable of acting, to be filled by the appointment by the governor of an acting judge in his place, such person to have all the powers of a judge of the court. In 1931, an ordinance was enacted establishing in the colony a Court of Criminal Appeal. It provided that the judges of the court should be the chief justice and the puisne judges of Trinidad and Tobago, and the court so established was to be a superior court of record. This ordinance did not contain a power to appoint a person to act as a judge of the Court of Criminal Appeal. The appellant was indicted on a charge of sedition, tried in the Supreme Court, and found guilty. He appealed from his conviction to the Court of Criminal Appeal, which dismissed the appeal. The court which heard and dismissed the appeal was composed of the chief justice of the colony and two acting judges, the latter being appointed by the governor to act as judges of the Supreme Court to hear and determine the appeal. The appellant alleged that this court was not a duly constituted court. The Crown contended that, by virtue of sect. 7 (3) of the ordinance of 1880, every person appointed as an acting judge was given all the powers of a judge of the Supreme Court, and that one of the powers thus given enabled him to sit and adjudicate in the Court of Criminal Appeal. The Crown further contended that, under the Interpretation Ordinance (No. 19 of 1933), ss. 17, 20, conferring upon the governor power to appoint a person to act in the place of a public officer during his absence, the governor had power to make the appointments in this instance:—

HELD: (i) the constituent members of the Court of Criminal Appeal were, by enactment, the chief justice and the puisne judges of the colony. A person appointed under sect. 7 (3) was not a puisne judge, and could not, therefore, be a member of the Court of Criminal Appeal.

(ii) the Interpretation Ordinance, 1933, ss. 17, 20, had no application. Each section dealt with the case of one individual being appointed to take the place of another individual, and act as substitute for him. In this case, neither of the acting judges had been appointed to take any one's place or to act as substitute for any individual.

[EDITORIAL NOTE.] Though decided upon the construction of the particular ordinances of Trinidad, this decision is of importance to most colonial legislative and judicial bodies. Put quite shortly, an acting judge is not a puisne judge, and cannot, therefore, be a member of a court which, by statute, must be composed of puisne judges. It would seem that it is necessary, when drafting the constitution of additional courts to be composed of existing judges, to state that persons acting for such judges—that is, acting judges—shall be competent to sit in the court.

AS TO CONSTITUTION OF COLONIAL COURTS, see HALSBURY, Hailsham Edn.,

Case referred to :

- (1) *R. v. Marais, Ex p. Marais*, [1902] A.C. 51 ; 17 Digest 424, 60 ; 71 L.J.P.C.
32 ; 85 L.T. 363.

APPEAL from a judgment of the Court of Criminal Appeal of Trinidad A
and Tobago (GERAHTY, C.J., HOBSON and BOLAND, Acting JJ.), dated
Jan. 28, 1938, dismissing an appeal from a judgment of the Supreme
Court (ROBINSON, J.), dated Dec. 16, 1937. The judgment of their
Lordships was delivered by LORD RUSSELL OF KILLOWEN.

Hon. Sir Stafford Cripps, K.C., and *G. Granville Slack* for the appellant. B
The Attorney-General (Rt. Hon. Sir Donald Somervell, K.C.) and
Kenelm Preedy for the Crown.

Cripps, K.C. : The governor has power to appoint an acting judge to
the Supreme Court. There is no provision in the Criminal Appeal Ordi-
nance for the appointment of any acting judges, such as is to be found C
in the Supreme Court Act, and sect. 3 (1) of the former does not give any
power of putting into the Court of Criminal Appeal anybody except
puisne judges. The Interpretation Ordinance, 1933, has no bearing
here.

The Attorney-General : The governor has power to appoint a person D
to act as a judge of the Supreme Court, and a person so appointed has
all the powers of a judge of that court, including the power to be, or act
as, a judge of the Court of Criminal Appeal. That court consists of the
judges of the Supreme Court, and this jurisdiction would come within the
powers of an acting judge so appointed : *R. v. Marais, Ex p. Marais* (1) E
“Puisne” is a word which is used to distinguish the judges from the
chief justice. This is merely a nomenclature, and has nothing to do
with jurisdiction. In this case, there was a valid appointment of an
acting judge of the Supreme Court, even if the appointment of an acting
judge of the Court of Criminal Appeal was *ultra vires* the powers of the F
governor, and, under the provisions of the Interpretation Ordinance,
1933, s. 20 (2), the person so appointed was empowered to act as a judge
of the Court of Criminal Appeal. In the further alternative, sect. 17 is
applicable.

Cripps, K.C., in reply : The words of sect. 17 of the Interpretation G
Ordinance are wholly inapplicable to the present case. The appoint-
ment of an acting judge *ad hoc* under sect. 7 of the Judicature Ordinance
gives him the powers, not of a puisne judge, but of a judge of the Supreme
Court.

LORD RUSSELL OF KILLOWEN : The appellant was indicted on a
charge of sedition before ROBINSON, J., and a jury in the Supreme
Court of Trinidad and Tobago. He was found guilty, and on Dec. 16,
1937, was sentenced to 2 years' imprisonment with hard labour. He
appealed from the conviction to the Court of Criminal Appeal of that

H

colony. The appeal was heard and dismissed on Jan. 28, 1938. The appellant then petitioned His Majesty in Council for special leave to appeal *in forma pauperis*, alleging, amongst other grounds, that the court which had heard and dismissed his appeal was not a duly constituted court, and, by order in council dated July 28, 1938, leave was granted to him
 A to appeal against the judgment of Jan. 28, 1938 :

... the appeal to be limited to the sole question whether the said court was duly constituted according to the provisions of the Criminal Appeal Ordinance, 1931 (No. 31 of 1931), of Trinidad and Tobago having regard to the fact that the court included 2 acting judges.

B Their Lordships are accordingly in no way concerned with the merits of the appellant's appeal from his conviction. They have only to consider whether the appeal was heard by a tribunal capable of adjudicating upon it.

The court which heard and dismissed the appeal was composed of
 C GERAHTY, C.J., HOBSON and BOLAND, Acting JJ. The question for determination is whether the two last-named gentlemen were members of, or entitled to sit in, the Court of Criminal Appeal. The solution of this question depends upon the true construction of certain ordinances.

The Judicature Ordinance, 1880 (c. 35), is dated Mar. 20, 1880, and
 D (as amended by some subsequent ordinances) provides as follows :

3. There shall be one Supreme Court in the colony, which shall be a superior court of record, and such court shall be called the Supreme Court of Trinidad and Tobago.

4. (1) The Supreme Court shall consist of not more than 3 and not less than 2 judges, of whom one shall be called the chief justice of Trinidad and Tobago and shall be the president of the court, and the other or others shall be called the puisne
 E judge or puisne judges of Trinidad and Tobago, and shall, if more than one, be called the first and second puisne judges according to the terms of their respective appointments. [Substituted by 23 of 1914, s. 3.] (2) The court shall be deemed to be duly constituted notwithstanding any vacancy in the office of any judge.

5. Every judge of the court shall be appointed by letters patent under the public seal of the colony by the governor, in accordance with such instructions as he may receive through one of His Majesty's principal secretaries of State, and shall hold his
 F office during His Majesty's pleasure, subject to any conditions contained in any regulations made by or under the authority of His Majesty for His Majesty's colonial service, and shall receive such salary as the governor, with the sanction of the legislative council, may appoint. The acceptance by any judge of the court of any other office or place of profit or emolument not authorised by law shall be and be deemed *de facto* an avoidance of his office of judge, and his salary as judge shall cease accordingly from the time of his acceptance of such other office or place.

6. Any act required or authorised to be done by, before, or in the name of the
 G chief justice may be done by, before, or in the name of a puisne judge of the court in case of the absence on leave or otherwise, indisposition, or inability to attend of the chief justice.

7. (1) Whenever the office of any judge of the court is vacant, or whenever any judge is absent from the colony, or is, by reason of illness, interest in any cause or matter, or for any other reason, incapable of acting, or whenever in the opinion of the governor the due administration of justice so requires, the governor may, in the name of His Majesty, by letters patent under the public seal of the colony, appoint some person, being a barrister-at-law of 5 years' standing at least to act
 H as judge of the court. (2) Every such appointment shall be for such time, or for the trial or hearing of such causes or matters, or otherwise, as may be specified in the instrument of appointment. (3) Every person so appointed and acting under such appointment shall, so far as may be necessary for the purposes of his appointment, have all the powers of a judge of the court, and all acts done within the scope of his appointment by any person so appointed and acting as aforesaid shall be as valid as if done by a judge, whether in court or chambers or otherwise.

By the Judicature (Amendment) Ordinance, 1936, the following sections were substituted for sects. 4 and 5 above set out :

4. (1) The Supreme Court shall consist of 4 judges, one of whom shall be designated the chief justice of Trinidad and Tobago and the others the puisne judges of Trinidad and Tobago. The chief justice shall be the president of the said court. The puisne judges shall be called the first, second and third puisne judges according to the terms of their respective appointments. (2) The court shall be deemed to be duly constituted notwithstanding any vacancy in the office of any judge.

5. Every judge of the court shall be appointed by letters patent under the public seal of the colony by the governor, in accordance with such instructions as he may receive through one of His Majesty's principal Secretaries of State, and shall hold his office during His Majesty's pleasure, subject to any conditions contained in any regulations made by or under the authority of His Majesty for His Majesty's colonial service, and shall receive such salary as the governor, with the sanction of the legislative council, may appoint. No judge shall accept or perform any other office or place of profit or emolument not authorised by law without the consent of the governor: Provided that this restriction shall not apply to a judge temporarily appointed to act as such under sect. 7 of this ordinance.

The Supreme Court of the colony accordingly now consists of 4 judges—namely, the chief justice and the first, second and third puisne judges.

In 1931, there was enacted an ordinance to establish in the colony a Court of Criminal Appeal, by the Criminal Appeal Ordinance, 1931. That ordinance contained the following provisions :

3. (1) There shall be a Court of Criminal Appeal in the colony, and the chief justice of Trinidad and Tobago and the puisne judges of Trinidad and Tobago shall be judges of that court. (2) For the purpose of hearing and determining appeals under this ordinance, and for the purpose of any other proceedings under this ordinance, the Court of Criminal Appeal shall be summoned in accordance with directions given by the chief justice, and the court shall be duly constituted if it consists of 3 judges. The court shall sit in Port-of-Spain except in cases where the chief justice gives special directions that it shall sit at some other place. (3) The chief justice, if present, and in his absence the senior member of the court, shall be president of the court. (4) A judge of the Court of Criminal Appeal shall not sit as a judge on the hearing of any appeal, or on the hearing of any application for leave to appeal, against a verdict given or sentence passed at a trial at which he presided, or on the consideration of any point reserved by him under the provisions of the Criminal Procedure Ordinance, c. 5. (5) The determination of any question before the Court of Criminal Appeal shall be according to the opinion of the majority of the members of the court hearing the case. (6) Unless the court direct to the contrary in cases where, in the opinion of the court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the court, the judgment of the court shall be pronounced by the president of the court or such other member of the court hearing the case as the president of the court directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the court. (7) The Court of Criminal Appeal shall be a superior court of record, and shall, for the purposes of and subject to the provisions of this ordinance, have full power to determine, in accordance with this ordinance, any questions necessary to be determined for the purpose of doing justice in the case before the court. (8) Any direction which may be given by the chief justice under this section may in the event of any vacancy in that office or in the event of the incapacity of the chief justice to act from any reason, be given by the senior judge of the Court of Criminal Appeal.

It is to be observed that the court so established is not established as a branch of the existing Supreme Court; but as a separate court of record, the judges of which are stated to be "the chief justice of Trinidad and Tobago and the puisne judges of Trinidad and Tobago." It is further to be observed that the Criminal Appeal Ordinance contains no power to appoint a person to act as a judge of the Court of Criminal Appeal.

The critical point now becomes apparent. Is a person who has been appointed under sect. 7 of the Judicature Ordinance "to act as judge of the Supreme Court" a member of the Court of Criminal Appeal or capable of acting as such? The letters patent appointing Mr. Hobson to be an acting judge ran thus:

A WHEREAS by Section 7 of the Judicature Ordinance, Chapter 35, it is among other things provided that whenever in the opinion of the Governor the due administration of justice so requires the Governor may, in the name of His Majesty, by Letters Patent under the Public Seal of the Colony, appoint some person, being a Barrister-at-Law of five years' standing at least to act as Judge of the Supreme Court.

B AND WHEREAS it is expedient to appoint some person to act as a judge of the Supreme Court for the purpose of hearing and determining the appeal of Tubal Uriah Buz Butler to the Court of Criminal Appeal in the case of *The King vs. Tubal Uriah Buz Butler for Sedition*;

C KNOW ye therefore by these presents that WE being well satisfied of the loyalty, integrity and ability of JOHN DAVIDSON HOBSON, ESQUIRE, B.A., K.C., do hereby appoint the said John Davidson Hobson to act as Judge of the Supreme Court and of the Court of Criminal Appeal of the said Colony as from the 24th day of January, 1938, for the purpose of hearing and determining the said appeal of the said Tubal Uriah Buz Butler, and for that purpose to have, hold, exercise and enjoy the said office and place, together with all rights, privileges and advantages thereunto belonging or appertaining.

The letters patent appointing Mr. Boland were in identical language.

D It seems plain to their Lordships that, if the acting judges were members of the Court of Criminal Appeal, or were capable of sitting therein, that result can have flowed only from their having been appointed to act as judges of the Supreme Court, for no power existed to appoint them to act simply as judges of the Court of Criminal Appeal, or to appoint them for the hearing of a specified matter in that court.

E It is said on behalf of the respondent that the result does flow from their appointment to act as judges of the Supreme Court, because, under sect. 7 (3) of the Judicature Ordinance, every person so appointed is given all the powers of a judge of the Supreme Court, and that one of the powers thus given is the power of a judge of the Supreme Court to sit

F and adjudicate in the Court of Criminal Appeal. Their Lordships are unable to accept this contention. The powers conferred by sect. 7 (3) are the powers exercisable by a judge of the Supreme Court when he is acting in that capacity. Those are the powers which are to be exercisable by the appointee when he is acting in the same capacity. They are

G conferred upon him only "so far as may be necessary for the purpose of his appointment"—that is, his appointment to act as a judge of the Supreme Court—and it is the acts done by a person "acting as aforesaid" which are to be as valid as if done by a judge. Nor is it true to say that one of the powers of a judge of the Supreme Court is the power

H to sit and adjudicate in the Court of Criminal Appeal. That power is derived only from the fact that the constituent members of that court are, by enactment, the individuals who are the chief justice and the puisne judges of Trinidad and Tobago. A person appointed under sect. 7 (3) of the Judicature Ordinance is not a puisne judge of Trinidad and Tobago, nor is he, under that provision, invested with any powers

beyond such as are necessary to enable him to act effectively as a judge of the Supreme Court.

Two further contentions were advanced on behalf of the respondent, based upon the Interpretation Ordinance, 1933 (No. 19 of 1933), ss. 17, 20. Those sections provide as follows :

17. Where by or under any law, any powers are conferred or any duties are imposed upon a public officer, the governor may direct that if during any period owing to absence or inability to act from illness or any other cause such public officer shall be unable to exercise the powers or perform the duties of his office in any place under his jurisdiction or control, such powers shall be had and may be exercised and such duties shall be performed in such place by the person named by or by the public officer holding the office designated by the governor; and thereupon such person or public officer, during any period as aforesaid, shall have and may exercise the powers and shall perform the duties aforesaid, subject to such conditions, exceptions, and qualifications as the governor may direct. A

20. (1) Where any law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires. (2) Where any law confers a power or imposes a duty on the holder of an office, as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder of the office for the time being or by a person duly appointed to act for him. B

It was said that this case was covered by one or other of these sections, but quite plainly neither section can apply. Each section deals with the case of one individual being appointed to take the place of another individual, and to act as a substitute for him. In the present case, neither Mr. Hobson nor Mr. Boland was appointed to take anyone's place, or to act as a substitute for any individual. C

Nor can the respondent derive any help from the decision of their Lordships' Board which was cited—namely, *R. v. Marais, Ex p. Marais* (1)—which at most might be an authority to establish that a person appointed to act as a judge of the Supreme Court is a judge of the Supreme Court. It falls far short, however, of establishing the proposition that a person appointed so to act is a member of, or entitled to sit in, a court the judges of which, it is enacted, shall be the chief justice and the puisne judges of the colony. An acting judge is not a puisne judge of the colony, for the number of puisne judges is fixed, and cannot be exceeded. Moreover, they are appointed in accordance with instructions received through a Secretary of State, which is not the case with acting judges. For the reasons indicated, their Lordships are of opinion that the court which purported to adjudicate upon the appellant's appeal from his conviction was not properly constituted as the Court of Criminal Appeal in the colony. It had no jurisdiction to deal with the matter. The appeal from the conviction, accordingly, has never been heard. This appeal should, therefore, be allowed, and the judgment of the chief justice and the two acting judges of Jan. 28, 1938, should be declared to be void and of no effect. Their Lordships will humbly advise His Majesty accordingly. D

Appeal allowed.

Solicitors: *Hy. S. L. Polak & Co.* (for the appellant); *Burchells* (for the respondent). E

[Reported by T. A. DILLON, Esq., Barrister-at-Law.] F

G

H

BEAUMONT-THOMAS v. BLUE STAR LINE, LTD.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), May 24, 25, 1939.]

Carriers—Carriage of passengers—Passenger ticket—Conditions—General exclusion of liability—Followed by exclusion of particular risks—"From any cause whatsoever"—Passenger slipping on floor being washed.

The plaintiff, while a passenger on the defendants' steamship, slipped on the floor of the corridor outside his cabin and sustained injuries. He then sued the defendants for damages for breach of an express or implied contract that the floor of the corridor should be safe, and for negligence on the part of their servants in washing the floor in such a way as to make it slippery and dangerous and a concealed trap to the plaintiff without warning him of the danger. The defendants denied negligence on the part of their servants, and contended that they were protected by the conditions set out upon the ticket. The jury found that the defendants, through their servants, had been guilty of negligence, and the question then remained whether their liability for this negligence was excluded by the terms of the ticket. The two conditions relied upon were Nos. 8 and 9, which it was agreed should be read together. Condition 8 provided that passengers took upon themselves "all risk whatsoever of the passage;" including risks of embarking and disembarking, and condition 9 provided that, without restricting the generality of condition 8, neither the company, the master nor its agents should be held liable for loss or damage arising in certain specifically enumerated circumstances or from any other cause whatsoever. No mention was made of the negligence of the defendants' servants:—

HELD: (i) in order to construe any exception of liability, it was first necessary to ascertain the contractual duty, apart from the exception. As this duty was one to use due care and skill, it followed that the exceptions clause must extend to exempt the person so bound to use due care and skill from the consequences both of his negligence and of that of his agents. There was nothing in condition 9 to limit the wide terms of condition 8, and the shipowner was protected from liability.

(ii) there was no evidence of negligence.

Judgment of LORD HEWART, L.C.J. ([1939] 1 All E.R. 174) reversed.

[EDITORIAL NOTE.] The decision in this case in the court below was based mainly on the fact that, upon their proper construction, the material clauses of the contract of carriage only referred to the risks of the passage. The Court of Appeal have wholly dissented from this view, and the judgments given are important by reason of the plain statement of the principles of the law and the result of the leading cases affecting such conditions.

AS TO CONDITIONS LIMITING LIABILITY, see HALSBURY, Hailsham Edn., Vol. 30, p. 621, para. 780; and FOR CASES, see DIGEST, Vol. 41, pp. 306-308, Nos. 1678-1692.]

Cases referred to:

- (1) *Price & Co. v. Union Lighterage Co.*, [1904] 1 K.B. 412; 8 Digest 44, 265; 73 L.J.K.B. 222; 89 L.T. 731; *affg.*, [1903] 1 K.B. 750.
- (2) *Pyman S.S. Co. v. Hull & Barnsley Ry. Co.*, [1915] 2 K.B. 729; 41 Digest 976, 8660; 84 L.J.K.B. 1235; 112 L.T. 1103.
- (3) *Rutter v. Palmer*, [1922] 2 K.B. 87; Digest Supp.; 91 L.J.K.B. 657; 127 L.T. 419.
- (4) *Calico Printers' Asscn., Ltd. v. Barclays Bank* (1931), 145 L.T. 51; Digest Supp.
- (5) *Larsen v. Sylvester & Co.*, [1908] A.C. 295; 41 Digest 306, 1682; 77 L.J.K.B. 993; 99 L.T. 94.

- (6) *Thorman v. Dowgate S.S. Co., Ltd.*, [1910] 1 K.B. 410 ; 41 Digest 307, 1685 ; 79 L.J.K.B. 287 ; 102 L.T. 242.
- (7) *France, Fenwick & Co., Ltd. v. Spackman (Philip) & Sons* (1912), 108 L.T. 371 ; 41 Digest 452, 2836.
- (8) *Reynolds v. Boston Deep Sea Fishing & Ice Co., Ltd.* (1922), 38 T.L.R. 429 ; Digest Supp.
- (9) *Travers (Joseph) & Sons, Ltd. v. Cooper*, [1915] 1 K.B. 73 ; 8 Digest 44, 266 ; A 83 L.J.K.B. 1787 ; 111 L.T. 1088.
- (10) *Haigh v. Royal Mail Steam Packet Co., Ltd.* (1883), 52 L.J.Q.B. 641 ; 8 Digest 103, 684 ; 49 L.T. 802.
- (11) *The Stella*, [1900] P. 161 ; 8 Digest 57, 376 ; 69 L.J.P. 70 ; 82 L.T. 390.
- (12) *Weigall v. Westminster Hospital*, [1936] 1 All E.R. 232 ; Digest Supp.
- (13) *Indermaur v. Dames* (1866), L.R. 1 C.P. 274 ; 36 Digest 35, 208 ; 35 L.J.C.P. B 184 ; 14 L.T. 484 ; *affd.* (1867), L.R. 2 C.P. 311.

APPLICATION by the defendants for judgment or new trial on appeal from verdict and judgment at the trial before LORD HEWART, L.C.J., and a special jury, dated Jan. 20, 1939, and reported [1939] 1 All E.R. 174, awarding the plaintiff £6,000 damages. The facts are fully set out in the judgment of SCOTT, L.J. C

Rt. Hon. Sir William Jowitt, K.C., and *Cyril T. Miller* for the appellants.
W. Norman Birkett, K.C., and *Robert Fortune* for the respondent.

Jowitt, K.C. : The contract excludes the company's liability for all risks whatsoever. The *ejusdem generis* doctrine of construction has D no application here. [Counsel referred to *Price & Co. v. Union Lighterage Co.* (1), *Pyman S.S. Co. v. Hull & Barnsley Ry. Co.* (2), *Travers (Joseph) & Sons, Ltd. v. Cooper* (9), *Rutter v. Palmer* (3), *Reynolds v. Boston Deep Sea Fishing & Ice Co., Ltd.* (8), *Haigh v. Royal Mail Steam Packet Co., Ltd.* (10), *The Stella* (11), *Larsen v. Sylvester & Co.* (5), *Thorman v. E Dougate S.S. Co., Ltd.* (6), *France, Fenwick & Co., Ltd. v. Spackman (Philip) & Sons* (7) and *Weigall v. Westminster Hospital* (12).]

Miller : There is no duty on an invitor to see that the place to which he invites another is absolutely safe. All that is necessary is that there shall be no unseen or unusual danger. Here the danger was obvious F to anyone. Everybody knows that, when a floor is being washed, it is slippery. There was no evidence fit to go to the jury. It is admitted that, if there had been evidence for the jury to consider, the judge's summing up was unexceptionable. [Counsel referred to *Indermaur v. Dames* (13).] G

Birkett, K.C. : It was submitted at the trial that there was no evidence to go to the jury, but the judge, after hearing the defendants' counsel, rejected that argument. In the first place, there was the unusual hour at which the deck was being washed. The passengers were going to their cabins to dress for dinner. No warning was given to prevent H people from using the alley-way in question. The interpretation which the defendants seek for conditions 8 and 9 is that in no circumstances can they be liable for anything at all. This is inconsistent with condition 9. The words "risk of the passage" should be construed to exclude negligence of the company's servants in cleaning the decks.

There is authority that the management of a ship does not include the washing. As to condition 9, the *ejusdem generis* principle applies. If all risks are excluded, why should it be necessary to have a clause giving specific instances? [Counsel referred to *Calico Printers' Assn., Ltd. v. Barclays Bank* (4).]

A Counsel for the appellants were not called upon in reply.

SCOTT, L.J.: This is an appeal from a judgment of LORD HEWART, L.C.J., entered after trial of an action before a special jury. The plaintiff in the action was Mr. Reginald Beaumont-Thomas, and the defendants were the Blue Star Line, Ltd. The action was upon a contract between the plaintiff and the defendants that the defendants should take him on a cruise on the *Arandora Star* to see the Naval review in May, 1937. It was a short cruise from Southampton, through the English Channel to North Sea ports in Germany and Holland, and back to Spithead. The cruise was to begin on May 14, and was upon the terms of a passenger's ticket issued to the plaintiff. On the first day out from Southampton, 2½ hours or so after sailing from Southampton, when the ship was passing up the English Channel in calm weather, there being no motion of the ship, about 6.30 p.m. the plaintiff and his wife, followed by another passenger, were walking forwards along the port alley-way on Deck C on the *Arandora Star*. That alley-way was at the time being cleaned by a steward. He was cleaning the alley-way from aft in a forward direction, he himself being on his knees in order to scrub it, and facing aft towards the direction from which the plaintiff and his wife were coming. The steward was scrubbing the floor in that way. The floor was of rubber of a usual type, and the method of cleaning it was a method usual, not only on ships, but also on shore—namely, with soap and water. As the plaintiff's wife passed the steward who was cleaning, the steward withdrew his bucket slightly to the side. As she passed, she herself slipped slightly, and called out to her husband: "Take care, dear." Her husband had, as a child, suffered from the disease of poliomyelitis, which affects the marrow of the bones, and had also suffered an accident, and was to a certain extent a crippled man, not having complete control either of his legs or of his arms. As he followed his wife, he slipped and fell. She had saved herself from slipping, and had passed on, but he fell and injured himself severely, and incurred heavy hospital expenses. The jury, as a matter of fact, awarded him the sum of £6,000. That award was given on the ground that the defendants were guilty of negligence.

H The evidence before the jury was the evidence given by the plaintiff himself and his wife, and an ordinary charwoman as an expert. The defendants elected to call no evidence, submitting that there was no evidence of negligence to go to the jury. LORD HEWART, L.C.J., however, left the case to the jury, with the result which I have stated.

The second defence of the defendants was that the contract of carriage

between themselves and the plaintiff as a passenger on the cruise was a written contract contained upon a form partly in print, and that the conditions of that contract included two conditions either of which protected them from liability for the negligence of their servants. LORD HEWART, L.C.J., interpreted both those conditions as not covering the negligence of the defendants' servants in such a matter as the cleaning A
of an alley-way, and consequently held that those two conditions did not afford the protection which the defendants claimed. He therefore gave judgment, in accordance with the verdict of the jury, in favour of the plaintiff for the amount awarded. The appeal is by the defendants from that judgment on two grounds, (i) that the contract did protect B
them from that liability under its express clauses, and (ii) that there was no evidence of negligence fit to be left to the jury.

I will deal with the former of those two questions first. That question depends upon conditions 8 and 9 of the conditions, and their proper interpretation. It is clear, in my view, that both conditions are conditions C
about the liability of the defendants under their contract of carriage, and both are intended to give to the defendants immunity from liability in accordance with their terms. It is not disputed on behalf of the plaintiff (the respondent here) that both conditions are in fact conditions D
excluding liability as far as they go, but the question is, what is their true scope? LORD HEWART, L.C.J., as I have said, thought that there was a way of limiting their scope which seemed to him to be a correct interpretation, and he applied it. On all questions of pure interpretation of a written document, where the language is not perfectly clear, it is very easy for different minds to take different views, and I feel, naturally E
enough, some hesitation in arriving, as I do arrive, at a view different from that held by LORD HEWART, L.C.J. I must therefore endeavour to explain clearly the reasons why I differ from him.

The first point is this. In order to construe any exception of liability for events happening in the performance of the contract, where the F
words of the exception are not so clear as to leave no doubt as to their meaning, it is essential first to ascertain what the contractual duty would be if there were no exception. In the contract of a common carrier by land, or of a shipowner for the carriage of goods by sea, broadly speaking, the carrier is an insurer of the safe delivery of the goods. If they G
are damaged on the way, he is liable. That is his primary duty. There is also a secondary duty, however—namely, the duty to use skill and care. That duty comes into play in case of the carrier invoking some term of an exception clause as a protection against liability. In such a case, if the excepted peril has been occasioned by the negligence of the carrier's H
servants, the failure to perform the secondary duty debars him from reliance upon his exception. In the case of a carrier of passengers, no such double liability attaches. He is under a duty to use due skill and care, and no more. The absolute duty of the goods carrier to keep and deliver safely does not apply. This fundamental difference in the

basic contract caused the common law courts of England during the last 100 years to make a difference in the interpretation of general words of exception from liability according as the contract to be construed was one imposing the double duty or only the one duty. In each interpretation they had two principles to guide them, (i) the rule of construction *contra proferentem*, and (ii) their natural reluctance to read into a contract a release from the duty of skill and care, unless quite unambiguous language made that construction unavoidable. When one looks back over the history of the judicial interpretation of contracts of carriage by English courts, it is now to be remembered that the question of negligence clauses has been solved for a large part of the world by the International Convention based on the Hague Rules, to which legislative effect was given by this country by the Carriage of Goods by Sea Act, 1924.

In the case of double duty, the courts have treated the exception as *prima facie* directed to the absolute undertaking of safe delivery, but as not applying to the performance of the duty of skill and care. On the other hand, in a contract where there was no duty except the duty of skill and care, the courts have construed the same words of exception in the opposite sense—namely, as directed to the duty of skill and care—for the two simple reasons (i) that some meaning must be given, and (ii) that no other meaning than an exception of liability for negligence was left. This principle of interpretation runs through a long line of cases, of which *Price & Co. v. Union Lighterage Co.* (1), *Pyman S.S. Co. v. Hull & Barnsley Ry. Co.* (2) and *Rutter v. Palmer* (3) are the chief. In the last case, SCRUTTON, L.J., after referring to the above rule of construction, speaks of a garage proprietor taking charge of cars and selling them on commission after demonstrating their performance to prospective customers, and says, at pp. 92, 93 :

What is his liability [the garage proprietor's liability for a servant driving a car] in these circumstances? He is only liable for his own negligence and the negligence of his servants. If an accident happened without his negligence or that of his servants he would not be liable; but if it happened through his or his servants' negligence he would be liable. In these circumstances he introduces this clause into the contract of his customer: "Customers' cars are driven by your staff at customers' sole risk." There are two obvious limitations to be imposed upon the meaning of those words: First "staff" must mean "driving staff"; secondly, "driven" must mean driven for the purposes of the bailment, namely, the purpose of selling the car. The clause does not mean that the garage keeper is to be free from liability if a member of his clerical staff takes the car out for pleasure. So limited, the clause, which is regularly inserted in all contracts by garage keepers to sell cars for customers and to run them for that purpose, can have only one meaning, and that is that the owner of the car must protect himself by insurance against accidents for which without the clause the garage keeper would be liable, that is against accidents due to the negligence of the garage keeper's servants.

In the same case, ATKIN, L.J., at p. 94, states the reasons with which I began in terms of convincing logic, and his reasoning, in my view, applies directly to, and governs, the present case. I rather think that this decision of the court was not brought to the attention of LORD HEWART, L.C.J. The other cases cited to us by counsel for the appellants take this rule of construction no further, but it is borne out by a case to which

our attention was drawn by GODDARD, L.J., *Calico Printers' Assn., Ltd. v. Barclays Bank* (4). In that case, this court, in deciding the appeal, consisted of SCRUTTON, GREER and SLESSER, L.JJ.

The next thing is to see whether an interpretation on these lines applies to condition 8. LORD HEWART, L.C.J., read into the word "passage" a restrictive meaning which limited the condition to what he called "marine risks." He therefore concluded that washing alley-ways fell altogether outside its ambit. As I have said before, questions of construction are notoriously difficult, and easily lead one mind to differ from another. Unfortunately, I find myself unable to share his view, and therefore I am bound to state my own view. The condition seems to me quite unrestricted, and intended in the most general words possible to tell the passenger that he must travel throughout the passage at his own risk. That is to say, he must insure himself, as the shipowner is not taking those risks for the passage money paid, just as in *Rutter v. Palmer* (3) SCRUTTON, L.J., pointed out that the customer had to insure himself. This wide interpretation is, to my mind, not weakened, but reinforced, by the word "passage" upon which the judge relied, for that word seems to me to be the correlative of "passenger" and to make the condition say: "From the moment you become a passenger till the moment you cease to be one, you take all risks, and we take none." If this be right, and if condition 8 is the governing condition, it follows from the principle applied in *Rutter's* case (3) that no action can be brought by a passenger against shipowners in respect of any accident caused by the negligence of the defendants' servants.

Counsel for the respondent argued at length that condition 9 cut down, or at any rate affected, the interpretation of condition 8. Condition 9 begins as follows :

Without restricting the generality of condition No. 8 neither the company, the master nor its agents shall be held liable for [various things].

Those words at the opening of the condition—"Without restricting the generality of condition No. 8 . . ."—are of extreme importance. The condition contains a long list of heterogeneous exceptions, and, after the list of particular exceptions, ends as follows :

. . . or from any other cause whatsoever.

The particular exceptions, I think, should be read :

. . . liable for loss, damage, injury, detention, delay or overcarriage (or maintenance or expense during the same) of or to any passenger or his or her luggage and property arising or resulting directly or indirectly from any act, neglect or default of pilot, master, officers, mariners, or of any other persons whatsoever whether in any way acting for or under contract with or in the employ of the company or not in the navigation or management of the ship or from the act of God, collision, stranding, enemies, hostilities, riots and civil commotion, robbers or thieves, strikes, lockouts or stoppage or restraint of labour from whatever cause whether partial or general by land or sea, whether on board or not, and whether in the service of the company or not ; restraint of princes, rulers or peoples, quarantine restrictions or sanitary regulations, from the perils of the sea, ports, rivers, canals and navigation ; from unseaworthiness or unfitness of the ship or her machinery, equipment, appliances or boats, tugs or tenders whether existing at the beginning of the voyage or at

any time during the same, from fire steam or electricity, from acts of other passengers or other persons or of animals on board; from unlighted or unguarded ladders, doors, gangways or openings through any deck or the side of the steamer whether in port or at sea or from any other cause whatsoever.

That is condition 9.

- Counsel for the respondent argued at length, as I have said, that condition 9 cuts down, or at any rate affects, the interpretation of condition 8.
- A He was not merely submitting that, when one clause of a contract is to be construed, it is right to keep the whole contract in mind, and to interpret the clause consistently with the purpose of the whole. He was saying that the particular condition 9 restricted the wide meaning of
- B condition 8. The first answer to that is that the opening words of condition 9 forbid any such use of that condition. The second is that condition 9 is an instance of the common and pernicious practice of cramming a contract with particular illustrations of some general stipulation, which in a legal sense are wholly unnecessary, and which, just
- C because they are unnecessary, often afford a pretext for limiting general words in a way which was never intended. Even without the final words of condition 9, I should hold that this explanation of condition 9 was the key to its true interpretation, but the final words of the condition are conclusive, since they must be construed as intended to exclude any
- D *ejusdem generis* rule or any other limiting rule of construction: *Larsen v. Sylvester & Co.* (5), *Thorman v. Dowgate S.S. Co., Ltd.* (6) and *France, Fenwick & Co., Ltd. v. Spackman (Philip) & Sons* (7). This construction of condition 9, be it noted, is consistent with, and does not contradict, its own opening words: "Without restricting the generality of con-
- E dition No. 8. . . ." For the above reasons, I find myself compelled to differ from LORD HEWART, L.C.J. I think that, even if the defendants' servants were guilty of negligence, and so caused the plaintiff's injuries, the defendants' contract protected them from liability.

- This conclusion makes it possible to decide the appeal without discussing
- F the second ground of appeal—namely, that there was no evidence of negligence—a ground which was very clearly and tersely argued by counsel for the appellants. I think, however, that leave to appeal to the House of Lords should be given, and it is therefore our duty to that House to express our own views on the question of evidence also.
- G On this second issue, my first proposition is that alley-ways must be washed when they are dirty. I venture also to formulate a second proposition, which does not appear yet to have taken shape—namely, that, when they have become dirty, other things being equal, the sooner they are washed the better. At no moment of the cruise do they ever
- H become so dirty as they do in the last two or three hours before the moment of sailing from the starting port. We all know the amount of nondescript dirt which is brought on board somehow by the porters and others and then shed by them as they go along the alley-ways. Therefore, *prima facie*, it surely is the duty of the captain to clean ship as soon as he can after the ship has cast off. In the present case, it was conceded by the plaintiff

that there was nothing wrong with the defendants' method of washing. It was the ordinary operation familiar to all who are used to ocean travel or cruising. It was also conceded that the floor-covering was proper and usual.

In these circumstances, if a physically normal passenger slipped on a wet patch, I am unable to see in that mere fact any evidence whatever of negligence. *A fortiori* if the person who slips does so because he has some infirmity. Nor can I see that there is any duty on a steward engaged in washing a floor to warn passengers that they may slip. There was no expert evidence given for the plaintiff that washing does usually cause slipperiness, and, in the absence of such evidence, I see no call for warnings. The only evidence given in the present case to which reference is needed appears in three passages. The plaintiff's wife said that she slipped, and that it was that which caused her to call out to the plaintiff, at the very moment when he fell, to be careful. I treat that statement as evidence that there was a particular spot which was slippery. It does not follow, however, that the washing of the alley-way was therefore wrong, or that the steward should have noticed the slipperiness and given warning. I do not, therefore, regard this statement by Mrs. Beaumont-Thomas as constituting evidence of negligence. The second point is that Mrs. Beaumont-Thomas said in her evidence that the purser came into the alley-way in question shortly after and exclaimed: "I thought something like this would happen. I said so all along." If I am right in holding that there was no substantive evidence of negligence, this ejaculation of the purser's private opinion—possibly uttered really only to convey sympathy—does not convert a cleaning operation which was proper into one which was improper. The third point is a curious one. Counsel for the defendants in the court below, when cross-examining the plaintiff, put this question:

Now, you have said you did not hear the steward say anything either to you or your wife? —No, I did not.

Well, I am bound, according to our rules, to put this to you. Did he say to you, "Be careful you do not slip," or something of that kind? I am not pinning you to the exact words, but "Be careful you do not slip?"—No. I did not hear him say that.

When counsel for the defendants in the court below elected to call no evidence, the question seemed to disappear for good. However, counsel for the respondent before us, and I think before the jury, used the fact of the question being put as evidence that counsel for the defendants in the court below had been instructed by the defendants that, in the circumstances, it was the steward's duty to warn passengers of the presence of a danger. In other words, he treated the mere question as evidence of the underlying assumption of fact. Was it? That it might well have considerable influence with a jury is probable, as might the ejaculation by the purser, but there are possible explanations of the action of counsel for the defendants in the court below which would negative any real inference of fact. On the whole, I do not think that that was any evidence.

In ultimate analysis, the real point taken by counsel for the respondent was that the time chosen for washing the floor was wrong. It was, he said, too near the time when passengers would be going to their cabins to dress for dinner. However, if it was a proper thing to do, and involved no element of negligence at a time when a smaller number of passengers would be passing, I cannot see that the hour makes any difference. As a matter of fact, at the time of the accident, there were no passengers passing except the plaintiff and his wife, and one other passenger who was following them. In the result, I cannot see any evidence of negligence in what appears to have been a proper, and wholly usual, washing of the floor. Therefore, for this reason also, I think that the appeal should be allowed. The verdict and judgment will, therefore, be set aside, and judgment entered for the defendants with costs here and below. As we have announced previously, leave to appeal to the House of Lords will be given.

CLAUSON, L.J. : While I hesitate to differ from LORD HEWART, L.C.J., in a case concerning such matters as those here in question, I feel bound to concur in the conclusion reached by SCOTT, L.J., on each point. I find myself in complete agreement with every step of his reasoning. In those circumstances, I do not desire to add anything to the judgment of SCOTT, L.J.

GODDARD, L.J. : As we are differing from LORD HEWART, L.C.J., I will add my reasons for agreeing with the judgment which has been delivered by SCOTT, L.J. In my view, there was no evidence of negligence in this case at all. Washing an alley-way is an ordinary domestic proceeding, the necessity for which may arise from time to time and at any time, and the particular time of day at which it is done cannot make an act which is not a nuisance in itself a negligent act. It was patent that it was being done, and, although some people might find it inconvenient at the hour at which the washing was taking place, that cannot make it a negligent act. If a person sees that the washing is going on, he can decide for himself whether or not he will walk over the place which is being washed. No evidence that the alley-way was rendered more slippery than would ordinarily be expected with ordinary washing was called, and there could be no duty on the steward to give a warning where what was being done was obvious, and where no unusual risk was created. Wholly different considerations would arise if the steward had gone away leaving the floor wet and slippery, without taking steps to warn perambulating passengers of its condition. I entirely agree with what SCOTT, L.J., has said with regard to the purser's statement, which was apparently admitted without objection. In my opinion, the case should not have been left to the jury.

As to the exception clause, I have very little to add. Whatever doubt may once have existed as to the construction of this class of clause, that

doubt has now been resolved in *Reynolds v. Boston Deep Sea Fishing & Ice Co., Ltd.* (8), *Rutter v. Palmer* (3) and *Calico Printers' Assn., Ltd. v. Barclays Bank* (4), none of which appears to have been cited to LORD HEWART, L.C.J. Those cases lay down a rule which is capable of terse and simple statement, and therefore may be regarded as a satisfactory rule—namely, first of all, find what is the nature of the liability which, but for the exception, would rest on the person for whose protection the clause exists. If such liability arises only where there is a lack of due care and skill, it follows that a clause exempting that person from liability exempts him from the consequences of his negligence. As a shipowner is only liable for damage which occurs by his servants' negligence, it follows that a clause exempting him from liability in respect of any cause whatever—quite apart from the wide terms of condition 8 to the same effect—must exempt him from claims and liability for negligence.

Appeal allowed with costs in both courts. Leave to appeal to the House of Lords.

Solicitors: *William A. Crump & Son* (for the appellants); *Elvy Robb & Co.* (for the respondent).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

ADAMS v. UNION CINEMAS, LTD.

[COURT OF APPEAL (MacKinnon and du Parcq, L.JJ., and Atkinson, J.),
May 24, 1939.]

Master and Servant—Contract of service—Necessity for writing—Modification of previous employment—Request and promise to reduce contract into writing—Statute of Frauds, 1677 (c. 3), s. 4.

Master and Servant—Contract of service—Determination—Notice—Reasonable notice—Controller of cinemas.

The plaintiff entered the employ of a cinema company, one of a group of companies, in 1934. In Dec., 1936, upon a reconstruction, he became the servant of the defendant company, but in fact continued, save for the change in the companies, in his old employment. On June 25, 1937, by way of promotion he was offered the position of controller of 120 cinemas at £2,000 per annum. In answer to his inquiries as to the length of the new service, he was told that he could make his arrangements for two years, but this was qualified by the statement: "You will see how you get on with the work." In 1937, the control of the defendant company passed into other hands, and on Nov. 5, 1937, the plaintiff's employment was determined upon one month's notice. It was contended on behalf of the defendant company that this was a contract of service for two years, and required to be evidenced in writing under the Statute of Frauds, 1677, s. 4. The plaintiff had repeatedly asked for a contract in writing, which had from time to time been promised to him, but was, in fact, never executed:—

HELD: (i) this was a contract which could be performed within a year. It was intended to be a temporary arrangement of indefinite duration, pending the preparation of a written agreement. It was, therefore, not within the Statute of Frauds, 1677, s. 4.

(ii) it was an implied term of the agreement that a reasonable notice to terminate it should be given by either party. In view of the nature

and importance of the plaintiff's employment, 6 months' notice was reasonable.

Decision of STABLE, J. ([1939] 1 All E.R. 169) affirmed.

[EDITORIAL NOTE.] The Court of Appeal have affirmed the decision of the judge below, and have agreed that the contract in this case is one which can be performed within the year. The second point—as to reasonable length of notice—

A

will be found very useful in practice.
AS TO NECESSITY FOR WRITTEN CONTRACT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 124-126, paras. 207, 208; and FOR CASES, see DIGEST, Vol. 12, pp. 123-125, Nos. 806-824.]

Cases referred to:

B

(1) *Hanau v. Ehrlich*, [1912] A.C. 39; 12 Digest 124, 818; 81 L.J.K.B. 397; 106 L.T. 1.

(2) *Jackson v. Hayes Candy & Co., Ltd.*, [1938] 4 All E.R. 587; Digest Supp.; 160 L.T. 112.

(3) *De Stempel v. Dunkels*, [1937] 2 All E.R. 215; Digest Supp.; 156 L.T. 418; *varied on appeal*, [1938] 1 All E.R. 238; 158 L.T. 85.

C

(4) *Buckingham v. Surrey & Hants Canal Co.* (1882), 46 L.T. 885; 34 Digest 64, 392.

(5) *The Moorcock* (1889), 14 P.D. 64; 12 Digest 611, 5048; 58 L.J.P. 73; 60 L.T. 654.

(6) *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488; 12 Digest 610, 5042; 60 L.J.Q.B. 734; 65 L.T. 286.

D

(7) *Fisher v. Dick & Co., Ltd.*, [1938] 4 All E.R. 467; Digest Supp.

(8) *Vernon v. Findlay*, [1938] 4 All E.R. 311; Digest Supp.; 160 L.T. 130; *reversd.*, [1939] 2 All E.R. 716.

APPEAL from a decision of STABLE, J., dated Jan. 19, 1939, and reported [1939] 1 All E.R. 169, where the facts are fully set out.

E

H. St. John Field, K.C., and *A. Aiken Watson* for the appellants.

Sir Patrick Hastings, K.C., and *Hon. T. G. Roche* for the respondent.

Field, K.C.: The plaintiff proved an oral contract of service for 2 years at a salary of £2,000 per annum. In any event, he proved a contract of service which must be for at least a year, and should, therefore, have been

F

in writing. [Counsel referred to *De Stempel v. Dunkels* (3), *Vernon v. Findlay* (8), *Jackson v. Hayes Candy & Co., Ltd.* (2) and *Fisher v. Dick & Co., Ltd.* (7).]

MACKINNON, L.J.: The task which in this case confronted STABLE, J., was to see, when all the facts were perfectly known, whether he was compelled by this statute to achieve injustice or whether it was not possible for him to say that this agreement, as proved, was not one in regard to which of necessity the performance must continue beyond a year, and which, therefore, was not within this disabling statute. He took the view that he was not compelled to hold that it was within the statute, and the question before us is whether, there being no real doubt as to what happened, and no conceivable danger of perjury or subornation of perjury, we are compelled to hold that this action must be dismissed because the claim is brought under an agreement which is not to be performed within the space of one year from the making thereof, which means one the per-

formance of which of necessity will last beyond a year. One difficulty in the way of STABLE, J., was that the plaintiff and his advisers, perhaps by inadvertence or by too sanguine an expectation, thought the defendants would not be so ungentlemanly as to plead the statute. The statement of claim pleaded that an agreement was made and that the plaintiff's appointment in the position should be continued for two years, but, on A hearing the evidence of the parties, the judge found that that was not correct, and that it was not established. He acceded to an application to be allowed to amend the statement of claim by striking that out, and it has been struck out, and we therefore are relieved from any difficulty in regard to that. B

I agree with STABLE, J. I think that he was right in saying that this agreement was not one the performance of which of necessity must last beyond a year. It was an agreement to employ the plaintiff for an indefinite period. Some mention was made as regards the time it was likely to last, and some statement was made by the other contracting C party, Mr. Bernhard, that it was likely to last for two years, but I do not think that there was a contractual undertaking by Mr. Bernhard that it should last for two years, so as to make it a contract the performance of which necessarily was to continue for more than a year.

I do not think that it is necessary to go into the matter in greater detail. D I gather that DU PARCQ, L.J., has another way in which this matter may be analysed, with which I entirely agree, and I prefer to leave him to restate that as he has done already in the argument. It is sufficient for me to say that I think the decision of the judge was right, and that this appeal fails. E

DU PARCQ, L.J. : I agree. I think that, when the facts are viewed aright, it is plain that the much-abused Statute of Frauds has no operation in this case whatsoever. I must confess that I should be very sorry to have to explain the facts of this case and the importance of the legal F issues in this case to an intelligent foreigner, because I can imagine his asking : " Why is it that counsel for the defendants was apparently much more anxious even than counsel for the plaintiff to show that his client had entered into an agreement to employ the plaintiff for a longer time and at a larger salary ? Is it because of undue generosity on their part, G or how is it to be explained ? " I can imagine that, when one had to tell him that the reason was that, if only the defendants could satisfy the court that they had given their word to the plaintiff that they would employ him for two years, then the court would at once decide that, in the circumstances, they need not pay him a penny and they were not bound H to employ him, the intelligent foreigner would find a little difficulty in understanding the explanation. However, as I say, I think that the Statute of Frauds has no application in this case at all. I have read the evidence with some care. I do not take quite the same view about it as the judge who tried the case did, but it seems to me that really

- the matter is plain enough. Mr. Adams, the plaintiff, had not been working for this company very long, because they had not come into existence a very long time before (they were only formed in Dec., 1936), but, as I understand the facts, he had been working for them since their formation in a humbler capacity than that of controller of theatres. In
- A June, 1937, he had a conversation with Mr. Bernhard, acting for the company. He gave evidence as to that. He was cross-examined about it, and one has to take the evidence he gave in chief and under cross-examination to see what one can make of it. There, of course, one must be guided to a great extent by the view which the judge took of it. He
- B had the advantage, denied to us, of hearing this witness give his evidence, and he was much better able than I am to form an opinion about the effect of his evidence. I am bound to say, reading this transcript, that it seems reasonably clear. What I understand took place was this. Mr. Adams received the good news that the company intended to employ
- C him as controller, a very responsible position, because he had, I think, 120 theatres under him. He was to be paid at the rate of £2,000 per annum—not specified in so many words, but “the same salary as your predecessor had,” and it turned out that that was £2,000 per annum. He was to begin work within a few days. The agreement was made on
- D June 25. In fact he began work on June 28, with the rank and position of controller. Those who were concerned in the matter were told that he had been appointed controller. It was understood between the parties that he would not go on working as a controller without some clear written agreement. As one would expect, it was contemplated that the terms of
- E the agreement would be put into writing. I have no doubt that if that had happened, the agreement would have been one which contained a great many terms. We have all seen a good many agreements of this kind, and it would, of course, have been an agreement which contained various covenants on the part of the employer and the employee. They
- F would have specified the duration of employment, and very likely the length of notice required, and there might well have been some restrictive covenants, and so on. Agreements like that cannot be prepared in five minutes, when one has on one side a very busy man like Mr. Bernhard, for whom, perhaps, unless he is prepared to put off a good many things
- G to which he would like to attend, one is likely to have to wait some considerable time. This much was agreed, however—namely, that, until the matter was put into shape, the plaintiff was to go on working as controller and be paid at the rate of £2,000 per annum. Then there was, not an agreement, but a promise, that, all being well, he would carry
- H on with an agreement which would probably be for a term of at least two years. Meanwhile there was no agreement for any time at all—no definite time at all. He had an agreement for an indefinite period. Mr. Bernhard continued to be very busy, and the plaintiff was not very pressing. It might very well have gone on for a very long time, but they might have had a written agreement in a month or two if Mr.

Bernhard had not been so busy. In those circumstances, to adopt the words of LORD ALVERSTONE in *Hanau v. Ehrlich* (1), at p. 42, it was not within the class of cases which fall within the statute. LORD ALVERSTONE puts it in this way, at p. 42 :

The one class of cases decides that if there is no mention of time, and the time is uncertain, the agreement is not within the statute. A

Nothing could have been more uncertain than this. It might be, and probably would be, less than a year. It might conceivably be more than a year. First of all, however, the statute does not apply.

Then, as to the question of salary, I have no doubt that it was a part of the agreement for this indefinite period that during that indefinite period the plaintiff should be paid at the rate of £2,000 per annum. The plaintiff says in one of his answers that Mr. Bernhard told him, subsequently to this agreement, that he could be quite sure he would get his back salary as from June 28. I ought to add this about that agreement. One has to consider the question of what term, if any, is to be implied in it as to notice. I have said that, in my view, there was no binding agreement. There could be no binding agreement to enter into a subsequent written contract. I think his employment was to last under this contract, which was made on June 25, until the parties came to terms on a written agreement for a term of years, when, of course, the existing oral agreement would necessarily be determined, and I think that it is to be implied in the contract that another way in which the contract might be determined would be by reasonable notice on the one side or the other. If one can imagine somebody intervening when these two gentlemen were discussing the matter and saying, "This is all very well. It is clear, of course, that, if this employment goes on until there is a written agreement and you both come to terms for a longer period, when that written agreement is entered into, this oral agreement is determined. Supposing, however, that you never do. Supposing that the defendant company never puts forward any written agreement, and supposing you go on as you are. What then? Can either party put an end to the contract at a moment's notice?" Then I have no doubt whatever that both Mr. Bernhard and Mr. Adams would have said: "Certainly not. In that event, although we do not contemplate that it may in fact happen, there would have to be a reasonable notice on either side, and a notice reasonable in all the circumstances." If that is so, it is a case in which the court properly says that that term for a reasonable notice must be implied. D E F G

I want to say only one other thing about the construction of the agreement. It seems to me to be plain that, if I am right upon what the agreement was, any suggestion that it was a general hiring, subject to a presumption that the hiring is for a year, is at once negatived. I do not wish, as at present advised, to withdraw anything I said in *Jackson v. Hayes Candy & Co., Ltd.* (2), to which reference has been made. I am dealing with this case on the footing that that passage in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 22, p. 144. para. 235, which H

I there cited, and which has received the approval of at any rate one member of the Court of Appeal, is accurate. That is to say, in a contract of hiring and service, if it is a general hiring—that is, one without a limitation of time—there is a presumption that the hiring is for a year. The presumption is capable of rebuttal. It is not an inflexible rule, and must
A be considered in connection with the circumstances of each case. If I am right in the view which I take, it is obvious that the presumption cannot stand with the other conditions and terms of this contract. The two are inconsistent, and the presumption is obviously not applicable.

In cross-examination, counsel for the appellants made a valiant attempt
B to get Mr. Adams to be more definite than he had been in examination-in-chief, when he had attributed to Mr. Bernhard the following words :

I shall have an agreement prepared for you. You carry on as you are for the time being. If you take on the job, and I am sure you will do it satisfactorily, you can make some arrangement for a couple of years.

C That was the way in which it was dealt with in examination-in-chief, and he did go a little further, or very nearly a little further, in cross-examination. In cross-examination, however, as ATKINSON, J., has pointed out, he did eventually say, when he was asked if he had a definite binding oral agreement for two years certain :

D That is what Mr. Bernhard suggested, but he did say, “ You will see how you get on with the work,” and of course I carried on with the work.

Just before that, he had said :

I was hoping when I did the work Mr. Bernhard would make the agreement for me.

E It would be quite impossible, on that evidence, in my view, for the judge to have decided that there was a binding contract made on June 25 for two years. The judge did not so decide, and, up to a point, I entirely accept the finding of the judge, who says in his judgment, after relating what had happened, that he thought that both these gentlemen would
F have been very much surprised if anybody had suggested that the defendants were pledging themselves to employ the plaintiff, whatever happened, for two years. Moreover, the judge takes, I think, substantially the view on the facts which appears to me to be the only view justified by the evidence. I do not, however, agree with the judge
G when he says that on June 25 there was a clear offer, which was accepted on June 28, and I do not think that it is necessary to import any such artificial consideration into the case at all. I can see that difficulties might have arisen under this contract if, for instance, the parties had discussed the terms of a written agreement and been unable to agree
H upon them. It might have been necessary then, on considering the question of notice, to see whether or not one side had been unreasonable. That does not arise in this case. I am satisfied here, as I have said, that there is an implied term in the contract that there must be reasonable notice. In these circumstances, the judge was plainly right, in my view, in giving the plaintiff the arrears of salary which he claimed.

I have felt a little more doubt about the question of the 6 months' notice, but, on reflection, it seems to me to be clear that there again the judge's decision, not only can be supported, but ought to be supported. The position one has is that this man was employed in most responsible duties, a position which was worth £2,000 per annum, in control of all these theatres. It was a most important thing, from his point of view, that he should not be dismissed without reasonable notice, and most important, equally, from the point of view of his employers, that they should not be suddenly left without a controller. In those circumstances, one has an indefinite agreement, which may come to an end by a proper agreement being put forward, but which otherwise, if the defendants do not choose even to tender an agreement, will only come to an end by notice. I do not think, having regard to the importance of it, that one can possibly say that 6 months' notice is too much. I think that it is reasonable. Viewing the case as I do, I think that it is the notice which I myself should have thought the proper one in the circumstances. For these reasons, I am in agreement with my brethren that this appeal should be dismissed, with the usual consequences.

ATKINSON, J. : I agree. With reference to the first contention of counsel for the appellants, I am quite satisfied that the plaintiff never had a definite oral agreement for two years. I think that it is impossible to read the evidence without being driven to that conclusion.

The second point is that, if the plaintiff had not got an agreement for two years, at any rate he had an engagement for one year certain, to date from June 28. It is said that that is a presumption of law which we are bound to apply. If it be so, it would be wholly contrary to the facts in this case, but I do not myself think that that presumption of law arises, and, if it does, it seems to me that the circumstances displace it. In *De Stempel v. Dunkels* (3), GREER, L.J., said, at p. 247 :

The rule with regard to an indefinite hiring, being, in the absence of a special agreement to the contrary, a hiring for a year, arose out of the hiring of agricultural labourers, which usually took place at a particular time in each year. Undoubtedly, in the last case referred to [*Buckingham v. Surrey & Hants Canal Co.* (4)] it was applied to the engagement of an engineer at £500 a year. I think that it ought not to have been so applied, as it is unreasonable to suppose that either the employer or the engineer contemplated, when they entered into their agreement, that the agreement should be determined other than by reasonable notice. Applying the rule as to implied contracts stated by BOWEN, L.J., in *The Moorcock* (5), and that stated by LORD ESHER, M.R., in *Hamlyn & Co. v. Wood & Co.* (6), I think that there must be implied in the contract between the plaintiff and Otto Dunkels in the present case a term to the effect that the plaintiff's employment should be determined only by a reasonable notice . . .

In the same case, SLESSER, L.J., began by approving the principle as laid down in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 22, p. 144, and added, at p. 252 :

On the other hand, as has frequently been said, the presumption of a yearly hiring is capable of rebuttal. It is not an inflexible rule, and the nature of the contract must be considered in connection with the circumstances of each case . .

Again, in the same case, SCOTT, L.J., said that he was content to record his agreement with what GREER, L.J., had said, and added, at p. 261 :

In the present case [and these words apply to this case], there was, in my opinion, ample material in the evidence given . . . to show that the oral agreement . . . was not a yearly hiring at all, but a long-term contract of indefinite duration, extending beyond the then current year, and not terminable by reference to any particular annual or other date.

A I have not read every word of what SCOTT, L.J., said. I have left out a few words, and have merely read the words which are applicable to this case. Nevertheless, I think that those words are peculiarly applicable here, because, when one reads the evidence as a whole, it is perfectly
B plain that neither of these gentlemen thought for a second that the plaintiff was being engaged for one year certain, to date from June 28.

In *Fisher v. Dick & Co., Ltd.* (7), BRANSON, J., was considering the quotations I have just read, and he said that he was bound by them. He added, at p. 469 :

C If I may respectfully say so, they appear to me to state the common sense of the matter. When you are dealing with agreements which are not agreements between agricultural labourers and their employers, there is not the same kind of reason for treating the agreement as a yearly hiring, but rather the contrary.

Having heard Mr. Fisher in the witness-box, and having heard Mr. Franks, who was the other party to the contract of service, I am satisfied that neither of them thought that this was an agreement for one year which, if neither party said anything about it, would terminate at the end of the first year by effluxion of time.
D On the contrary, I think that both parties contemplated that it was an agreement which would go on for an indefinite period—probably, as it did, for several years at least.

I think that that all applies here. The agreement contemplated was not one for a year certain at all. It was, as DU PARCQ, L.J., has put it, an
E agreement to go on, for a period which might well be less than 12 months, until it was displaced either by a written agreement for a longer period or by a reasonable notice given by one side or the other.

Like DU PARCQ, L.J., I was rather worried about the length of 6 months' notice. It seems to me that it might be thought that that was rather
F long notice for an engagement of rather a temporary character. When one remembers, however, the importance of the position and the size of the salary, and the fact that the plaintiff had continued in that position for over 4 months, I am not prepared to differ from the view formed by the judge, who had the evidence before him. I agree that the appeal
G must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *H. S. Wright & Webb* (for the appellants) ; *E. C. Randall* (for the respondent).

H [Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

HOWELLS v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Lawrence, J.), May 8, 1939.]

Income Tax—Yearly interest—Interest on mortgage retained out of proceeds of sale—Mortgagee also solicitor acting in sale for mortgagor—Whether receipt as agent for mortgagor or as mortgagee—Person by or through whom payment made—Income Tax Act, 1918 (c. 40), All Schedules Rules, r. 21. A

A practising solicitor had, in the course of his practice, lent money to a builder upon mortgage of the properties which the builder was building. The properties were sold, the sale being carried through as a sale by the mortgagor with the concurrence of the mortgagee. The solicitor, who was the mortgagee, acted in the sale as the solicitor of the mortgagor, and he retained a sum of money out of the proceeds of sale in respect of interest due to him. The Crown contended that, in those circumstances, although the solicitor was the person to whom, as mortgagee, payment was made, he was none the less a person through whom payment was made within the meaning of All Schedules Rules, r. 21, and that he should be assessed to income tax on that sum, in so far as it had not been brought into charge by the mortgagor:— B

HELD: the solicitor was a person by or through whom the payment had been made within the meaning of All Schedules Rules, r. 21, and was assessable to tax on the sum so paid. C

EDITORIAL NOTE. The rule here in question, shortly put, requires a person who receives money as agent for another to deduct the tax payable in respect of such sum before paying it over to the person entitled, and to account to the Revenue for the sum so deducted. The question, on the facts here, is whether, in retaining the money out of the proceeds of sale, he has received it in his capacity as mortgagee or in his capacity as agent for the mortgagor. Both the special commissioners and the judge have come to the conclusion that he received it as solicitor to—i.e., agent of—the mortgagor. D

AS TO PERSONS BY OR THROUGH WHOM PAYMENTS ARE MADE, see HALSBURY, Hailsham Edn., Vol. 17, pp. 241-245, paras. 485-494; and FOR CASES, see DIGEST, Vol. 28, pp. 69-73, Nos. 368-391.] E

Cases referred to:

- (1) *Drummond v. Collins*, [1915] A.C. 1011; 28 Digest 80, 441; 84 L.J.K.B. 1690; 113 L.T. 665; 6 Tax Cas. 525.
- (2) *Rye & Eyre v. Inland Revenue Commissioners*, [1935] A.C. 274; Digest Supp.; 104 L.J.K.B. 401; 152 L.T. 493; 19 Tax Cas. 164.
- (3) *Re Harmony & Montague Tin & Copper Mining Co., Spargo's Case* (1873), 8 Ch. App. 407; 9 Digest 92, 379; 42 L.J.Ch. 488; 28 L.T. 153.

CASE STATED under the Income Tax Act, 1918, All Schedules Rules, r. 21, as amended by the Finance Act, 1927, s. 26, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. G

The appellant was a practising solicitor who had from time to time advanced to a builder money secured by a mortgage of the property built or being built by the builder. Upon the sale of certain property subject to such a mortgage—the sale being by the mortgagor with the concurrence of the appellant as mortgagee—the appellant, who acted in the sale as solicitor for the mortgagor, deducted out of the purchase-money on account of mortgage interest due to himself the sum of H

£285 13s. 9d. This was a net sum of interest less tax, the corresponding gross sum being £368 12s. 7d. To the extent of £199 9s. 4d., this sum was treated as covered by profits and gains of the mortgagor which had been brought into charge for tax. This left a balance of £163 3s. 3d., and an assessment to income tax in this sum was raised as representing
A interest paid under deduction of tax otherwise than out of profits or gains brought into charge to tax. This assessment was made under the All Schedules Rules, r. 21, upon the appellant as a person "by or through" whom the payment of interest had been made.

It was contended on behalf of the appellant that, in retaining the
B interest, he was intervening as mortgagee, and not acting as solicitor for the mortgagor, and that the payment had been made without any intermediary.

On behalf of the Crown, it was contended that the appellant was a person by or through whom the payment had been made, and
C reference was made to *Rye & Eyre v. Inland Revenue Comrs.* (2) and *Re Harmony & Montague Tin & Copper Mining Co., Spargo's Case* (3).

The special commissioners were of opinion that the payment of the interest must be taken to have been made by the mortgagor in account; that the payment was made by means of retention of interest by the
D solicitor of the mortgagor out of funds in his hands representing the proceeds of sale of the mortgagor's properties, and that, although, in these circumstances, the appellant was the person to whom, as mortgagee, payment was made, he was none the less a person through whom payment was made within the meaning of All Schedules Rules, r. 21.

E The taxpayer appealed.

F. Heyworth Talbot for the appellant.

The Attorney-General (Rt. Hon. Sir Donald B. Somervell, K.C.) and *Reginald P. Hills* for the respondents.

F LAWRENCE, J.: This case turns upon the construction to be put upon the Income Tax Act, 1918, All Schedules Rules, r. 21, which provides as follows:

(1) Upon payment of any interest of money . . . not payable, or not wholly payable out of profits or gains brought into charge, the person by or through whom any such
G payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.

By r. 1 (2), the person who has made that deduction shall forthwith deliver to the Inland Revenue Commissioners an account of the payment, and of the tax deducted out of the payment. The question is whether
H or not, on the facts of this case, the appellant was a person "by or through whom" a payment was made within the meaning of r. 21, and who was, therefore, bound to deduct the amount of the tax and to account therefor to the Revenue.

The appellant is a solicitor who had been in the habit of lending money to one of his clients, a builder, at a rate of 6 per cent. interest. As a

rule, the interest was paid by that client direct to the appellant under deduction of tax. At the end of 1934, however, there were certain sums of interest which were not paid to the appellant by his client. At that time, the client was selling certain houses which apparently he had built, and the sales were being effected through the instrumentality of the appellant, as solicitor. The appellant received the sums which were the proceeds of those sales. As an illustration of the way in which the transactions were carried out, I may refer to the letter of Jan. 25, 1935, which is annexed to the case. In that letter, the appellant wrote to his client saying that he had completed the sale of certain property, and enclosed a cheque for £144 6s. 4d., made up as follows. He then set out the figures. First of all, the amount of the purchase money less the deposit. Then a number of deductions which fell to be made in respect of that purchase money, finally deducting a sum of £127 11s. 4d., interest on loans to Dec. 25, 1934, and another sum of £4 13s. for similar interest on loans. The amount of that interest on loans was the net amount of the interest due by the client to the appellant. After deducting those sums in respect of various allowances and those sums in respect of interest on the loans, the appellant sent his client the balance, which was the sum of £144 6s. 4d. Thereafter the Inland Revenue sought to assess the appellant in accordance with the provisions of r. 21 (2), on the footing that he was accountable for the amount of the tax upon these interest payments.

The special commissioners have decided that the appellant was accountable under r. 21. From their decision this appeal is brought. It is contended that the appellant is not the person by whom the payment of interest was made, in the circumstances of this case, or the person through whom such payment was made, and that, therefore, he was under no obligation to deduct and to account to the Inland Revenue for the amount of the tax. The special commissioners expressed their opinion in para. 15 of the Special Case, and held as follows :

... payment of the interest in question must be taken to have been made by the mortgagor in account. ...

Therefore, as I understand the argument of the appellant, it is said that the appellant cannot himself have made the payment, and cannot be said to be a person through whom the payment was made, because there were only two persons concerned—namely, the mortgagor, his client, and himself, the mortgagee. He contends that the words “ through whom ” are, therefore, inapplicable.

Counsel for the appellant further relies upon the argument that, if the appellant and his client, the mortgagor, had chosen to carry out the transaction, not in account, in the way in which it was carried out, but by an exchange of cheques, the appellant giving his client a cheque for the total amount of the proceeds of the sale less expenses, and the mortgagor client giving the appellant a cheque for the interest less the tax, in such circumstances it could not have been contended that the

appellant was either the person by whom the payment was made or the person through whom the payment was made.

A On the other hand, the Attorney-General contends that this is a collecting section, and is, therefore, properly to be given a liberal interpretation. In support of that proposition he refers to *Drummond v. Collins* (1), and he contends that the true interpretation of r. 21 is that the words "the person by or through whom any such payment is made" may refer to the same person in different capacities. As an illustration of that, he cites the case of a trustee who may also be a beneficiary, and he says that there a trustee into whose hands trust funds come and who
B pays himself as a beneficiary is clearly a person by whom a payment is made, although there is only one individual concerned, but, if the separate capacities are regarded—the trustee and the beneficiary—there are, so to speak, two individuals. He says that, just as it is clear that the capacities in which persons act must be considered in the interpretation
C of the words "by whom payment is made," so they must be considered in interpreting the words "the person through whom a payment is made," and he says that, on the facts of this case, the appellant who received the money as the solicitor for the mortgagor was the person through whom the money was paid to the appellant in his capacity as mortgagee.

D I have come to the conclusion that the view taken by the special commissioners is right, and, assuming that the payment was made by the mortgagor, I think that it was made through the appellant within the meaning of r. 21. He received the money as solicitor for the mortgagor, and he, as mortgagee, in appropriating it to his own debt against the
E mortgagor was the person through whom the money was paid to the mortgagee.

In my opinion, the principle of construction referred to by LORD PARKER in *Drummond v. Collins* (1) is applicable. I think that r. 21, upon its true interpretation, is intended to apply to any person into
F whose hands any sums of money which arise from those categories dealt with by r. 21 actually come, if they are to be paid either to that person or to anyone else, and that that person into whose hands they come must deduct the tax, and is accountable for the tax. Therefore, I think that the appellant in this case, having received this money as proceeds
G of the sale, in applying the money to a payment of his own debt was a person "by or through whom" such payment was made, and he was bound to deduct the tax thereout, and to account for it. For these reasons, the appeal must be dismissed with costs.

Appeal dismissed with costs.

H Solicitors : *T. Vincent Howells* (for the appellant) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.*]

Re MARSLAND, LLOYDS BANK, LTD. *v.* MARSLAND.[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.J.J.), **May 4, 5, 25, 1939.**]*Wills—Covenant not to revoke—Revocation by marriage—Construction of covenant—Wills Act, 1837 (c. 26), ss. 18, 20.*

A
B
A husband and wife entered into a separation deed on May 30, 1902, wherein the husband covenanted, *inter alia*, that he would not revoke or alter a will which he had already made. That will gave one half of his estate to trustees upon trust for the wife and the two children of the marriage. The wife died in 1908, and the husband subsequently remarried. He made a new will which gave smaller benefits to the two children than those which had been given by the earlier will. It was contended that the testator had broken the covenant by remarrying:—

HELD: (i) the covenant not to revoke or alter the earlier will did not amount to a covenant not to remarry.

(ii) the covenant not to "revoke" the will should be confined to acts of revocation performed as such and for that purpose, and it did not extend to the case where revocation follows as a matter of law.

Decision of FARWELL, J. ([1938] 4 All E.R. 279) affirmed on a different ground.

[EDITORIAL NOTE.] In the court below this case was dealt with on the question whether a covenant restricting remarriage was against public policy. The Court of Appeal have not found it necessary to discuss this question, since they have held, as a matter of construction, that a covenant not to revoke a will, is only a covenant against actual revocation by the testator, and is not one against revocation by operation of law.

AS TO COVENANTS RELATING TO WILLS, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 514, 515, para. 1025; and FOR CASES, see DIGEST, Vol. 44, pp. 178, 179, Nos. 73-86.]

Cases referred to:

- (1) *Doe d. Goodbehere v. Bevan* (1815), 3 M. & S. 353; 5 Digest 953, 7811.
- (2) *Robinson v. Ommanney* (1883), 23 Ch.D. 285; 44 Digest 179, 83; 52 L.J.Ch. 440; 49 L.T. 19.
- (3) *Allen v. Jackson* (1875), 1 Ch.D. 399; 44 Digest 459, 2795; 45 L.J.Ch. 310; 33 L.T. 713.
- (4) *Baker v. White* (1690), 2 Vern. 215; 12 Digest 249, 2030.
- (5) *Hartley v. Rice* (1808), 10 East 22; 12 Digest 249, 2034.
- (6) *Re Lanyon, Lanyon v. Lanyon*, [1927] 2 Ch. 264; 44 Digest 456, 2782; 96 L.J.Ch. 487; 137 L.T. 806.
- (7) *Lowe v. Peers* (1768), 4 Burr. 2225; 17 Digest 131, 388; *affd.* on other grounds (1770), Wilm. 364.
- (8) *Newton v. Marsden* (1862), 2 John. & H. 356; 44 Digest 459, 2794; 31 L.J.Ch. 690; 6 L.T. 155.
- (9) *Fender v. St. John-Mildmay*, [1938] A.C. 1; Digest Supp.; *sub nom.* *Fender v. Mildmay*, [1937] 3 All E.R. 402; 106 L.J.K.B. 641; 157 L.T. 340.
- (10) *Re Hewett, Eldridge v. Iles*, [1918] 1 Ch. 458; 44 Digest 455, 2773; 118 L.T. 524; *sub nom.* *Re Hewitt, Eldridge v. Iles*, 87 L.J.Ch. 209.

APPEAL by the defendant Mrs. Grace Mavis Gutteridge from an order of FARWELL, J., dated Nov. 4, 1938, and reported [1938] 4 All E.R. 279. On May 30, 1902, the testator and his wife Annie Marsland entered into a deed of separation. This deed contained a covenant that the testator

would not revoke a will he had previously made so far as concerned a gift of a half-share of his estate to his wife and his two children. Later the wife died, and the testator remarried. He made a new will on Feb. 17, 1935, and died on May 28, 1936.

A *J. Leonard Stone* for the appellant Grace Mavis Gutteridge, the testator's daughter.

Herbert Hart for the respondent Bertram Marsland, the testator's son.

L. M. Jopling for the respondent Clara Louise Marsland, the testator's widow.

B *H. O. Danckwerts* for the respondents Lloyds Bank, Ltd., executors and trustees of the will.

P. A. Ferns for the respondent Ann Austina Gutteridge, an infant beneficiary.

C *Stone* : The court is being asked whether or not the covenant contained in the separation deed is enforceable against the testator's estate, owing to the will therein referred to having been revoked by the second marriage. A case for election arises. Up to the time of the death of the testator's first wife, the terms of the separation deed had been faithfully performed by both parties to it. The contrary is not alleged. The summons in this case asks for the true construction of cl. 12 of the second will, but, D as it was held by FARWELL, J., that no case of election arose, he did not deal with that clause. As to the covenant not to revoke the first will so far as the provision for the wife was concerned, there is a vital distinction between a covenant in restraint of marriage made by a person who is already married and one made by one who is not married. In E *Robinson v. Ommanney* (2), the covenantor was an unmarried person. Before the Wills Act, 1837, a covenant not to revoke a will was perfectly good, but sect. 18 of that Act has introduced a difficulty. In *Allen v. Jackson* (3), it was held that a condition in restraint of a second marriage was not void. There is no rule against a covenant not to revoke a will, F and breach of that covenant gives rise to an action for damages. By the Wills Act, 1837, s. 18, marriage revokes a will, with one exception which is irrelevant in the present case. In *Robinson v. Ommanney* (2), the covenant in restraint was held to be divisible and a valid covenant except so far as it was revoked by marriage. *Allen v. Jackson* (3) shows G that there is nothing in public policy which restrains a second marriage. Therefore, so far as this case is concerned, one is in the position in which one would have been before the Wills Act was passed, and the covenant is wholly good. So far as this ground is concerned, the covenant cannot be impeached, and it can be enforced by an action for damages for its breach. H. In the present case, the covenant was not only not to revoke the will but was also not to alter it. In the word "alter" is included anything done actively. The court must give the covenant the wider meaning, because the bargain, in substance, was that the wife and children should have the estate. The testator broke the covenant when he remarried. Clause 12 of the second will imposes a prohibition upon what the son or

the daughter may do. The difficulty is to know exactly what the son or the daughter is or is not to do to bring the clause into operation. The making of a claim for damages would not be a refusing of the provision made by the will. [Counsel referred to SHEPHERD'S TOUCHSTONE, 7th Edn., p. 641.]

Hart : This contract not to revoke the will cannot give rise to an action for damages, because it was revoked by the remarriage of the covenantor. A
It is against public policy for a man to covenant not to marry, even though he is married at the time he makes the contract. It is in the public interest that the right to marry shall be free and unfettered. B
The cases which have been cited are cases in which the condition was attached to a gift by will. *Allen v. Jackson* (3) does not purport to lay down any general rule which is applicable in a case such as the present, which is one of contract. In *Baker v. White* (4), it was held that a widow who had contracted not to remarry could not be held to her contract. C
It would be contrary to public policy for a bachelor to contract never to marry, and there can be no difference in principle where the contract is not to remarry. Cases relating to gifts by will have no relation to the much more formidable act of a man covenanting not to marry. In *Hartley v. Rice* (5), a contract by a man that he would not marry within a period of 6 years was held to be void as being in restraint of marriage. D
In *Re Lanyon, Lanyon v. Lanyon* (6), it was held that a condition, although in its terms only a partial restraint, was of such a nature that it would lead to the probable prohibition of marriage, and that it was void. There is not a single reported decision in which a covenant in restraint of a second marriage has been held valid. In *Robinson v. Ommanney* (2), E
the covenant was framed differently. The present case relates to a deed of separation, and it could not possibly have been the intention of either party to prevent the other from contracting a second marriage. Although the will was revoked by the second marriage, that was not within the ambit of the covenant not to revoke. It was not the covenantor who F
revoked the will. It was revoked by operation of law. [Counsel referred to *Lowe v. Peers* (7), *Newton v. Marsden* (8) and *Fender v. St. John-Mildmay* (9).]

Ferns : Clause 12 of the second will was made by a man who had entered into a contract with his wife not to revoke the previous will. G
The contract was for good consideration. His estate ought not, by the device of cl. 12, to escape the consequences of the deed. It is *in terrorem* and void. A clause of this nature ought not to be allowed to assist a man to escape the consequences of a contract. In the face of a claim for damages, a penal clause must be strictly construed. To make a H
claim for damages is not to claim a benefit under the will.

Jopling : By looking at the will, one sees that the testator has used the word "estate" in the sense of "property." His use of the word in various parts of the will indicates that. He defines his residuary estate, after payment of all debts, as his trust estate. Later he uses

the expression "my residuary estate," and he gives it the same meaning as that given to the expression "my trust estate" in the earlier clauses.

Stone, in reply : *Hartley v. Rice* (5) was a case in which the covenant was by a single man. In *Lowe v. Peers* (7), both the parties were single. In *Baker v. White* (4), there were mutual bonds, and the one in question
A was given by a widow. If a matter is against public policy, it must be so whether it relates to devolution of property or to contract. If public policy applies in this respect, it must apply to all branches of the law. *Allen v. Jackson* (3) is the latest relevant case. It is the governing
B decision, and it stands as the law. The effect of the Wills Act, 1837, ss. 18, 20, is to show the ways in which a will is revoked. When a man covenants not to revoke a will, he covenants, not only that he will not personally do the act which must be done, but also that he will not do the act in consequence of which the law revokes a will. The act of remarriage here brought sect. 18 into operation, and there is no ground
C for drawing a distinction between sect. 18 and sect. 20. [Counsel referred to *Re Hewett, Eldridge v. Iles* (10).]

SIR WILFRID GREENE, M.R. [delivering the judgment of the court] :
On May 30, 1902, the late Mr. Fred Marsland (whom we will call the
D testator) and his first wife entered into a deed of separation. At that date, the two children of the marriage, the respondent Mr. Bertram Marsland and the appellant, Mrs. Grace Mavis Gutteridge, were aged respectively 12 years and 7 years. Immediately before the execution of the deed, the testator had made a will whereby he had bequeathed two-
E thirds of one moiety of his residuary trust funds upon trust to pay the income thereof to his wife for life and after her decease as to two-thirds of such two-thirds for his son Bertram and as to the remaining one-third of such two-thirds to his daughter Grace Mavis. The remaining one-third of the moiety was given as to two-thirds to Bertram and as to one-
F third to Grace Mavis, to be paid to them on Bertram attaining the age of 24 years, the income thereof in the meantime to be equally applied for their maintenance.

The separation deed recited the pendency of a suit for judicial separation at the instance of the wife, the ages of the children, and the execution
G of the will and its provisions as above stated (with some inaccuracies not relevant for present purposes). The operative part of the deed contained provisions of the usual kind, including a covenant by the testator to pay to his wife during their joint lives, if they should so long live apart, an annual sum of £400, rising to £700. It also contained a
II covenant by the testator which has given rise to the present controversy. That covenant is in the following terms :

... and also that the said Fred Marsland shall and will not revoke the before-mentioned will or alter the same so far as regards the gift of the half of his estate to his wife and children as aforesaid.

The only other provision of the deed which need be mentioned is the

final clause, under which the terms contained in the deed were to become null and void if the wife should thereafter apply for and obtain a judicial separation.

The first wife of the testator died on Nov. 14, 1908, and on a date not specified, but before Feb. 19, 1935, the testator married the respondent Mrs. Clara Louise Marsland. By this marriage the will referred to in the separation deed was revoked : Wills Act, 1837, s. 18. On Feb. 19, 1935, the testator made his last will, appointing the respondents Lloyds Bank, Ltd., executors and trustees. He bequeathed to his wife personal chattels and a legacy of £2,000, and, subject to a provision in favour of his sister, a life interest in his residuary estate. Subject to these provisions, he left one half of his residuary estate to his son, Bertram, absolutely and the remaining half to his daughter, Mrs. Gutteridge, for life, and after her death to her issue as she should appoint, and in default of appointment to her children attaining 21 years of age or (in the case of daughters) marrying, with an ultimate gift to his son, Bertram. Clause 12 of the will was to the following effect :

If either of them my said son and daughter shall refuse to accept the provisions hereinbefore contained as the final settlement of my estate or shall claim to be entitled to any larger share or interest in my estate than is given to him or her by the foregoing provisions then I direct the bank to stand possessed of one half of my net estate (including therein the effects and money mentioned in cl. 4 hereof) upon trust for my said wife absolutely and I direct that in that event the preceding clauses of this my will shall be deemed to be varied so far as necessary to give effect to this provision.

There were no children of the second marriage of the testator. The appellant, Mrs. Gutteridge, has one child, the infant respondent Ann Austina Gutteridge.

In these circumstances, questions have arisen as to the right (if any) of the children of the testator under the separation deed, the effect (if any) on those rights of the revocation of the earlier will of the testator by his second marriage and the effect of cl. 12 of the later will, and its bearing on any claim which the children of the testator or either of them may make upon the basis of the separation deed. These questions, so far as relevant, may be thus summarised. (i) Did the separation deed confer any right upon the children to complain of a breach by the testator of his covenant not to revoke or alter the earlier will ? (ii) Did the testator commit a breach of that covenant by marrying again ? (iii) If, on the true construction of the covenant in the separation deed, the second marriage did amount to a breach of it, is the covenant void as being against public policy in so far as it imports an undertaking by the testator not to marry a second time ? (iv) In view of cl. 12 of the later will, what would be the position of the children if they or one of them were to make a claim (whether successful or not) based on the separation deed ? Of these questions, the only one dealt with by FARWELL, J., against whose decision Mrs. Gutteridge appeals, was the third. Upon that question, holding or assuming that the covenant, on its true construction, was broken by the second marriage of the testator,

he considered that, inasmuch as it was in effect a covenant not to revoke the will by subsequent marriage, it was void as being against public policy.

- The first question is whether the children can claim at all under the separation deed, in view of the fact that they were not parties to it.
- A This question was not fully argued before us, as it appeared to us that it could not properly be dealt with on an originating summons. It is, therefore, unnecessary for us to say anything more about it. The second question, however is a true question of construction, and was fully argued before us, although it does not appear that it was argued before
- B FARWELL, J. In our opinion, the covenant by the testator not to revoke or alter the earlier will does not amount to a covenant by him not to marry again. The covenant must be construed with reference to the sections of the Wills Act, 1837, which describe the ways in which a will may be revoked. Sect. 20 states exhaustively the ways by which the testator
- C by his own act can revoke a will—that is to say, by another will or codicil or by destruction *animo revocandi*. In these cases, the action of the testator is directed to revocation of his will, and to that alone, and revocation takes place as the intended consequence of his action. Sect. 18 provides that a will shall be revoked by marriage. Here revocation takes
- D place, not by virtue of some action of the testator directed to the revocation of the will, but as a collateral consequence, imposed by law, of an action performed *alio intuitu*. In our opinion, when the testator here covenanted not to “revoke” his will, his words are to be confined to acts of revocation performed as such and for that purpose—namely,
- E to revocation under sect. 20—and do not extend to the case under sect. 18, where revocation follows as a matter of law, whether or not the testator wishes it. This view, if we may say so, appears to have the merit of being in accordance with the probabilities of the case. It seems highly unlikely that the parties can have intended under cover of such a
- F covenant to impose a tacit restriction on remarriage.

- So far as we have been able to ascertain, there is no precise authority with regard to the meaning of a covenant not to revoke, but we see no difference in principle between a covenant not to revoke and a covenant not to assign. In the latter case, if the covenant is simply against assignment, the courts have always construed this as prohibiting actual assignment, and not as including any assignment by operation of law: *Doe d. Goodbehere v. Bevan* (1).
- G

- Nothing that was said in *Robinson v. Ommanney* (2) is inconsistent with the view which we have expressed. In that case, the covenant
- H was that the covenantor would not :

... do or commit any act, deed, matter, or thing by means whereof the said will so to be made by her should be revoked, annulled, cancelled, or affected in any manner howsoever.

This covenant would clearly have been broken if the covenantor had married. Having regard to the view which we have formed upon the

second question, the third question does not arise, and we find it unnecessary to express any opinion upon it. The fourth question as to the effect of cl. 12 of the later will has no practical importance in view of our decision upon the second question, and we accordingly do not deal with it.

Appeal dismissed. Costs of all parties as between solicitor and client to be paid out of the residue of the trust estate.

Solicitors: *Marchant, Newington & Dommatt*, agents for *J. A. K. Ferns*, Stockport (for the appellant and for a respondent, an infant beneficiary); *Gregory, Roucliffe & Co.*, agents for *Ramsden, Sykes & Ramsden*, Huddersfield (for all other respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

STEVENS v. TIRARD.

[KING'S BENCH DIVISION (Lawrence, J.), **May 16, 17, 18, 26, 1939.**]

Income Tax—Reliefs—Children's allowance—Sums over £50 payable to guardian for maintenance of children—Whether children entitled to such sums in their own right—Finance Act, 1920 (c. 18), s. 21.

By an order of the Divorce Court, the respondent was ordered to pay to his wife yearly sums of £90, £90, and £70 for the maintenance and education of the 3 children of the marriage respectively. It was contended for the Crown that the children were entitled to those sums in their own right, with the result that the respondent was not entitled to any children's allowance in respect of those children:—

HELD: the children were not entitled in their own right to those sums payable to their guardian for their maintenance. The money was not impressed with a trust, but payable upon a condition. The respondent was, therefore, entitled to the children's allowance.

[EDITORIAL NOTE.] Relief in respect of children is dependent upon the income of the child in its own right, and the question here is whether money paid to the guardian of an infant to be applied to its education and maintenance was income of the child in its own right. It is decided that the child has no interest in such money, and it is money paid upon a condition as to its application, and not money received by the guardian as a trustee for the child.

AS TO CHILD ALLOWANCE, see HALSBURY, Hailsham Edn., Vol. 17, p. 304, para. 602; and FOR CASE, see DIGEST, Vol. 28, p. 91, No. 540.]

Cases referred to:

- (1) *Drummond v. Collins*, [1915] A.C. 1011; 28 Digest 80, 441; 84 L.J.K.B. 1690; 113 L.T. 665; 6 Tax Cas. 525.
- (2) *Johnstone v. Chamberlain* (1933), 17 Tax Cas. 706.
- (3) *Jodrell v. Jodrell* (1851), 14 Beav. 397; 28 Digest 242, 1003.
- (4) *Brown v. Smith* (1878), 10 Ch.D. 377; 28 Digest 255, 1107; 40 L.T. 374.
- (5) *Wetherell v. Wilson* (1836), 1 Keen, 80; 28 Digest 244, 1013; 5 L.J.Ch. 235.

CASE STATED under the Income Tax Act, 1918, s. 149, by the commissioners for the general purposes of the income tax, Kensington division, for the opinion of the King's Bench Division of the High Court of Justice. In 1939, the respondent was divorced by his wife, and the wife was given the custody of the three children of the

- marriage. The respondent was ordered to pay to his former wife (i) £500 per annum during the joint lives of the respondent and the wife for her maintenance, and (ii) £90, £90 and £70 per annum less tax during the joint lives of the respondent and the wife until the three children should respectively attain the age of 21 years or marry under that age, for the
- A maintenance and education of those three children respectively. The respondent had duly paid the wife those sums less tax, and she, as the children's guardian, had preferred repayment claims on their behalf, on the basis that the sums paid in respect of the children were the incomes of the respective children, and those claims had been allowed. For the
- B years in question—namely, from the year ending Apr. 5, 1933, to the year ending Apr. 5, 1938—the respondent claimed and was allowed children's allowance at the appropriate rate of tax, in respect of the three children, in the first assessments made on him. His returns for income tax did not disclose the amounts of the sums payable to his
- C former wife in respect of each child, but merely referred to them as "share in alimony." When the attention of the inspector of taxes was drawn to the claims for repayment of tax made by the respondent's former wife on behalf of the three children in respect of the amounts payable by the respondent under the order, the matter was brought
- D before the additional commissioners acting for the division, who made the additional assessments now under appeal.

- On behalf of the respondent, it was contended (i) that the only question for the decision of the commissioners was the correct interpretation to be placed on the order, so far as the payments made to the respondent's
- E former wife in respect of the children were concerned, (ii) that, on a true construction of the order, those payments were income of the wife, and were not income of the children (*Jodrell v. Jodrell* (3) was referred to), and (iii) that the children's allowances for the years in question claimed by and allowed to the respondent in the first assessments
- F made on him had been rightly made to the respondent, and the additional assessments appealed against were wrong in law and ought to be discharged.

- The inspector of taxes, on behalf of the Crown, contended (i) that *Jodrell v. Jodrell* (3) had no application to the facts of the present case,
- G (ii) that the order provided for the payment of three separate sums for the maintenance and education of the three children respectively, that the wife received those sums as guardian having custody of the children, and that she was bound to account to them for those sums, if required (*Drummond v. Collins* (1) and *Johnstone v. Chamberlain* (2)
- H were referred to), (iii) that each of the three children was entitled in his or her own right to an income, which, by the Finance Act, 1920, s. 21 (3), as amended by subsequent enactments, precluded the respondent from being entitled to any deduction under the Finance Act, 1920, s. 21, or any other section, in respect of any of the children, and (iv) that the additional assessments should be confirmed.

The commissioners discharged the additional assessments, whereupon the inspector of taxes required them to state this case for the opinion of the King's Bench Division of the High Court of Justice.

The Solicitor-General (Sir Terence O'Connor, K.C.) and Reginald P. Hills for the appellant.

Cyril King, K.C., and Frederick Grant for the respondent.

A

LAWRENCE, J. : This is an appeal from the general commissioners who have discharged certain additional assessments on the respondent made on the footing that each of the respondent's three children was entitled in his or her own right to an income exceeding £50 per annum within the meaning of the Finance Act, 1920, s. 21 (3), and that therefore the respondent could not claim a deduction in respect of them under that section. B

By an order of the Divorce Court dated Jan. 21, 1930, the respondent was ordered to pay to his wife, who divorced him, certain sums in excess of £50 per annum for the maintenance and education of his three children, and the question is whether the children are entitled to those sums in their own right. The Solicitor-General contends that they are and counsel for the respondent contends that they are not. In support of his contention, the Solicitor-General argues that the respondent's wife, although not bound to account for the expenditure of the sum paid to her under the order, is in the position of a guardian, and that her interposition between the payer (the respondent) and the children does not alter the fact that the money paid to her for the maintenance of the children is their money in their own right, any more than would the creation of a trust in which the trustees are interposed between the settlor and the *cestui que trust*. He relies upon a number of cases, and particularly upon *Drummond v. Collins* (1) and *Johnstone v. Chamberlain* (2), in both of which cases sums advanced by trustees for the maintenance of children were held to be the income of the children, and in the latter case under the section now in question—namely, the Finance Act, 1920, s. 21 (3). C D E F

Counsel for the respondent, on the other hand, relies upon the fact that in each of the cases cited there was a trust under which the children were *cestuis que trustent*, and the children's title to the income depended upon that trust, and not merely upon the payment by the trustee to their guardian for maintenance. Moreover, as LORD COZENS-HARDY, M.R., said in *Drummond v. Collins* (1), at p. 534, the guardian was accountable for the money to the infant. In *Johnstone v. Chamberlain* (2), as FINLAY, J., said, at p. 715 : G H

... when the income is in fact paid over to the child, then it is income of the child.

The only question really in debate was whether, as the child had only a contingent right unless the trustee exercised his discretion to pay before vesting, such a payment to the child constituted income in his own right.

Counsel for the respondent further relies upon *Jodrell v. Jodrell* (3), and contends that the legal position of a guardian who is not accountable for the use of property paid to him for maintenance of the infant, but is only under an obligation properly to maintain the infant out of the property, is not the same as that of a trustee of property, and that it cannot be said that the property is the property of the infant in his own right.

- A In my opinion, the decision of the commissioners was right. The words of sect. 21 (3) are clear, and I do not think that it can be said that the child is entitled in his own right to money paid to his guardian for his maintenance. He has no title to any of the money. His only right is
- B to be maintained, and, if the guardian can maintain him properly and save some of the money, the child has no interest in the money so saved. It is argued that the money paid to the guardian is expended by him partly upon the actual maintenance of the child and partly upon the maintenance of the establishment in which he lives with the guardian
- C (see *per* SIR GEORGE JESSEL, M.R., in *Brown v. Smith* (4), at p. 381), and that the expenditure in both cases is expenditure for the benefit of the child, and expenditure of money which is really the child's money. I do not, however, think that this is the true view. The words of the section are not "a child who enjoys the benefit of an income exceeding
- D £50," but "a child who is entitled in his own right to such a sum." Moreover, there is nothing in the order here providing that the wife shall maintain any particular establishment, or keep the children with her in such establishment. She might send them anywhere, provided that it was consistent with her obligation properly to maintain them.
- E In my judgment, the payment of money to a wife on the condition that she is not accountable for the expenditure of the money, but is only bound properly to maintain the children, is inconsistent with the view that that money is the children's money in their own right. The money is not impressed with a trust, but is paid upon condition. Reliance was
- F placed upon the decision in *Wetherell v. Wilson* (5), in which it was held that sums devised upon trust to pay them to a spouse for the maintenance of a child cannot be seized by creditors of that spouse on bankruptcy. In my opinion, however, that case does not decide that the income of the trust was the child's in her own right. In any event,
- G the child's title, if any, was derived from the will, just as in the other cases cited. For these reasons, I think that the appeal must be dismissed with costs.

Appeal dismissed with costs.

- H Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Reynolds, Sons & Gorst* (for the respondent).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

MAYER & SHERRATT v. CO-OPERATIVE INSURANCE
SOCIETY, LTD.[COURT OF APPEAL (MacKinnon and du Parcq, L.J.J., and Atkinson, J.),
May 24, 1939.]*Workmen's Compensation—Industrial disease—Injury by accident—Date of
accident—Death of workman without obtaining certificate and while not in
receipt of compensation—Workmen's Compensation Act, 1925 (c. 84),
s. 1 (1)* A

The workman, an employee of the claimants, had, though the fact was not established until after his death, contracted lead-poisoning in their employ, had become totally incapacitated in Nov., 1936, and had died from that disease in Mar., 1937. His dependants were awarded compensation and costs under the Workmen's Compensation Act, 1925. B

The claimants were insured with the respondents against all claims in respect of personal injury by accident or disease sustained while in the service of the claimants, under a policy which expired on July 11, 1936, and claimed to be indemnified in respect of the compensation and costs paid to the dependants of the workman and of their own costs. It was found as a fact that the workman was suffering from lead-poisoning when he entered the claimants' employment in 1929. From May 5, 1932, to Apr. 11, 1936, but not after that date, he was engaged in work involving the use of lead or its compounds, and it was further found as a fact that during this period by gradual process he suffered an aggravation of the disease, and that the aggravation was the direct cause of his death. The workman died without having obtained a certificate of disablement and was not at the time of his death in receipt of a weekly payment on account of disablement. It was contended that by reason of sect. 1 (i) liability on an employer to pay compensation in respect of a personal injury from accident arose only if the workman were prevented for at least 3 days from earning full wages, and that, in the present case, this had not happened during the currency of the policy :— C

HELD : the liability on the respondents to pay compensation was in respect of a personal injury by disease which was sustained between May, 1932, and Apr., 1936. The injury here was during the currency of the policy, and the insurers were, therefore, liable. It was not necessary for the man to have been disabled for at least 3 days. D

Decision of MACNAGHTEN, J. ([1939] 1 All E.R. 76) affirmed. E

[EDITORIAL NOTE. In the court below the insurance company relied upon a construction of the Workmen's Compensation Act, 1925, s. 43, based on the decision of the House of Lords in *Richards v. Goskar* (2). In the Court of Appeal this contention was abandoned, and it was sought to be said that no claim could be made under the policy, because, at not time during the currency of the policy, had the workman been incapacitated for a period of 3 days. This period is referred to in sect. 1 (1) of the Act, and the employer is not to be liable in respect of any injury which does not disable the workman for at least 3 days. This argument, however, is rejected as having nothing to do with the construction of the policy, and it is held that under the policy here in question, the insurance company must indemnify the employers against any claim in respect of any personal injury by disease sustained by the workman during the currency of the policy, although no actual claim by the workman can be made until after the expiration of the period covered by the policy. F

AS TO INDUSTRIAL DISEASE AND INJURY BY ACCIDENT, see WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 534-537 ; and FOR CASES, see DIGEST, Vol. 34, pp. 470, 471, Nos. 3844-3846.] G

Cases referred to :

- (1) *French v. Archibald Russell, Ltd.* (1934), 104 L.J.P.C. 17; Digest Supp.; 152 L.T. 1; 27 B.W.C.C. 338.
- (2) *Richards v. Goskar*, [1937] A.C. 304; [1936] 3 All E.R. 839; Digest Supp.; 106 L.J.K.B. 85; 156 L.T. 52; 29 B.W.C.C. 357.
- (3) *McNicholas v. West Leigh Colliery Co., Ltd.* (1933), 26 B.W.C.C. 29; Digest Supp.
- (4) *M'Dougall v. Summerlee Iron Co., Ltd.* (1927), 20 B.W.C.C. 419; Digest Supp.
- (5) *Blatchford v. Staddon & Founds*, [1927] A.C. 461; 34 Digest 465, 3810; 96 L.J.K.B. 608; 137 L.T. 257; 20 B.W.C.C. 391.
- (6) *Ellerbeek Collieries, Ltd. v. Cornhill Insurance Co., Ltd.*, [1932] 1 K.B. 401; Digest Supp.; 101 L.J.K.B. 117; 146 L.T. 153; 24 B.W.C.C. 376.
- (7) *Victoria Insurance Co., Ltd. v. Junction North Broken Hill Mine*, [1925] A.C. 354; 34 Digest 463, case r.

APPEAL by the defendants from a decision of MACNAGHTEN, J., dated Dec. 21, 1938, and reported [1939] 1 All E.R. 76, where the facts are fully set out.

H. J. Wallington, K.C., and *A. J. Flint* for the appellants.

Gilbert Beyfus, K.C., and *R. H. Norris* for the respondents.

Wallington, K.C. : Under this policy, there has to be liability on the employer to pay compensation during the currency of the policy. If there is not, there is no liability on the appellants. There is no dispute that the workman incurred personal injury arising out of and in the course of his employment. Therefore the employer was liable to pay compensation. The only question is as to the date of the injury. By sect. 1 of the Act, the liability of the employer is defined. He is not liable for any injury which did not disable the workman from earning full wages for 3 days. The obligation to pay compensation arises from the disablement, and because of it, and does not arise before the disablement takes place. The Act says that the date of disablement shall be the date of death. Therefore the employers were not rendered liable within the time covered by this policy. They had to give notice under the policy. They could not possibly do that, because the date of disablement was the date of death.

Flint : There was an accident within the currency of this policy, but there was no disablement within that period. Under sect. 43, there are 3 moments at which the date of an injury by accident may be fixed, (i) the date of the certificate of disablement, (ii) the date of suspension, or (iii) the date of death. Here it was the date of the death. The whole purpose of sect. 43 is to establish a time. A man may have lead-poisoning all his life and yet never be disabled. The employer is not liable to the workman for the poisoning until the workman is disabled. [Counsel referred to *Blatchford v. Staddon & Founds* (5), *Ellerbeek Collieries, Ltd. v. Cornhill Insurance Co., Ltd.* (6), *Richards v. Goskar* (2), *French v. Archibald Russell, Ltd.* (1) and *Victoria Insurance Co., Ltd. v. Junction North Broken Hill Mine* (7).]

Beyfus, K.C., was not called upon.

MACKINNON, L.J.: This is an appeal from a judgment of MACNAGHTEN, J., from an award on a case stated with great care and lucidity by the arbitrator. The respondents here are a firm of pottery manufacturers in Staffordshire. The appellants are the Co-operative Insurance Society, Ltd. The insurance society issued to the pottery firm a policy of insurance, dated June 23, 1926, by which they promised A
as follows :

The society will, during the period of insurance specified in the schedule or a subsequent period of renewal during which the premium is paid, indemnify the insured against all sums for which they shall be liable in respect of any personal injury by . . . disease as described in the Workmen's Compensation Act, 1925, sustained whilst engaged in the service of the insured. . . . B

The whole question in this case depends upon the proper construction of those comparatively few words. The original period of the policy was from July 12, 1926, to July 11, 1927. It was renewed year after year by the payment of premiums until July 11, 1936, when it came to an end, and was not further renewed. Therefore, the period of insurance C
was from July 12, 1926, to July 11, 1936—that is to say, 10 years.

A man named Sutton entered the employment of the employers in 1929. From May, 1932, up to Apr. 11, 1936, he was engaged in a particular form of work called glostplacing, which involved his contact with lead or lead compounds. Upon the facts as found, the only connection of the man Sutton while in the employment of the employers with lead, or anything to do with lead, was during that period from May, 1932, until Apr. 11, 1936. After Apr. 11, 1936, he had nothing to do with lead, but on Nov. 7, 1936, he had become so ill that he could not go on with his work, and on Mar. 10, 1937, he died. The post-mortem examination elicited the fact that he had died from lead-poisoning. In those circumstances, his widow made a claim under the Workmen's Compensation Act, 1925, for compensation from the employers in respect of his death by an industrial disease. There was no defence to that claim. An award of £265 was made in her favour, and the employers D
had to pay her £26 costs. In respect of that liability to the widow for the award and her costs, and for the costs the employers had incurred, a claim is made under the policy. The sole question is whether that was a liability in respect of a personal injury by disease sustained by a workman, or a liability which accrued to the employers during the period E
of the currency of the policy from July 12, 1926, to July 11, 1936. Merely upon that statement of facts, inasmuch as they had to pay compensation because the man died through lead-poisoning sustained while in their employment, and on the fact that his only connection with lead in their employment was between May, 1932, and Apr., 1936, both dates well H
within the period covered by the policy, I should have thought there was no doubt whatever that the employers were entitled to the indemnity promised by the policy. If we were concerned solely with the construction of those few words in the policy, the question would appear to be quite simple. However, the liability referred to against which indemnity F
G

is promised is a liability in respect of personal injury or disease as described in the Workmen's Compensation Acts, 1906 to 1925. That being so, the opportunity has been afforded for that sort of investigation under the provisions of the Workmen's Compensation Act which always involves me, at any rate, in a feeling of despair as to the possibility of forming any intelligible view of what some of those provisions mean. In the court below, before MACNAGHTEN, J., an argument was addressed upon the terms of sect. 43 of the Act of 1925 and upon the application of sect. 43 (1) (iii). Sect. 43 provides as follows :

(1) Where (i) the certifying surgeon . . . certifies that the workman is . . . disabled . . . or (ii) a workman is . . . suspended . . . on account of having contracted any such disease ; or (iii) the death of a workman is caused by any such disease ; and the disease is due to the nature of any employment in which the workman was employed . . . he or his dependants shall be entitled to compensation . . . as if the disease . . . were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications : (a) the disablement or suspension shall be treated as the happening of the accident . . .

It was argued before MACNAGHTEN, J., that that modification (a) of the proviso included death, and should be read as meaning: "The disablement or suspension or death shall be treated as the happening of the accident." It was said that this man's death only occurred in Mar., 1937, after the expiration of the policy, and that, therefore, the liability did not arise in respect of any accident occurring during the currency of the policy. Before us, counsel for the appellants has not sought to re-affirm that argument, but has frankly abandoned it, and I think with very good reason, because the answer to such an argument seems to be quite simple—namely, that modification (a) says nothing about death. It speaks of the disablement or suspension, and it is quite clear that disablement refers to subsect. (1) (i)—where the certifying surgeon certifies that the man is disabled—and suspension refers to subsect. (1) (ii)—where the workman is suspended. It is quite a wrong construction to go on to say that it must be implied also as applying to subsect. (1) (iii) so as to say that the death shall be treated as the happening of the accident. That argument was rejected by MACNAGHTEN, J., and has not been renewed before us by counsel for the appellants. Counsel for the appellants takes another point. He says that the liability in respect of industrial disease is a liability arising under the provision that the workman shall be entitled to compensation as if the disease were a personal injury by accident arising out of and in the course of the employment. Therefore, he says, one must go back to the early provision of the Act to see what is the liability for compensation for personal injury by accident arising out of and in the course of the employment. That is sect. 1 (1), which provides as follows :

If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as herein-after mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained : Provided that (a) the employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least 3 days from earning full wages at the work at which he was employed . . .

Counsel for the appellants says that the employer is only liable in respect of a personal accident if it is an accident which stops the man from working for 3 days. That is to say, in respect of a claim under this policy, it must be an accident which prevented the man from working during 3 days of the period of the currency of the policy. This man was working throughout the currency of the policy until after it had expired, because the policy expired on July 11, 1936, and the man was continuing in his work with them—for all we know, at full wages—until Nov. 7, 1936. Therefore, there cannot have been any accident or injury which disabled him from working for 3 days during the currency of the policy, and, therefore, there was no accident in respect of which there was any liability during the currency of the policy. I cannot accept that argument. It is quite clear that the purpose of that proviso is to secure that an employer shall not be liable for trivial accidents, and to shut out the innumerable claims for trivial accidents which disable a man only very slightly and for a period fixed arbitrarily as 3 days. To argue from that, on the construction of a policy such as this, that the accident must have disabled the workman from working for at least 3 days during the currency of the policy is, I think, obviously erroneous. That it is so seems to me quite sufficiently brought home to one by a consideration of the case I ventured to put during the argument—that is, that 2 days before the expiration of the policy a man suffers a serious accident, is carried off to hospital, lingers perhaps unconscious and desperately hurt for four or five days before he dies. If this argument were sound, it would mean that the insurance company could say: "We are not liable to pay you an indemnity in respect of that accident, because it happened 2 days before the expiration of our policy, and, as a result, the man was not disabled for three days. Therefore your liability to pay him compensation did not arise during the currency of the policy." I think that that argument is manifestly erroneous, and must be overruled.

Counsel for the appellants tried to assist us by citing separate expressions of opinion by various members of the House of Lords as to sect. 43 in its various applications. I am bound to confess that I am not sure that it is possible to collect the meaning of this part of the Act from a great number of separate sentences inconsistent with one another culled from different judgments and dealing with two different subject-matters. I think we are set a very much simpler task, which is simply to construe these few words in this policy—namely, a promise by the society to indemnify the insured against all sums for which he or they shall be liable in respect of any personal injury by disease sustained by a workman whilst engaged in the service of the insured, that liability, of course, being incurred during the currency of the policy. I think that this liability to the widow of Sutton established by the award of the county court judge did arise during the currency of the policy—namely, in respect of a personal injury by disease which was

sustained by Sutton during the period from May, 1932, to Apr., 1936, while he was working with lead in that service. That clearly was during the period of the policy, and, therefore, I think that the judge was right in upholding the award of the arbitrator in favour of the claimants, and I think that this appeal should be dismissed with costs.

- A DU PARCQ, L.J. : I agree that the judge in this case came to a right conclusion. I think that, if one does not allow one's mind to be confused by references to decisions which are really of no assistance in this particular case, the matter is plain. If one looks at this policy, it seems to me that to any business man reading it, even if he had a moderate acquaintance with the decisions under the Workmen's Compensation Act, there would be no doubt as to the nature of the risk in respect of which the assured were being indemnified. Of course the insurers are only to undertake liability during the period of insurance. One considers the nature of the risk in respect of which the assured are to be indemnified.
- B I think that it is plain enough that it is the risk that during that time one of the workmen, or perhaps many of the workmen, engaged in the service of the assured in the specified work—if one looks at the indorsement, one sees that only lead-workers are affected—may sustain personal injury by disease. If the workman sustains personal injury by disease during that period and during the period of his engagement in the service of the assured, and, of course, during the currency of the policy, and if, as the result of the personal injury then sustained, the assured, though at some later date, has to make payments to the man or his dependants, then it seems to me plain as a matter of construction that the assured is entitled to succeed in his claim. The only question which can give rise to any difficulty is the question as to when the personal injury was sustained. It has been argued that one cannot say that a personal injury is sustained until one has, not only the causing of the disease by the man's employment, but also the death or disablement, death being treated under the Act as disablement. I think that that argument is quite wrong, and really derives no support from these decisions, when one looks at them. Counsel for the appellants relied on some words of LORD TOMLIN in *French v. Archibald Russell, Ltd.* (1) which were cited with approval by LORD ATKIN in *Richards v. Goskar* (2), at pp. 322, 323 ([1936] 3 All E.R. at p. 849). LORD TOMLIN said, at p. 20 :

... in cases of industrial disease the injury by accident is not the contraction of the disease *simpliciter* but the contraction of the disease plus the consequent disablement or suspension . . .

- In that case, LORD TOMLIN was dealing with a case to which sect. 43 (1) (iii) (a)—“the disablement or suspension shall be treated as the happening of the accident”—applied. I agree with what MacKINNON, L.J., has said, and with what was conceded by counsel for the appellants in argument—namely, that those words really do not affect this case at all. What LORD TOMLIN was saying was that, where the

Act said that the accident was to be taken to have happened when there was disablement or suspension, then one could not say that the mere contraction of the disease was an injury by accident. One had to have disablement as well, because, until one had disablement, one had not an accident. That was merely stating in the words of LORD TOMLIN what the Act said already, and LORD ATKIN, one is not surprised A to find, cites those words with approval. Where LORD ATKIN cites that passage with approval in *Richards v. Goskar* (2), he cites also with approval, at p. 323 ([1936] 3 All E.R. at p. 849, what ROMER, L.J., said in *McNicholas v. West Leigh Colliery Co., Ltd.* (3), at p. 44 :

It is, on the plain words of the section, the disease that he [the workman] is B entitled to treat as the injury, and not the disablement . . .

In *Richards v. Goskar* (2), LORD ATKIN also says earlier in his opinion, at p. 318, referring to something which is stated to have been said by LORD BLACKBURN in *M'Dougall v. Summerlee Iron Co., Ltd.* (4), C . . . the existence of the disease and not the disablement was the accident.

I do not think myself that, for the purposes of this case, it is necessary to say any more than that the Act itself says that the workman is entitled to compensation as if the disease were a personal injury by accident. If one treats disease as a personal injury by accident, then the question is: When was that personal injury sustained? It really is D verging on the absurd, I think, to suggest that anyone could say that it was sustained some time after the workman was removed from all the dangers of working as a lead-worker. It was sustained, according to the finding of the arbitrator, during the time he was working for these employers. That injury having been sustained during the currency of E the policy, and being one in respect of which, though at some later date, the employers were bound to pay compensation, I think it is plain that the insurers cannot escape their liability under the words of the policy. For these reasons, I agree that this appeal should be dismissed.

ATKINSON, J. : I agree. The claimants are claiming to be indemnified in respect of a liability falling upon them as the result of the death of a man named Sutton. The liability to Sutton arose under the Workmen's Compensation Act, 1925, s. 43, which provides that, where the death of a workman is caused by any such disease, and the disease is due to the G nature of any employment in which the workman was employed at any time within the 12 months previous to the date of the disablement, he or his dependants shall be entitled to compensation as if the disease were a personal injury by accident arising out of and in the course of that employment. For the purpose, and, as I think, the only purpose, of H fixing from when the period of 12 months is to date, one has to look at sect. 43 (2) (b), which provides as follows :

Where a workman dies without having obtained a certificate of disablement, or is at the time of death not in receipt of a weekly payment on account of disablement, it shall be the date of death.

That is the only relevancy of disablement for the purpose of this section. Thus, the 12 months ran backwards from the date of Sutton's death. It seems perfectly clear that the disease, having caused death, is to be deemed a personal injury by accident.

I agree with what **MAC KINNON, L.J.**, said—namely, that it is now merely a question of construing the policy. The broad object of this policy—or of any policy of this kind, I suppose—is to indemnify against the results of injury by accident arising during the period of insurance. Here this injury by accident arose during the pendency of the policy. The language is quite plain :

... will, during the period of insurance . . . indemnify the insured against all sums for which they shall be liable in respect of any personal injury by . . . disease . . . sustained whilst engaged in the service of the insured . . .

It was agreed, when I asked the question, that the words "in the service of the insured" referred to the period during which the policy was effective. Therefore one has here a personal injury by accident which arose during the period of insurance and which did create a liability. It seems to me too plain for argument that this claim comes well within the policy, and the claimants are entitled to succeed. I agree that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *W. S. Eastburn*, agents for *Freeland & Passey*, Birmingham (for the appellants) ; *Berrymans*, agents for *T. Haynes Duffell & Son* Birmingham (for the respondents).

[*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*]

WATKINS v. INLAND REVENUE COMMISSIONERS.

[**KING'S BENCH DIVISION (Lawrence, J.), May 18, 19, 26, 1939.**]

Income Tax—Sur-tax—Deductions—Annual payments—Payments by receiver of person of unsound mind made in pursuance of undertaking given on appointment—Making up deficiency between patient's income and sum required for maintenance—Income Tax Act, 1918 (c. 40), s. 27.

The husband of a patient in a mental institution, upon his appointment as receiver, entered into an undertaking to make up out of his own money the deficiency between his wife's income and the cost of maintenance. It was contended that there was a distinction between payments made under such an undertaking and payments made under an order of the Divorce Court or of a magistrate, and that the payments in question were not proper deductions in arriving at the husband's total income for the purposes of sur-tax :—

HELD : (i) there was no material distinction between the two classes of payments, and the payments in question were not proper deductions as claimed.

(ii) as the payments were annual payments which were not income in the hands of the payee, they did not come within the Income Tax Act, 1918, s. 27.

[EDITORIAL NOTE.] Before the special commissioners, this case was argued by the Crown on the footing that these payments were voluntary payments, but, on the appeal, this argument was abandoned, and it was contended that these payments

were distinguishable from payments under an order of the Divorce Court or of a magistrate. LAWRENCE, J., however, rests his decision upon the ground that the payments are not income in the hands of the wife, since they must be applied directly to the cost of her maintenance, without passing into her hands at all.

AS TO ANNUAL PAYMENT : see HALSBURY, Hailsham Edn., Vol. 17, pp. 180-183, paras. 377-380 ; and FOR CASES, see DIGEST, Vol. 28, pp. 66-69, Nos. 340-367.] A

Cases referred to :

(1) *Smith v. Smith*, [1923] P. 191 ; 28 Digest 68, 361 ; 92 L.J.P. 132 ; 130 L.T. 8.

(2) *Clack v. Clack*, [1935] 2 K.B. 109 ; Digest Supp. ; 104 L.J.K.B. 271 ; 152 L.T. 588.

(3) *Howe (Earl) v. Inland Revenue Comrs.*, [1919] 2 K.B. 336 ; 28 Digest 111, 683 ; 88 L.J.K.B. 821 ; 121 L.T. 161 ; 7 Tax Cas. 289. B

CASE STATED under the Finance Act, 1927, s. 42 (7), the Income Tax Act, 1918, s. 149, the Finance Act, 1923, s. 24, and the Finance Act, 1927, s. 42 (3), by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. C

The appellant was married in 1904. In 1924, his wife was certified as incapable of managing her own affairs, and was conveyed to an institution administered under the Lunacy Act, 1890. The cost of maintaining her there is a fluctuating amount of about £45 per month exclusive of doctor's fees, laundry and other items. She is entitled to certain investments producing about £164 per annum. In Nov., 1924, the appellant was appointed receiver of his wife's estate, upon giving an undertaking to make up the deficiency between his wife's income and the amount required for her maintenance. It was stated in evidence by the assistant chief clerk of the Management and Administration Department that that undertaking was not enforceable at law, but that such an undertaking was usually taken upon the appointment of a receiver in such circumstances. If it were broken, the receivership of the appellant would not automatically terminate, but it would probably necessitate the removal of the patient to a cheaper institution. D E F

It was contended by the appellant that, by reason of his undertaking, he was legally bound to make up the deficiency between his wife's income and the cost of maintenance, and that the sums paid under such undertaking were annual payments, and, as such, charges against his income. They were, therefore, proper deductions in arriving at his total income for the purposes of sur-tax. G

The Crown contended that the payments were not made in pursuance of any legal obligation, and were not proper deductions in arriving at the total income for the purposes of sur-tax. H

The special commissioners held that the payments were voluntary applications of the appellant's income, and were not proper deductions.

The tax-payer appealed.

J. S. Scrimgeour and *J. A. Wolfe* for the appellant.

The Solicitor-General (Sir Terence O'Connor, K.C.), and *Reginald P. Hills* for the respondents.

A LAWRENCE, J. : This is an appeal from the special commissioners, who decided that the appellant was liable for sur-tax in respect of sums paid towards the maintenance of his wife in a mental institution, in pursuance of an undertaking embodied in an order of the Master in Lunacy, dated Nov. 6, 1924, to make up the deficiency between the income of the wife and the amount required for her maintenance. The decision of the special commissioners proceeded upon the view that the payments were voluntary applications of the appellant's income, and, as such, were not annual payments constituting charges on his income. This view has not been advanced before me, the Solicitor-General admitting for the purposes of this case that the payments were not voluntary.

B The argument for the Crown now is that, although maintenance paid to a wife under an order of the Divorce Court (*Smith v. Smith* (1)) or of a magistrate (*Clack v. Clack* (2)), or under an order of the court for separation, or under an agreement for separation, constitutes an annual payment within the Finance Act, 1918, s. 27, yet maintenance paid under an order of a Master in Lunacy does not. It is said that the obligation of a husband to maintain his wife differs entirely at common law and under the Divorce Act, that maintenance payable under the order of a Master in Lunacy is a fulfilment of the common law obligation, and that whereas nothing can terminate a divorce or separation except the consent of both parties, in the case of the reception of a wife into a mental institution the marriage is not terminated, and the parties may be obliged to cohabit again upon the recovery of the afflicted wife.

E These arguments have not convinced me that there is any material distinction between payment made under an order of a Master in Lunacy and that made under an order of the Divorce Court. The matter does not rest there, however.

F It is well-settled that annual payments do not fall within the Finance Act, 1918, s. 27, unless they themselves constitute income in the hands of the payees, and are not merely expenditure of the payer's income *Howe (Earl) v. Inland Revenue Comrs.* (3). The crucial question, in my opinion, is whether or not the payment to be made by the husband in the present case constitutes income in the wife's hands. It is not a fixed sum such as was the payment in *Smith v. Smith* (1) and *Clack v. Clack* (2), and the husband cannot deduct tax, because his obligation is to make up the deficiency between the income of the wife and the amount required for her maintenance. Nor can the wife pay income tax or sur-tax out of the sum so provided by the husband, because her maintenance would then be unprovided for. Yet, if the sum so paid formed part of the income of the wife, she would be taxable thereon.

H Can it be said that the wife must apply her own private income to payment of income tax and sur-tax on the sum she receives from her husband, thereby increasing the sum he has to pay? In my opinion, it cannot. It might be that her private income ceased, in which case her husband would have to pay the whole cost of her maintenance. Would

he in such circumstances have to pay an additional sum on account of her income tax and sur-tax? I cannot think so. Moreover, though the wife has the benefit of the expenditure, she is not entitled to the money as such. She does not choose the institution, and has no say in the application of the money. These considerations lead me to the conclusion that the sum payable by the husband is an expenditure of his income, and does not constitute the income of the wife. The appeal is therefore dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Bartlett & Gluckstein* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

N.V. ARNOLD OTTO MEYER v. AUNE.

[KING'S BENCH DIVISION (Branson, J.), **May 18, 19, 22, 1939.**]

Sale of Goods—C.I.F. contract—Bill of lading—From port of transhipment—Dated as from port of loading—Custom of trade.

Arbitration—Remission of award—Fresh evidence since award—Not sufficient to disturb award.

The appellants and respondents were parties to 6 contracts of sale whereby the appellants sold to the respondents 4 quantities of Philippine copra and 2 quantities of Cebu copra. All the contracts incorporated the conditions of the London Copra Association's contract No. 2, under which the sales were c.i.f., including war risk, and they were all for Dec., 1937/Jan., 1938, shipment. Shipments were all made in the coastal steamers within the contract time, but the Hamburg-Amerika steamer *Mecklenburg*, the ocean steamer into which the parcels of copra were loaded, did not arrive at Cebu until Feb. 8. The sellers, however, in purported execution of the 6 contracts, tendered to the buyers 6 bills of lading of the Hamburg-Amerika Line. Two of these bills of lading expressed the shipment to have been made at the coastal port of Dumaguete on board the *Kinau* for transit to the *Mecklenburg* at Cebu for Marseilles, and stated that they were issued in exchange for the original bill of lading of the coastal company from Dumaguete to Marseilles, and were subject to the conditions and exceptions of the local steamer's bill of lading. Each of these bills of lading was dated "Jan. 30, 1938, at Cebu for Dumaguete." In each of the other 4 bills of lading, shipment was expressed to have been made at Cebu per the *Mecklenburg* as transit cargo per the particular coastal vessel, and the bills of lading were dated as at a date in Jan., 1938, "at Cebu for" the coastal port at which the goods had been loaded, and were issued "in exchange for original through bill of lading of the coastal company." The buyers contended that none of the 6 bills of lading was good tender, inasmuch as the *Mecklenburg* could not have loaded in January. They also contended that, in the case of the *Kinau* shipment, a copy of the manifest which was discovered subsequent to the arbitrators' award showed the date of shipment on that vessel to have been Feb. 6, and that the award should be remitted to the arbitrators for the admission of this fresh evidence as disproving the correctness of the bill of lading dates:—

HELD: (i) the bills of lading tendered under the contracts were in the form usual in the trade, and were good tender.

(ii) if there is a mercantile custom in existence, the question as to what would be the law in the absence of that custom does not arise.

(iii) as the arbitrators could not hold that the manifest dated Feb. 6 conclusively disproved the correctness of the bill of lading dates, the award should not be remitted to the arbitrators for the admission of this evidence.

[EDITORIAL NOTE. The characteristics generally required to exist in a bill of lading are so required because it is the general custom of merchants that it possesses those characteristics. If there is a custom in any particular trade that bills of lading have other characteristics in addition to, or in substitution for, those generally required by the custom of merchants, then in that trade bills of lading, in order to be good tender, need only conform to that custom.

AS TO BILLS OF LADING ON C.I.F. CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 215, 216, para. 287; and FOR CASES, see DIGEST, Vol. 39, p. 577, Nos. 1810-1812.]

Cases referred to:

(1) *Dower (E. M.) & Co. v. Corrie Maccoll & Sons, Ltd.* (1925), 42 T.L.R. 43; 39 Digest 462, 886.

(2) *The Athol Viscount* (1934), 39 Com. Cas. 227.

(3) *Hansson v. Hamel & Horley, Ltd.*, [1922] 2 A.C. 36; 39 Digest 577, 1812; 91 L.J.K.B. 433; 127 L.T. 74.

(4) *Landauer & Co. v. Craven & Speeding Brothers*, [1912] 2 K.B. 94; 39 Digest 577, 1811; 81 L.J.K.B. 650; 106 L.T. 298.

(5) *Cox, McEuen & Co. v. Malcolm & Co.*, Unreported.

(6) *Malmberg v. Evans (H. J.) & Co.* (1924), 41 T.L.R. 38; 39 Digest 579, 1821.

D **APPEAL** by way of special case stated from an award of the board of appeal of the London Copra Association and a motion to set aside the award. The facts and arguments are fully set out in the judgment.

Patrick H. Dean for the buyers, the claimants.

Cyril T. Miller for the sellers, the respondents.

E **BRANSON, J.:** This matter comes before me on appeal by way of special case from an award of the board of appeal of the London Copra Association and on a motion to set aside that award on a variety of grounds. The dispute arises out of 6 contracts under which N.V. Arnold **F** Otto Meyer had sold, and André Aune had bought, four 100-ton quantities of Philippine copra in bulk and two quantities of Cebu copra, one of 100 tons and one of 50 tons, also in bulk. All the contracts incorporated the conditions of the London Copra Association's contract No. 2, under which the sales were c.i.f., including war risk. By cl. 1 of that **G** contract, shipment was to be direct or indirect, with or without transshipment, and by cl. 5 the name or names of steamer or steamers, together with bill of lading date, and, in case of transshipment, the name of the on-carrying steamer in addition to the name of the coastal steamer, were to be given. All the contracts were for Dec., 1937/Jan., 1938, shipment. **H** On Mar. 16, 1938, declarations were duly made by the sellers under all the contracts, and in each of them the respective names of the coastal steamer and of the on-carrying ocean steamer were given.

It was admitted by the buyers that the shipments in question were all made in the coastal steamers concerned within the contract time, and that the declarations under all the contracts were in order. All declared

that the ocean steamer into which the parcels of copra were loaded was the Hamburg-Amerika Mecklenburg, and it is found as a fact that this ship did not arrive at Cebu until Feb. 8, and so could not have loaded there in January. The sellers, however, in purported execution of the 6 contracts, tendered to the buyers 6 bills of lading of the Hamburg-Amerika line. Two of these, numbered 11 and 12 respectively, expressed the shipment to have been made at the coastal port of Dumaguete on board the Kinau, and contained the following clauses :

Transit cargo per s.s. Kinau from Dumaguete to Cebu for s.s. Mecklenburg for Marseilles. This bill of lading is issued in exchange for the original through bill of lading of La Naviera Filipina Inc., from Dumaguete to Marseilles. Subject to the conditions and exceptions of the local steamer's bill of lading.

Each of these bills of lading was dated : " Jan. 30, 1938, at Cebu for Dumaguete." A bill of lading for 200 tons of Philippine copra in bulk shipped in the Kinau with the statement upon the face of it that it was " intended for transshipment at Cebu per s.s. Mecklenburg, ultimate destination Marseilles, France. Notify Behn Meyer & Co.," was produced to the board of appeal, but had not been tendered to the buyers as part of the contract documents.

In each of the other 4 bills of lading, shipment is expressed to have been made at Cebu per the Mecklenburg, the bill of lading is dated Jan., 1938, at Cebu for whatever the coastal port was at which the goods had been loaded. The goods are described as transit cargo per the named ship, and the bill of lading is stated to have been issued " in exchange for original through bill of lading of the [named] company." The coastal bills of lading in relation to these shipments were also produced at the hearing before the board of appeal. The buyers contended that none of the 6 bills of lading was good tender, inasmuch as the Mecklenburg could not have loaded in January.

The matter having gone to arbitration, the arbitrators failed to agree, and on Mar. 22, 1938, their umpire awarded that the bills of lading were not a good tender against the contracts and declarations. The sellers appealed to the appeal board, whose award in the form of a special case has now come before me.

The first question for decision is whether the award should be remitted to the board to take fresh evidence. Two circumstances must co-exist before this court will remit an award for the admission of fresh evidence. First, the evidence must be such that the tribunal of fact could properly give it some weight, and, secondly, it must be evidence which the party desiring to adduce it could not, by the exercise of any reasonable diligence, have procured before the first trial : *Dower (E. M.) & Co. v. Corrie, H Maccoll & Sons, Ltd.* (1) and *The Athol Viscount* (2).

The fresh evidence which the buyers wish to adduce in the present case relates, in the case of the Kinau, to the date of the original shipment on board that vessel. They have now procured a copy of the manifest, which it is sought to say shows that the shipment was made on or after

- Feb. 6. The entry in question is "added" to the previous entries, and may well be intended to represent an omission inserted late. Rule 3 of the conditions of the contract provides that the bill of lading shall be considered proof of the date of shipment in the absence of conclusive evidence to the contrary. The master of the Kinau is equally responsible
- A for the date on the bill of lading and for the manifest, and, even if the manifest clearly stated that shipment was on Feb. 6, that could not possibly be held to be conclusive evidence that the bill of lading date was wrong. Furthermore, counsel for the buyers before the appeal board expressly admitted that the dates of shipment were correct. He
- B says that he would not have done so except upon the assumption, which he now contends was false, that the bill of lading dates of original shipment were correct. I am not prepared to remit the award for the admission of this evidence, as the arbitrators could not, in my opinion, hold that the manifest conclusively disproved the correctness of the bill
- C of lading dates.

- Then the buyers say that, whereas all the ocean bills of lading state that the copra was shipped in bulk, the manifests show that it was shipped on some of the coastal ships in bags. This is true. The fact, however, that some of the coastal bills of lading which were available to the buyers
- D at the hearing specify shipment in bulk and some are silent on the point should, if the buyers wished to rely upon this point, have put them upon inquiry, and the fact that, according to the affidavits produced by the sellers, it is customary to ship in bags, owing to the absence of suction plant, which might well have led to a finding of custom had the point
- E been taken, prevents the buyers from relying on this point at this late stage.

- A small point which can be dealt with on the same grounds is that one of the bills of lading at least, the coastal bill, shows that one lot of 200 tons was shipped on one bill of lading to answer two contracts of 100 tons each, the amount being split when the ocean bill of lading came to be
- F drawn up. That was patent upon the face of the documents which were before the arbitrators and the appeal board, and, no point having been taken there, I do not think that that can be relied upon now.

- The last point on this branch of the case is that some of the manifests and the relative coastal bills of lading disagree as to the name of the shipper. There is no evidence that the name of the shipper is in any way
- G material, and, again, no point has been taken upon it. In fact, it is only put forward as a minor matter, to be taken into consideration with the other points in the case. In my view, it would not be right to remit the case upon that ground.

- H A further consideration which weighs heavily against allowing the admission of evidence of the coastal vessels' manifests is that it appears from the appeal board's findings on usage, to which I shall refer in a moment, that it is not usual to tender the coastal bills of lading with the contract documents, and that, by virtue of the course of business and the clause regarding war risks pasted on the margin of the contract form,

it appears that the goods are at sellers' risk until transhipped into the ocean vessel. For these reasons, the motion to remit for the purpose of admitting further evidence fails.

Then it is contended, however, that the award should be set aside for error on the face of it. The argument in support of this contention may be summarised as follows. Cases such as *Hansson v. Hamel & Horley, Ltd.* (3) and *Landauer & Co. v. Craven & Speeding Brothers* (4) have laid down as a matter of law the essential characteristics which a bill of lading must possess if it is to be good tender under a c.i.f. contract. It must have been procured on shipment or not long afterwards, it must cover the contract goods, and none other, from shipment to the port of destination, and it must show shipment within the contract time. Here, say the buyers, the bills of lading tendered possess none of these characteristics. They were procured long after shipment at the coastal ports. They cover in two cases goods other than the contract goods, and they do not cover the goods from shipment to port of destination, and so are not good tender. The answer made on behalf of the sellers is that the appeal board has found as a fact that the bills of lading tendered under all the contracts were in the form usual in the trade, and were good tender, and should have been accepted as such by the buyers. They set out in para. 9 of the case the details of the customary method of shipping copra from the Philippine Islands :

Evidence was adduced before the board of appeal and the board of appeal find as a fact that it is customary to ship transit cargo in coastal vessels from outports in the Philippine Islands to a central port under through bill of lading by the coastal steamer from the outport to final port of destination and providing for transhipment into an ocean steamer at the central port, and to exchange the ocean steamer's bills of lading against surrender of the coastwise through bills of lading, and to date such ocean bills of lading in accordance with the dates of the coastwise bills of lading. The ocean bills of lading may be either on a through bill of lading form specially printed for the purpose or in lieu thereof on the regular homeward bill of lading form (such as those issued by the Hamburg-Amerika Line in the present case), a statement being inserted in the latter case to show that the goods have originated from a port other than the transshipment port, and have been forwarded to the transshipment port in a coastal vessel, the name of which must also appear in the ocean steamer's bill of lading. The original coastwise bills of lading are never forwarded to final destination, and it is neither necessary nor customary to tender them with the shipping documents as they are not in the usual course of business treated as part of the shipping documents. Furthermore the ocean bills of lading whether on the through form of bill of lading already referred to or in the form adopted in the present case are regularly accepted and negotiated by banks financing such shipments. In so far as it is a question of fact the board of appeal find that the bills of lading tendered under all the contracts in the present case were in a form usual in the trade and were good tenders and should have been accepted as such by the buyers.

The buyers contend that the documents produced do not conform to the custom stated. For example, they say that the coastal bills of lading in this case are not "through bills of lading." No doubt that is true as a matter of legal description, but the board had before them the very documents which they so describe, and those documents are described in the same way on the ocean bills of lading given in exchange for them, showing that persons engaged in this trade regard coastal bills in this form as "through" bills.

The only argument left to the buyers on this point is that the custom found by the appeal board is invalid as being contrary to the law laid down in *Hansson v. Hamel & Horley, Ltd.* (3). In my opinion, this argument is misconceived. The characteristics generally required by the common law to exist in a bill of lading, if it is to be good tender under a c.i.f. contract, are so required because, and only because, it is the general custom of merchants that such a bill of lading shall possess those characteristics. If, in any particular trade, there is a custom that bills of lading should have other characteristics in addition to, or in substitution for, those generally required by the custom of merchants, then, in that trade, bills of lading, to be good tender, need only conform to that custom.

This appears clearly enough, I think, from *Landauer & Co. v. Craven & Speeding Brothers* (4) and *Hansson v. Hamel & Horley, Ltd.* (3), to which I have already referred. In *Landauer & Co. v. Craven & Speeding Brothers* (4), which came before SCRUTTON, J., upon a special case stated by an umpire in an arbitration, the question was whether it was necessary, in order to make good tender, that bills of lading should be tendered covering the transport of the goods from the original port of shipment to the final destination. The bills of lading which had been tendered were bills of lading from Hong Kong to London, whereas it was said that there ought to have been tendered bills of lading from Manila to London—that is to say, bills covering the whole of the transport of the goods. It was argued for the sellers in that case that, as a matter of law, the question was concluded in favour of the sellers by the decision of HAMILTON, J., in *Cox, McEuen & Co. v. Malcolm & Co.* (5). When that case was being dealt with by SCRUTTON, J., what he said was, at p. 104 :

Mr. Bailhache, for the sellers, called my attention to an unreported decision of HAMILTON, J., in *Cox, McEuen & Co. v. Malcolm & Co.* (5). . . . HAMILTON, J., held that there was no necessity in law for the shipment to be under a through bill of lading. He said : “ In my opinion the contract does not require in order that a shipment may be made from Manila indirect to London that there shall be a through bill of lading stating on its face that the shipment to the intermediate port is for the purpose of transshipment by the carrier to a London steamer. If on this point I had only to deal with law I should of course follow this decision, leaving it to be examined, if the parties desired, in the Court of Appeal ; but I should very respectfully express my doubts of its correctness.

Later, SCRUTTON, J., said, at p. 105 :

But while prepared to follow the judgment of HAMILTON, J., on this point as deciding the question of law in this court, I have a finding of the umpire, on (I was told) evidence given before him, which in my view leaves me free to follow my own opinion.

He then read out the finding of the umpire, which begins by saying that no evidence was given before him of any custom affecting the Manila hemp trade, or varying in any way the well-known mercantile usage with regard to contracts of sale on c.i.f. terms. Then SCRUTTON, J., goes on, at p. 106 :

I read this as a finding of fact that by mercantile custom a seller c.i.f. must obtain on shipment a through contract of affreightment to the ultimate destination. If so, what would be the law in the absence of mercantile custom does not apply.

He therefore held, assuming that HAMILTON, J., had decided a matter of law, that proof of a custom with different requirements ousted the rule of law.

That case was dealt with by HAMILTON, J., who had then become LORD SUMNER, in *Hansson v. Hamel & Horley, Ltd.* (3), where LORD SUMNER dealt with his decision in *Cox, McEuen & Co. v. Malcolm & Co.* (5) in the following way, at p. 49 : A

The contract was for goods to be shipped from Manila to London by steamers "direct or indirect," and the buyers rejected bills of lading from Hong Kong, partly on the ground that they did not comply with a stipulation as to the date of shipment, and partly because they did not conform to the words "shipment direct or indirect." The arbitrator found as facts that transshipment at Hong Kong was usual, and that through bills of lading from Manila, though usual, were not essential. Evidently he was proceeding on some recognised custom of the trade affecting the meaning of the contract. Accordingly the decision was that the contract did not require a through bill of lading; that the goods were, in fact, shipped to London "indirect," and were shipped at Manila within the contract time. B

Then he proceeds to deal in a few sentences with the special facts of that case, and he continues, at p. 50 : C

On the facts found it was assumed that the Manila bill of lading was not one of the shipping documents which had to be tendered and taken up, since, on a contract to which a through bill of lading was not essential and which was in terms satisfied by indirect shipment, the tender of the Hong Kong bill of lading sufficed. The arguments of counsel on both sides in *Landauer & Co. v. Craven & Speeding Brothers* (4) show that *Cox, McEuen & Co.*'s case (5) was understood not to turn on any question of the shipping documents which are required by c.i.f. terms in general, and I do not think this case can affect the present appeal. D

Thus, one has these two masters of the commercial law agreeing that a custom can vary the requirements as to a bill of lading in a particular trade. The only trace of any authority to the contrary of this view is to be found in the judgment of ATKIN, L.J., as he then was, in *Malmberg v. H. J. Evans & Co.* (6), where he says, at p. 40 : E

. . . I am inclined to think that in a number of dealings, such as c.i.f. contract-which stipulate for cash against documents, the conditions have now been understood by authoritative decisions defining the terms of the contract and defining the documents which have to be delivered under that contract. I doubt, myself, whether it is open to the parties to say that before the contract a course of business existed between them which would have the effect of varying the terms which otherwise would by law be attributed to those words. F

Prior dealings between the parties are a very different thing from the custom of a particular trade, and, even if the remark of LORD ATKIN had been more than an expression of a doubt, and *obiter* at that, there would still be a further doubt as to its applicability to a case of custom. I cannot think that LORD ATKIN had the Sale of Goods Act, 1893, s. 55, in mind when he gave expression to a doubt which would seem to be dispelled by the express words of that section, which read as follows : G

Where any right, duty, or liability would arise under a contract of sale, by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract. H

The last point relates to the two bills of lading numbered 7 and 5. These are treated by the award on the same basis as that of the bills

tendered in respect of contracts for shipment "from Philippines," and as covered by the custom found in para. 9 of the award. In fact, however, it appears from the documents annexed to the award that the contracts in these two cases called for January shipment from Cebu, and that the shipments were made, not from Cebu, but from Surigao and Cagayan in January, and transhipped at Cebu in February. The custom relied upon plainly does not touch these two shipments, and the award states no other reason for holding that these two bills of lading were good tender. In my opinion, the award is wrong upon this point. These two bills of lading were not good tender against the two contracts for January shipment from Cebu, and the award must be varied accordingly, but otherwise it should be upheld.

Award varied.

Solicitors: *Parker, Garrett & Co.* (for the buyers, the claimants); *Thomas Cooper & Co.* (for the sellers, the respondents).

Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

**Re AN ARBITRATION BETWEEN T. D. BAILEY, SON & CO.
AND ROSS T. SMYTH & CO., LTD.**

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), **May 10, 11, 18, 1939.**]

Sale of Goods—Rejection—Sale of 15,000 units of corn—"Separate documents for each 1,000 units and each 1,000 units to be considered a separate contract"—Notice of appropriation for about 15,444 units—First provisional invoice for 15,444 units—Amended provisional invoice for 15,000 units—Validity of first tender—Whether withdrawn by amended provisional invoice—Validity of second tender.

A contract dated Aug. 3, 1938, provided for the purchase of 15,000 units, 2 per cent. more or less of No. 2 yellow American corn, with an option to the seller of shipping a further 3 per cent. more or less on contract quantity. At the foot of the contract were the words: "Separate documents for each 1,000 units and each 1,000 units to be considered a separate contract." In pursuance of this contract, the sellers wrote to the buyers on Aug. 27 giving notice of appropriation of about 15,444 quarters of corn as per "Generton" bill of lading, and on Sept. 6 sent a provisional invoice for 15,444 $\frac{2}{3}$ quarters, amounting to £17,471 10s. 6d., and the provisional invoice stated that there were 15 bills of lading dated Aug. 26, each for an amount of bushels equivalent to 1,000 units, and one for an amount equivalent to 444 $\frac{2}{3}$ units. On Sept. 7, the buyers rejected the provisional invoice as not being in accordance with the contract, and on the same day the sellers sent an amended provisional invoice for 15,000 quarters amounting to £16,968 15s., and stating that there were 15 bills of lading dated Aug. 26, each for a number of bushels equivalent to 1,000 units. This provisional invoice was received by the buyers on Sept. 8, and it was then arranged that the matter should proceed to arbitration:—

HELD: (i) the provisional invoice was in order, and the buyers committed a breach by rejecting it. This breach was, however, waived by submitting the amended invoice.

(ii) the tendering of the amended invoice was an anticipatory breach of the contract, as that invoice was for a quantity less than that irrevocably appropriated to the contract.

Decision of BRANSON, J. ([1939] 1 All E.R. 115) reversed.

[EDITORIAL NOTE.] The Court of Appeal have differed from BRANSON, J., as to the effect of the addition of the words "separate documents for each 1,000 units and each 1,000 units to be considered a separate contract." BRANSON, J., construed these words as converting the contract into a number of individual contracts for 1,000 units, but the Court of Appeal have not adopted this view. In their view, the contract is an indivisible one, and, therefore, the first invoice was in order.

AS TO QUANTITY OF GOODS TO BE TENDERED, see HALSBURY, *Hailsham Edn.*, Vol. 29, pp. 126-130, paras. 153-156; and FOR CASES, see DIGEST, Vol. 39, p. 496, Nos. 1131-1138.]

APPEAL by the appellants from an order of BRANSON, J., dated Dec. 14, 1938, and reported [1939] 1 All E.R. 115. The facts are fully set out in the judgment of the court delivered by SCOTT, L.J.

The material clauses of the contract were as follow :

Seller has the option of shipping a further 3 per cent. more or less on contract quantity, excess or deficiency over the above 2 per cent. to be settled at the c.f. and i. price at the date of bill of lading, and on the quantity thereof at the price of 25s. 4d. per 480 lbs. shipped including freight and insurance to Hull. Payment by cash in London in exchange for shipping documents on or before the arrival of the vessel. The unit of quantity under this contract shall be 480 lbs. Should any of the above-named quantity form part of a larger quantity of the same or a different period of shipment of bags of the same mark, or of similar quantity, whether in bags or bulk, no separation shall be necessary. Separate documents for each 1,000 units and each 1,000 units to be considered a separate contract.

H. U. Willink, K.C., and *W. L. McNair* for the appellants.

A. T. Miller, K.C., and *Cyril T. Miller* for the respondents.

SCOTT, L.J. [delivering the judgment of the court]: This is an appeal by buyers under a London Corn Trade Association contract arising out of an arbitration between them and their sellers on a question as to whether or not the buyers are entitled to treat the contract as brought to an end by the action of the sellers in delivering to the buyers a provisional invoice which the buyers contend contained demands not authorised by the contract. There was an arbitration under the contract, a decision by the umpire against the buyers, a reversal of that decision by the appeal committee of the association, and, upon a case stated by them, a reversal of their decision by BRANSON, J., who finally held that the sellers were in the right, and that the buyers were guilty of breach of contract.

The contract was on the printed form No. 28 of the London Corn Trade Association for parcels from Canada and the United States of America per steamship or power vessel to the United Kingdom. The buyers are a company carrying on business in Hull, and the sellers carry on business in Liverpool and London. The contract was for 15,000 units (which by the contract were to be quarters of 480 lbs.) of No. 2 yellow American corn, to be shipped in bags or bulk by one or more vessels as per bills of lading to be dated not earlier than Aug. 16, 1938, nor later than Aug. 31, 1938, and to be so dated when the goods were actually on

board. The sellers had an option of dividing the quantity between one or more vessels, subject to the shipment dates.

The dispute between the parties arose out of a clause in the printed form providing that the quantity might be increased up to 2 per cent. more, or reduced up to 2 per cent. less, than the named quantity, and
 A that the sellers should have an additional option of shipping a further 3 per cent. more or less on contract quantity over the 2 per cent., subject to certain price adjustment. At the foot of the long printed contract was a typed addition as follows :

B Separate documents for each 1,000 units and each 1,000 units to be considered a separate contract.

The particular dispute here arose out of the application of the typed condition to the provisions which I have just quoted about excess or deficiency liberties in regard to quantity as contained in the print. The contract was on c.i.f. terms to Hull, and payment was to be by cash in London in
 C exchange for shipping documents on or before the arrival of the vessel, or at sellers' option by buyers' acceptance. The arbitration clause on the back treated the contract as a contract for the whole quantity, and as if it had not been altered, in spite of the typed clause at the foot of the contract. On the back were numerous other conditions and rules which
 D were incorporated into the printed contract. It will be observed that these conditions contemplated a string of sellers subsequent to the first sale. So far as relevant to the dispute, they included the following :

(1) Notice of appropriation with ship's name, shall within 7 days from date of bill of lading be telegraphed, cabled or radioed by the shipper of the grain tendered under this contract direct to his buyer or to seller's house or representative or
 E agent in Europe and to be passed on by his buyer . . . and by each subsequent seller, to his buyer . . . A valid notice of appropriation when once given shall not be withdrawn. (3) Bill of lading to be considered proof of date of shipment in the absence of evidence to the contrary. Each shipment appropriated in whole or part fulfilment of this contract to be considered a separate contract. . . . In the event of more than one shipment being made each shipment to be considered a separate contract, but the margin on the mean quantity sold not to be affected thereby.

F On Aug. 27, 1938, Ross T. Smyth & Co., Ltd., wrote to the buyers as follows :

Contract dated Aug. 3, 1938, account ourselves, 15,000 quarters No. 2 yellow American corn Aug. 16, 31, 1938, Hull. According to the cable advice received from sellers about 15,444 quarters corn have been shipped per "Generton," bill of
 G lading dated ——— which we appropriate in fulfilment of the above contract.

This was an appropriation under condition 1 of the contract and sect. 17 (1) of r. 5 of the Sale of Goods Act. As from the receipt of that appropriation, at latest, the contract became a contract for the quantity named therein—namely, 15,444 quarters—the sellers having exercised
 H their 2 per cent. option (300 quarters) and a part of their 3 per cent. option (144 quarters) at the time when they had bills of lading for that quantity signed by the captain of the ship. On Sept. 6, Ross T. Smyth & Co., Ltd., sent to the buyers a provisional invoice :

. . . of a parcel of No. 2 yellow corn shipped per s.s. "Generton" from Albany to Hull sold to Messrs. T. D. Bailey, Son & Co., Hull. As per contract dated 3.8.38

After stating the bushel equivalent of the contract quantity—namely, 15,444 quarters and a fraction—it in effect stated that there were 15 bills of lading for 1,000 quarters each and one for 444 quarters, in bulk and/or ship's bags. Upon the buyers receiving that notice on Sept. 7, they at once wrote saying that the documents tendered were not in accordance with the contract, and were rejected, and that the contract must be considered repudiated in its entirety. The contents of this letter had already been imparted to Ross T. Smyth & Co., Ltd., on the telephone before the letter was written. In consequence of the telephone conversation, Ross T. Smyth & Co., Ltd., purported to withdraw the previous day's provisional invoice, and to substitute for it an amended provisional invoice in which they described the contract quantity, not as 15,444 quarters, but as 15,000 quarters, and stated that there were 15 bills of lading each for the number of bushels equivalent to 1,000 quarters. On Sept. 8, the buyers insisted on arbitration upon the question as to whether or not they were right in rejecting the first appropriation, and also telegraphed, apparently intending to treat the amended invoice as inoperative, though we do not think that they in fact said so.

The parties' respective arbitrators differed, and the umpire decided that the buyers were not entitled to reject. The buyers appealed to the appeal committee, consisting of 5 members, junior counsel being heard on each side, and, at the end of the hearing, counsel asked the committee to state their decision in the form of a special case asking whether or not, on the true construction of the contract, and on the facts found, the buyers were entitled to reject the goods tendered. The appeal committee decided as follows :

(1) The notice of appropriation of Aug. 27 was an exercise by the sellers of their option to ship 2 per cent. more or less and a further 3 per cent. more or less on the contract quantity making the contract one for about 15,444 units. (2) The word "about" in the notice of appropriation does not reserve to the sellers a right to re-exercise their option, but allows only a variation of fractions of quarters. (3) The provisional invoice of Sept. 6 tendering 15 bills of lading each for 1,000 units and one for 444 quarters 214 lbs. was a valid tender in accordance with the custom and practice of the trade and the terms of the contract. (4) The sending of the provisional invoice dated Sept. 7 amounted to a withdrawal of the provisional invoice of Sept. 6 and a waiver of buyers' breach of contract. (5) The tender by the provisional invoice of Sept. 7 was invalid because it was not a tender of the contract quantity as declared by the notice of appropriation and the provision in the contract that each 1,000 units were to be considered a separate contract does not affect the obligation of the sellers to tender such contract quantity.

Upon this finding, the appeal committee held in favour of the buyers. No question of amount arises on the present appeal, there having been made before the appeal committee an arrangement as to figures to which we give effect in our judgment.

On hearing the special case, BRANSON, J., reversed the finding of the appeal committee, and held that the sellers were entitled to send the second provisional invoice, and that the buyers were not entitled to reject it. He gave a carefully considered judgment dealing, not only with finding No. 5 of the appeal committee, but also with their finding No. 3, which

the appeal committee treated as rendered inoperative by the withdrawal of the first provisional invoice upon which that paragraph was based. There is no doubt that the contract, as altered by the typed clause, is a very difficult one to interpret from the point of view of various matters which might arise in transactions under it, particularly in regard to the

- A subject-matter of the third finding of the appeal committee. However, as the appeal committee treated the first provisional invoice as having gone out of the case for all purposes, and as the parties assented to that view, we do not think that it is necessary to discuss the application of the typed clause to the first provisional invoice. We limit our judgment to
 B the question of finding No. 5 of the appeal committee.

- On this question, we think that the view of the appeal committee was right, that, under the appropriation clause of the contract, the goods having in fact been shipped on board the "Generton," and the weight of 15,444 quarters having been ascertained, that quantity had been appropriated to the contract before the notice of appropriation was written, that the notice merely recorded the fact that the act of appropriation had taken place, that the sellers had shipped the quantity named in the notice, and that, by so shipping that quantity, they had exercised their option in regard to the 2 per cent. allowance and as to part of the 3 per cent. allowance. The result of this appropriation was that the property in the whole 15,444 quarters passed to the buyers under the Sale of Goods Act, and nothing the sellers could do or say thereafter could undo the fact of that appropriation, a result expressly contemplated in condition 1 on the back of the contract :

- E A valid notice of appropriation when once given shall not be withdrawn.

- That section is merely declaratory of the law. It follows that, when the sellers sent the provisional invoice of Sept. 6, the contract was a contract, as found by the appeal committee, for the larger quantity, and that, when
 F they sent a provisional invoice saying that they were going to tender 15 bills of lading for 1,000 units each—that is to say, for a total quantity less than the contract quantity—they were acting in a way which showed that they were going to disregard the rule contained in the Sale of Goods Act, 1893, s. 30 (1). That that provisional invoice, on its proper interpretation, did clearly mean that they were not going to tender documents for any more than the 15,000 units is beyond doubt. It therefore also meant, conversely, that they were refusing to tender shipping documents for the balance of 444 quarters, the property in which had already passed to the buyers. In these circumstances, the buyers were entitled to treat
 G that notification so conveyed as an anticipatory breach, or, in other words, as a repudiation of the contract, and to rescind the contract thereon. This they did, and, in our view, the judge ought to have held that the appeal committee was right in its conclusion.

Whilst satisfied that the above reasoning suffices to dispose of the appeal, out of respect for the judge, and for his great experience of com-

mercial enactments, we desire to explain just where and why we differ from him. He posed the question as follows :

Whether the amended provisional invoice was or was not a valid tender, using the expression in the way in which it is used in the case, of the goods under the contract.

The appeal committee took the view that the so-called " tender " was not valid, since it was, in their judgment, a tender of 15,000 units only, and not a tender of the 15,444 units which had been appropriated to the contract. The judge disagreed. His view was that the words " each 1,000 units to be considered a separate contract " gave the sellers the right to tender 15,000 units (as the sellers did by the amended provisional invoice) as a separate tender, and that the validity of this tender was unaffected by the failure to tender the balance of 444 units at the same time, since the sellers had the right, by reason of the typed clause, to treat the 444 units separately as a matter of separate contract. As we understand him, the judge contemplated that it might well be that, in respect of the 444 units, there never having been any tender, there was a breach of a separate contract to deliver 444 units, but that, since no damage (prices having gone down) flowed from that breach, it might be disregarded.

Strictly speaking, the point at which we feel bound to differ from the judge is on his understanding of the sellers' action in delivering the amended provisional invoice. If we thought that that document, sent under this contract, meant that the sellers proposed to satisfy their obligation as to 15,000 units in the manner indicated in the invoice, and that in due course they would state how they proposed to satisfy their obligations as to the remaining 444 units, and that they were entitled under the terms of the contract to take that course, we should feel difficulty in disagreeing with the judge's conclusion. We feel bound to disagree with both premises, however—with the first largely because of our disagreement with the second. We differ from the judge upon his interpretation of the added typed clause. We do not think, as he did, that the effect of that clause was to cause the contract—which is a contract for what we may call a " lump " quantity, what the Frenchman would call *une quantité globale*, for which we have in English no equivalent—" at some period to undergo a metamorphosis and become a number of separate contracts," with the consequence that the judicial problem was to ascertain " the moment at which the metamorphosis took place." In our view, the contract provided for no such " metamorphosis." What the clause did by its first half was to provide that the sellers should, for the purposes of the c.i.f. shipping documents called for by the contract, divide the contract quantity into parcels of 1,000 units each, and make up separate documents—that is to say, bills of lading and policy or certificate of insurance—for each parcel. That division would not take place, however, before the moment of making up the shipping documents—that is to say, after shipment, and after appropria-

tion to the buyers' purchase of the quantity shipped for them—which would, under the Act, have the effect of passing the property in that parcel to them and of casting the risks of the voyage on to them and their underwriters. The printed part of the contract already, by the shipment terms on its face and condition 3 on the back, gave the sellers the right to

- A divide the lump quantity and ship part in one vessel and part in another or others at their option, and the typed clause was not needed in order to confer that right on the sellers. The object of its first half was to impose on the sellers a limitation of their full printed option, under which they could make their subdivided shipments as large or as small as they chose,
- B and to compel them in practice to exercise their option as to dividing up by making their subdivided parcels all of a particular size—namely, 1,000 units. The commercial object of the special stipulation was, we were told—and we think that it can be guessed from the contract itself—to facilitate the system of string sales which the convenience of market
- C dealings makes usual, whether the parties are buying for the purpose of taking delivery or only gambling on the turn of the market.

The nature of the unexpressed implications of the first half of the clause in regard to particular shipments which fall short of the standard desideratum of 1,000 units, or constitute an odd balance at the end, as

- D happened with the 444 units in the present case, we do not investigate, as the question does not arise for decision. We agree with BRANSON, J., however, in thinking that some difficult points might arise.

The main object of the second half of the typed clause was to effect the same sort of modification in regard to separate shipments under the

E sellers' option in this c.i.f. contract as is effected by a similar clause in instalment contracts where actual delivery is required of the seller, whether at his place of business or to a carrier or at the buyer's place of business. There the main reason for the clause is the desire of the parties to prevent or limit argument as to whether one bad delivery justifies the

F inference of an intention by the seller to repudiate the whole contract.

It is unnecessary here, too, for us to investigate all purposes or effects of that second half of the clause, but we are definitely of opinion that the words cannot be given so wide a meaning as they seem to express. The arbitration clause, for instance, applies to "this contract," as expressed

G at the outset and throughout the print—namely, one for 15,000 units with options to the seller. The main contract was treated by the sellers as continuing when they sent their so-called provisional invoices, and equally so by the buyers on receiving them, and neither party thought of contending that there had been any such "metamorphosis" as the

- H judge suggested. We think that they were right.

The appeal committee also seem to have taken the view that the true meaning of the sellers' action was to intimate that they proposed to satisfy their obligation in regard to the whole 15,444 units by delivering the bills of lading for 15,000 specified in the invoice. It must be borne in mind that, as appears from the first and superseded invoice, the sellers

had in their hands, not only the bills of lading for the 15,000 units, but also the bill for the 444 units, and that the 444 units covered by the latter bill had in fact been appropriated to the contract. It is difficult to see what purpose was served by the amendment made to the original invoice except to intimate that the sellers intended to seek to discharge their obligations as to the whole contract, or, if that language be thought more appropriate, the whole bundle of contracts, by delivering bills of lading for 15,000 only, and had no intention of doing anything further to discharge their obligations. As we concur in the view of the sellers' action in delivering the amended provisional invoice, taken by the appeal committee, it must follow that the appeal must be allowed and the award of the appeal committee restored.

Appeal allowed. Leave to appeal to the House of Lords.

Solicitors: *Thomas Cooper & Co.* (for the appellants); *Middleton, Lewis & Clarke* (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

DICKSON v. JONES.

[CHANCERY DIVISION (Farwell, J.), May 18, 19, 1939.]

Trade—Restraint of trade—Covenant by employee in articles—Solicitor—Articled clerk—Not to practise within 15 miles of town where employer's business situated during whole life of employee.

The plaintiff, a solicitor of over 30 years' standing, who had acquired his practice in 1913, the business having originally been commenced in 1857, took the defendant into his employment as junior clerk in 1921. The defendant, who was then 15 years of age, gradually increased the scope of his duties, and, except for a short period of illness at the end of 1933 and the beginning of 1934, was employed by the plaintiff continuously until he left in July, 1937. On Apr. 10, 1934, the plaintiff agreed that the defendant should be articled to him, and by articles of that date it was agreed that the defendant would not "at any time hereafter practise as a solicitor within a radius of 15 miles from the Town Hall, Hanley, aforesaid, or solicit any client of the solicitor. . . ." Towards the end of his employment with the plaintiff, the defendant had become chief conveyancing clerk, and interviewed clients himself. Shortly after leaving the plaintiff's employment, the defendant commenced practice on his own account at a short distance from the plaintiff's office:—

HELD: the combination of a restriction over an area so great as a radius of 15 miles and one extending to the whole life of the defendant was, in the circumstances, wider than was necessary for the protection of the plaintiff, and was therefore unenforceable as being in undue restraint of trade.

[EDITORIAL NOTE. The main difficulty in drawing clauses in restraint of trade is to fix within reasonable limits the extent of the restraint permissible in law. In the case of solicitors acting as managing clerks for other solicitors the present case will provide a helpful guide in this respect.]

AS TO RESTRAINT OF TRADE IN CONTRACTS OF EMPLOYMENT, see HALSBURY, Halsham Edn., Vol. 32, pp. 408-418, paras. 682-698; and FOR CASES, see DIGEST, Vol. 43, pp. 21-26, Nos. 135-176 and pp. 68-71, Nos. 720-742.]

Case referred to :

- (1) *Fitch v. Dewes*, [1921] 2 A.C. 158 ; 43 Digest 34, 276 ; 90 L.J.Ch. 436 ; 125 L.T. 744 ; *affg.*, [1920] 2 Ch. 159.

A ACTION for an injunction to restrain the defendant from practising as a solicitor within a radius of 15 miles from the Town Hall, Hanley, in the county of Stafford, in breach of an agreement dated Apr. 10, 1934, and for damages and costs. The defendant pleaded (i) that he was not bound by the agreement because the plaintiff had repudiated an oral assurance which he had given to the defendant prior to executing the articles to the effect that he would be taking the defendant into partnership as soon B as he was admitted, and (ii) that the covenant was void as being contrary to public policy and in undue restraint of trade. The facts and arguments are fully set out in the judgment.

F. H. L. Errington for the plaintiff.

Andrew Clark for the defendant.

C FARWELL, J. : The plaintiff in this action is a solicitor who has a considerable practice in Stoke-on-Trent. He is claiming in this action an injunction against the defendant to restrain the defendant from practising as a solicitor within a radius of 15 miles from the Town Hall, D Hanley, in breach of a covenant. The defence to the action—the defendant himself being a solicitor—is the not unusual defence in a case of this kind—namely, that the covenant is too wide to be enforceable, because it is wider than is reasonably necessary for the protection of the plaintiff. The defendant, however, has chosen also to set up in his pleadings, and to rely upon, a plea that the plaintiff had in some way repudiated E an agreement by him to take the defendant into partnership with him, and that by such repudiation the defendant was entitled to disregard the covenant if it was otherwise binding upon him. A great deal of evidence has been given, and a good deal of time has been occupied in dealing F with that issue.

The facts are these. The plaintiff, as I have said, is a solicitor carrying on business at 32, Cheapside, Hanley, Stoke-on-Trent. He is a solicitor of over 30 years' standing, and has a considerable practice in the town. He is also secretary of the local law society, and no doubt a man of G standing in his profession in Stoke. He acquired his business from his predecessor, and that business was carried on, as it is still carried on, in the name of Challinors & Dickson. He acquired that business in 1913, the business having originally been commenced in 1857. The business, therefore, is an old and well-established business carried on by the H plaintiff, who, as I have said, is a solicitor of considerable standing. The defendant is the son of a draper in Stoke who has now retired. The son was born in Stoke, was brought up there, and has spent his life there, or thereabouts, and no doubt his friends, acquaintances and connections are in and around Stoke. At the age of 15—that was in 1921—the defendant entered the service of the plaintiff as a junior clerk. Of course he

was then only a boy, and his duties were those of doing a certain amount of typewriting, and doing a certain amount of ordinary office work, and I should suspect that at that time he had little or nothing to do with the clients. In 1922, however, there was a service agreement entered into under which the defendant agreed to serve the plaintiff for a term of 3 years. The defendant continued to occupy that position, gradually, no doubt, enlarging the scope of his duties and getting a better position in the service of the plaintiff. There was then another service agreement, entered into in 1934, which was for a term of 5 years. In neither agreement was there any sort of restriction upon the future activities of the defendant, nor would one expect it at that time. They were simply service agreements under which the defendant agreed to serve the plaintiff as a clerk. In 1933, the defendant, who had ambitions to become a solicitor himself, and who was reading, so far as he had time to do so out of office hours, for his preliminary examination, unfortunately had a breakdown in his health. In 1933, he felt bound to give up his work, tell the plaintiff the position of his health, and leave the plaintiff's employment. In the early part of 1934, when the defendant had recovered his health, he was unemployed. He happened to meet Mr. Woolliscroft, another solicitor who was carrying on business in Stoke, and he spoke to him and inquired whether there was any chance of that solicitor employing him. He also suggested that he would like to be articled to Mr. Woolliscroft. Mr. Woolliscroft, who, as I have said, is also a solicitor, and no doubt a solicitor of integrity, quite rightly and properly said: "You have been with Mr. Dickson all these years until quite recently, and, therefore, why do you not go back to him? I am quite willing to take you into my employment. I am very busy. I have plenty of work to do, and I am quite prepared to give you your articles, but I am not going to do anything without Mr. Dickson's knowledge and approval." That was a very proper attitude, of course, for another solicitor to adopt. Mr. Woolliscroft then said to the defendant: "Why do you not go and find out from Mr. Dickson whether he has any work for you to do, and is prepared to take you back into his employment?" The defendant said that he thought that Mr. Dickson had found another admitted solicitor, and that he thought that he had finished with him. He thought there would not be room in the office for him, and, therefore, he had not approached the plaintiff. However, at Mr. Woolliscroft's suggestion, he did go and see the plaintiff, and the plaintiff agreed to take him back into his service. He also agreed that he should be articled to him. At that date, the defendant was 28 years of age. He had spent practically the whole of his working life, except for a few months when he was away ill, in Mr. Dickson's office, and had no doubt during that time acquired some knowledge of the practice in a solicitor's office. When the defendant returned to the employment of the plaintiff, the plaintiff instructed him to prepare the deed for him to be articled to the plaintiff. The defendant thereupon, with the assistance of a precedent book, or precedent

books, did prepare a draft for the terms of the articles. Those articles, I think, are not in a very unusual form, with some exceptions. The indenture is made between the plaintiff of the one part and the defendant of the other part, and by it the defendant of his own free will :

A . . . hereby places and binds himself clerk to the solicitor to serve him in his profession of a solicitor from the date hereof for the term of 3 years.

B Then there are the usual covenants by the clerk that he will faithfully and diligently serve the solicitor, and certain provisions in the case of his injuring the solicitor by reason of misbehaviour, and a covenant to keep the secrets of the solicitor and so on. Then by para. 3 the solicitor covenants as follows :

C In consideration of the foregoing covenants and of the sum of £100 paid by the clerk to the solicitor the solicitor hereby covenants with the clerk that the solicitor will accept and take the clerk as his clerk and will by the best ways and means he may or can and to the utmost of his skill and knowledge teach and instruct or cause to be taught and instructed the clerk in the practice or profession of a solicitor and also will at the expiration of the said term use his best endeavours at the request and cost of the clerk to cause and procure him to be admitted a solicitor of the Supreme Court provided the clerk shall have well faithfully and diligently served his said clerkship.

D Then there is a covenant by the solicitor for the return of the premium in certain events, which I need not read. By cl. 5 of this deed, this covenant is provided, and it is on this covenant that the whole point in this action turns :

E In consideration of the foregoing covenants on the part of the solicitor the clerk hereby covenants that he will not at any time hereafter practise as a solicitor within a radius of 15 miles from the Town Hall Hanley aforesaid or solicit any client of the solicitor and if the clerk shall commit a breach of the foregoing covenant he shall pay to the solicitor the sum of £50 for every month or part of a month during which he so practises by way of liquidated damages and a further sum of £10 for every client solicited by him or by any person on his behalf.

F According to the defendant's evidence, he protested against the covenant in that form, and the plaintiff thereupon, according to the defendant's evidence, said that he did not suppose that it would ever be enforced because the plaintiff was prepared, or would be prepared, to take him into partnership, or give him a small share in the business, and, therefore, it was not in the least likely that it would ever become effective. On that, the defendant executed the document.

G I am quite satisfied, on the defendant's own evidence, that there was never anything like an agreement, in any sense of an enforceable agreement between the plaintiff and the defendant, by which the plaintiff undertook to take the defendant into partnership or to give him a share of the business. The defendant himself said in the witness-box that he recognised that his father would have to find some money to put
H into the business in order that he, the son, might have a share, and that his father would perhaps do that, but it is not suggested that any particular sum was ever agreed between the parties, and, in fact, putting it at its very highest, the most that can be said with regard to this part of the case is that there may have been some sort of conversation between the parties during which the plaintiff may have held out some hopes

that at some future time he might be prepared to take the defendant into the business as a partner. Certainly there was never anything which could amount to a contract which the defendant would ever have been entitled or enabled to enforce. So far as this case goes, and so far as the defendant relies upon any repudiation of any such contract between the parties, that defence must fail, for the simple reason that there never was such a contract, and never was anything which could be repudiated. Nevertheless, whatever the facts may be, it does remain a fact that the defendant did execute these articles containing this particular restrictive covenant. He was then 28 years of age, and he was a married man with children. He had had such experience as he could gain by acting as a clerk in the office of the plaintiff in the practice of the law. In truth the defendant was in his latter years largely concerned in conveyancing matters. A B

The plaintiff, as I have said, was the secretary to the local law society, and was much occupied with that, and I think that more and more, as years went on, he left his work in the office to be done, so far as it was possible, by people other than himself, because he had not a great deal of time to spare. He employed in the office as a managing clerk a Mr. Clark who had been in the employ of the plaintiff for many years, and who combined the duties of cashier and managing clerk. He was the first of the assistants whom the plaintiff had in his office. The plaintiff placed great reliance upon Clark, who undoubtedly did much of the work in the office. He was not an admitted solicitor, but, in so far as he could, he carried on the business under the supervision, and with the assistance, of the plaintiff. He was the person who, when the plaintiff was not available, or when it was not convenient for the plaintiff to do so, interviewed most of the clients. Undoubtedly, however, the defendant, who by this time had advanced in the office and had become the chief conveyancing clerk, also interviewed a number of clients who went to the office. If the plaintiff was not available, the defendant might at once see directly the clients, or, if it was a matter with which the defendant could properly deal, the plaintiff would send the client through to the defendant in order that he might carry out whatever was necessary to be done for the client. In that way, there is no doubt at all that the defendant came into touch with a large number of persons who went to the offices of the plaintiff as clients, and had opportunities of getting to know them, and of making their acquaintance in so far as they were not known to him already. There cannot be any doubt that that was the position. C D E F G

In July, 1937, the defendant left the employ of the plaintiff. There seems to have been some unpleasantness between the plaintiff and the defendant after that. The defendant was asked to come and give certain assistance over matters with which he had had to deal whilst he was in the office. He did so on two or three occasions, but on the last occasion when he was asked to come and assist he was not willing to do H

so, and thereupon certain correspondence of an acrimonious description passed between the plaintiff and the defendant, which I have been spared from reading in this action. It really has little to do with the matter beyond the fact that one certain result of the misunderstanding was that the plaintiff, if he ever had it in his mind to take the defendant into his business, certainly had not any longer any such intention. I am glad to say, and I think I ought to say, that the difficulty was got rid of, and that the matter was left in a quite amicable position. I ought also to add, in justice to the plaintiff, that the £100 which he got as a premium during the time when the defendant was serving him he repaid quite gratuitously by letting the two children of the defendant have the advantage of that sum. It was done through the defendant's father. The result was that the plaintiff did not get the benefit of the premium, but gave it to the two children of the defendant. That has really nothing whatever to do with this action, but it is only right that I should mention that as a generous act on the part of the plaintiff.

When it had been made quite clear to the defendant, as it was in 1938, that he was not going to be taken into partnership or given an interest in the business, the defendant was annoyed, and, being by that time an admitted solicitor, proceeded to set up his own business, not in the same street as the plaintiff, but within a very short distance from the plaintiff. He is there now, carrying on his business as a solicitor in very close proximity to the offices of the plaintiff. On that, the plaintiff commenced this action, and the question, and, in my view, the only question, which I have to determine is whether or not this covenant is one which the plaintiff is entitled to enforce. I say that that is the only question because I have already disposed of the suggestion that the plaintiff is debarred from enforcing the covenant because he had repudiated some part of the agreement. I say that there is no evidence of that at all, and the defence, so far as that goes, obviously must fail. The question which is left, however, is of more doubt and difficulty. I am not going to repeat, except very shortly, the principle which applies in this sort of case. It is quite plain that any restraint of trade is *prima facie* illegal, and not enforceable, but that an employer may require, and may take from his employee, a restriction, so long as it is not more than is reasonably necessary for the protection of the employer, and so long as it is not against public policy. It is quite plain that this is not a case where public policy enters into the question at all, but it is also quite plain on the authorities that the onus now is on the plaintiff—the person who is seeking to enforce the covenant—to show that it is not more than is reasonably necessary for his protection. It is not for the defendant to show that. It is for the plaintiff to prove that the covenant is enforceable, a covenant which *prima facie* would not be enforceable at all. In order to determine that question, I am bound to take into consideration all the circumstances of the parties on each side, and the general surrounding conditions, and to consider whether or not, in my view, the protection

is more than was reasonably required in order to protect the plaintiff.

I think that there can be little doubt that a solicitor who has served his time for several years in the office of another solicitor as an employee is, generally speaking, in a position in which he will come into touch with some, at any rate, of his employer's clients. He will get to know them, and he may be able to get into touch with them in such a way that it is possible, if and when he leaves the employment, for him to take advantage of the acquaintanceship, and of his position in the employer's employment. In so far as the employer desires to be, and is, protected by the covenant against the possibility of his practice being prejudiced by that sort of thing, he is entitled to some protection. I think that the case of a solicitor is eminently a case where some protection is almost always necessary if the employee is a person who is being employed in a more or less confidential position, where he does come into touch with, and does get to know, some, at any rate, of his employer's clients. Of course, the position which he holds must have some effect upon the reasonableness or otherwise of the covenant. A person who is merely employed as an office boy, and whose duties consist, among others, of putting stamps on the letters and dusting out the office (if that be part of his duty), and things of that sort, does not, probably, come into touch with the clients, and in that sort of case probably any restrictive covenant would be unnecessary, and therefore unreasonable. In the case, however, of a man who has attained a position of some importance in the office, and who comes into contact with clients, and necessarily sees the documents and other papers of the clients, he is in a position where he may be able, when he leaves the employment, to make use of that sort of connection which he may have formed as a result of coming into contact with the employer's clients. Therefore, *prima facie*, I think a covenant by a solicitor's clerk of this standing is indubitably a reasonable and proper protection for the employer and his business.

In my judgment, whether or not a particular covenant is enforceable must depend, not only upon the exact terms of the covenant, but also upon the general circumstances of the case. When I look at this case, I find this. The plaintiff has a substantial business, and his business is to a very large extent in Stoke-on-Trent, and in one or two other towns which are comparatively close to Stoke. He has, or has had, one or two clients, and in some cases a few more, scattered about in other towns in the surrounding country, but it would be, I think, right and accurate to say that, according to the evidence which I have heard and with which I have been supplied, the business of the plaintiff in this case is very largely confined to Stoke and one or two other towns in close proximity. Therefore, the opportunities which the defendant may have had of coming into touch with the plaintiff's clients and otherwise of getting any sort of acquaintanceship which might be of assistance to him in the future are largely confined to the areas where the plaintiff's practice was mainly carried on. The defendant, when he entered into this covenant, was a

young man of some 28 years of age. He had been brought up in Stoke, and the whole of his associations were in and about that part of the world, and no doubt his best hope of making a success in his profession was to set up business in that sort of neighbourhood, if not in Stoke itself. In those circumstances, it would be perfectly reasonable for the plaintiff

- A** to say : " I am going to debar you from setting up, at any rate for a limited time, as a solicitor in Stoke." Equally, it would have been perfectly reasonable for the plaintiff to have said : " I shall want a covenant from you that you will not solicit any persons who are clients of mine whilst you are in my service." That sort of protection, I think,
- B** clearly would be a protection to which the plaintiff would be entitled as being eminently reasonable. In the present case, however, there are two matters which call for special attention. In the first place, the area over which the covenant extends is 15 miles from Stoke. That is an area which includes a large number of towns, in some of which the plaintiff
- C** has not, and never has had, so far as I know, at any material time, any clients at all. In some of the towns he has one client, or possibly two, and not more than that. It is an area which embraces a very large portion of that part of the world with which the defendant himself is familiar, and, although a covenant of this sort is perfectly justified
- D** for the purposes of protecting the plaintiff's business, it is not justified if it is intended to, and does in fact, restrict competition. Fair competition is that which everybody has to face, and an employee cannot be asked to restrict himself against engaging in perfectly honest competition. What he can be restrained from doing is making use of the knowledge
- E** which he has acquired in the business of the plaintiff in order to filch from the plaintiff his goodwill, or some part of it.

When one considers a radius of 15 miles, the area seems to me to be extremely wide, but I should hesitate to say that it was necessarily so wide as to make this covenant unreasonable if the period of time during

- F** which the covenant was to be operative had been a limited period. When, however, I get the combination of a restriction over an area so great, as it seems to me, as a radius of 15 miles from Stoke and a restriction which is to extend during the whole of the life of this young man, it does appear to me that that is going very far beyond anything which may be
- G** said to be reasonably necessary for the protection of the plaintiff. I think it was very unfortunate that, when the covenant was entered into, the plaintiff did not consider more carefully than I expect he did what the limits of the future activities of his servant were to be—that is to say, what it was reasonable to ask his employee not to do. I suspect
- H** that the solicitor did not give it a great deal of attention at that time. He did not go very carefully into it, and, if he had made inquiries, I suspect that he would have made inquiries from other solicitors, and he would have found that it was not the practice in that part of the world, at any rate, to take covenants of such a wide nature as this one. At any rate, in this particular case, having regard to all the circumstances,

I have come to the conclusion that this covenant is wider than anything which is necessary for the protection of the plaintiff.

I have been referred to *Fitch v. Dewes* (1), which in some ways is not at all unlike the present case, in which the House of Lords came to the conclusion that the covenant was justified and enforceable, and ought to be enforced. Of course, that case was a decision which I must consider very carefully in coming to the conclusion which I do, but in that case there are differences which to my mind are amply sufficient to show that, although in that case the covenant was reasonable, in this case it is not reasonable. Therefore, the plaintiff has not discharged the onus which rests upon him of satisfying me that the covenant is no more than that which is reasonably necessary for his own protection. In my judgment, it goes beyond any such required protection, and, as I am bound to read it as a whole, I must come to the conclusion that the covenant is invalid, and cannot be enforced. In those circumstances, the action fails, and must be dismissed. With regard to the costs, the defendant has succeeded in the action, and is entitled to the general costs of the action, but, in my judgment, he is not entitled to the costs so far as they have been increased by the plea of repudiation. That was a plea which, in the view I take of this case, it was wholly unnecessary to set up, and, moreover, has completely failed. Therefore, to the extent to which the costs of the action have been increased by that plea, the defendant must pay them. The order will be that the defendant will have the general costs of the action, except in so far as they were increased by the defence of repudiation. Those costs will be the plaintiff's costs, and there must be the usual set-off.

Action dismissed with costs in so far as they have not been increased by the plea of repudiation.

Solicitors : *Church, Rackham & Co.* (for the plaintiff) ; *Gibson & Weldon* (for the defendant).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

NEWCASTLE-UNDER-LYME BOROUGH COUNCIL v. WOLSTANTON, LTD., AND DUCHY OF LANCASTER.

[CHANCERY DIVISION (Farwell, J.), May 24, 1939.]

Mines—Working of mines—Letting down surface without compensation—Plea of custom or prescription—Invalid plea.

In a defence to an action for an injunction to restrain the defendants from so working their mines as to let down the surface, and thus damage the plaintiffs' property, the defendants pleaded, *inter alia*, both a custom and a right by prescription to work their mines so as to let down the surface without making compensation :—

HELD : following *Hilton v. Granville* (Lord) (1), such a custom or prescriptive right was unreasonable and invalid, and could not be pleaded.

[EDITORIAL NOTE. The point in this case is how far the case of *Hilton v. Granville (Lord)* (1) has been affected by adverse criticism and decisions of the House of Lords. While it is found that upon some points that case must now be taken to have been overruled, yet, upon the unreasonableness of the custom or prescriptive right here contended for, that case is still an authority.

A AS TO CUSTOM TO CAUSE SUBSIDENCE, see HALSBURY, Hailsham Edn., Vol. 22, pp. 629, 630, para. 1359; and FOR CASES, see DIGEST, Vol. 34, p. 711, Nos. 961-966.]

Cases referred to :

- (1) *Hilton v. Granville (Lord)* (1844), 5 Q.B. 701; 34 Digest 703, 923; 13 L.J.Q.B. 193; 2 L.T.O.S. 419; *subsequent proceedings* (1848), 12 Q.B. 737, n.
- (2) *Rowbotham v. Wilson* (1860), 8 H.L.Cas. 348; 34 Digest 613, 121; 30 L.J.Q.B. 49; 2 L.T. 642; *affg.* (1857), 8 E. & B. 123.
- (3) *Salisbury (Marquis) v. Gladstone* (1861), 9 H.L.Cas. 692; 17 Digest 14, 114; 34 L.J.C.P. 222; 4 L.T. 849.
- (4) *Blackett v. Bradley* (1862), 1 B. & S. 940; 34 Digest 711, 963; 31 L.J.Q.B. 65; 5 L.T. 832.
- (5) *Consett Industrial & Provident Society, Ltd. v. Consett Iron Co.*, [1922] 2 Ch. 135; Digest Supp.; 91 L.J.Ch. 630; 127 L.T. 383.

D PRELIMINARY POINT OF LAW ordered to be tried by BENNETT, J., prior to the hearing of an action for a declaration and an injunction to restrain the defendants from so working their mines as to let down the surface and thus damage the plaintiffs' property. The facts and arguments are fully set out in the judgment.

Sir Herbert Cunliffe, K.C., C. R. R. Romer, K.C., and A. Andrewes Uthwatt for the plaintiffs.

G. P. Slade, K.C., and W. J. C. Tonge for the first defendants.

C. E. Harman, K.C., and Wilfrid Hunt for the second defendants.

F FARWELL, J. : This matter comes before the court upon a point of law which BENNETT, J., has directed should be heard before the action itself is dealt with. The order which was made by BENNETT, J., was made on Feb. 1, 1939, and it ordered :

... that the point of law raised by the reply of the plaintiffs in this action that is to say that in any event no such custom or prescriptive or other right as is alleged in the defences could or can be sustained or ought to be presumed as the same would be unreasonable be set down for hearing in the non-witness list and disposed of before the trial of the action.

G Accordingly, the question of law has now come before me and has to be determined, and I think I can deal with it quite shortly.

H In the statement of claim, there is a claim by the plaintiffs, the Newcastle-under-Lyme Borough Council, for a declaration against the defendant company and against the Duchy of Lancaster, and an injunction to restrain the defendants from so working their mines as to let down the surface and thus damage the plaintiffs' property. The defences are these. The defendants in the first place deny the fact that they have so worked their mines as to cause damage to the plaintiffs, and with that part of the case I am in no sense concerned at all. They also plead both a custom and a right by prescription to work their mines so as to let down the surface without making compensation, and that is a

matter which may have to be decided. The question which I have to consider, and the only question which I have to consider, is whether it has already been decided in earlier authorities that such a custom or prescription is in this particular case not a legal custom, or one which the courts will recognise.

In my judgment, exactly the same question with regard to the same manor did come before the courts in *Hilton v. Granville (Lord)* (1), and in that case the judgment, which was given by LORD DENMAN, C.J., decided quite clearly that such a custom was unreasonable, and therefore not enforceable, and I think that the judgment also covered the question as to whether or not a prescriptive right of such a kind as that would be upheld. That judgment seems to me to be quite a clear decision upon the question of both the custom and the prescriptive right which is claimed, but there is a statement in it which has been quite plainly overruled by the superior court and in the House of Lords. The statement in that judgment which was overruled was to the effect that, even if there had been an express grant of such a right, such a grant would have been unenforceable because it would have been repugnant to the grant itself. That *dictum* has quite clearly been decided to be wrong, and the courts have decided that, where there is an express grant of that sort, it would not necessarily be repugnant, and therefore void, but the question whether the custom or a presumed prescription would be a good custom or a prescription which could be assumed has been definitely decided in *Hilton v. Granville (Lord)* (1), and, in my judgment, has not been overruled in any sense of that word in any of the subsequent cases.

The decision in *Hilton v. Granville (Lord)* (1) was considered in *Rowbotham v. Wilson* (2). It was later considered in *Salisbury (Marquis) v. Gladstone* (3), a case in the House of Lords, and again it was considered in *Blackett v. Bradley* (4), and as recently as 1922 the Court of Appeal have referred to and considered it in *Consett Industrial & Provident Society, Ltd. v. Consett Iron Co.* (5).

In my judgment, on this question I have to determine, the position is still precisely the same as it was when COCKBURN, C.J., said in *Blackett v. Bradley* (4), at pp. 954, 955 :

There can be no doubt that to some extent the authority of *Hilton v. Granville (Lord)* (1) has been shaken, inasmuch as a position assumed in the reasoning of the court as one of the grounds of its decision has since been distinctly overruled in the House of Lords in the case of *Rowbotham v. Wilson* (2), in which the question presented itself for adjudication. And it cannot be denied that the decision itself has not met with the universal approval of the profession ; and that it may be desirable that the validity of that decision should be brought under the consideration of a court of error. At the same time it is equally clear that, though the reasoning of this court in *Hilton v. Granville (Lord)* (1) has been impugned, the decision in that case has not been overruled. And, the judgment having been a considered judgment of the court, and standing unreversed, we do not feel ourselves at liberty to consider ourselves as otherwise than bound by it. We must therefore, but without expressing any opinion one way or the other as to the propriety of the decision in question, give judgment on the third plea for the plaintiff, leaving the defendants to take the case into error if they shall be so advised.

In my judgment, that position, as stated by COCKBURN, C.J., in *Blackett*

v. *Bradley* (4), is still the position to-day, and, as the Court of Queen's Bench were bound in 1862, so am I bound to-day, and I can do no more than decide, without expressing any view at all on the merits of the question, that, so far as this court is concerned, the custom or the prescriptive right claimed must be held to have been already decided to be invalid. Therefore, I must declare that it is invalid.

Declaration that custom claimed invalid.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Joseph Griffith*, Town Clerk, Newcastle-under-Lyme (for the plaintiffs) ; *Hancock & Willis*, agents for *Ellis & Ellis*, Burslem (for the first defendants) ; *Solicitor to the Duchy of Lancaster* (for the second defendants).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

C COMPTON v. WEST HAM COUNTY BOROUGH COUNCIL.

[CHANCERY DIVISION (Crossman, J.), May 10, 11, 12, 1939.]

Local Government—Poor law relieving officer—Contract of service—Recovery of pay—Regulations of council relating to sick pay—Public Authorities Protection Act, 1893 (c. 61), s. 1—Public Assistance Order, 1930 (S.R. & O., 1930, No. 185), arts. 142 (1), 162.

The plaintiff was employed as a senior poor law relieving officer by the defendant council. The latter had made regulations in 1913 and 1919 governing, *inter alia*, the payment of salary to their officers during sickness. At the time of his appointment in 1934, the plaintiff did not know of these regulations, and they were not brought to his notice. By reason of sickness, he was unable to perform any of his duties from Dec. 6, 1935, to Sept. 13, 1936. He was paid his full salary until Mar. 7, 1936, but thereafter, until his return to work, he was paid at half-rate scale. He claimed the difference between this half rate and the full rate of salary, contending that no term authorising such reduction could be implied into his contract of service, and, further, that, by the Public Assistance Order, 1930, art. 162, the defendant council had no power to decrease his salary without the consent of the Minister of Health, and that no such consent had been obtained. The defendant council contended that it was an implied term of the contract that it was made subject to their regulations. They also pleaded the Public Authorities Protection Act, 1893, on the ground that the plaintiff's appointment was one which they were bound to make under the Public Assistance Order, 1930, art. 142 :—

HELD : (i) there was no implied term in the contract of service that the plaintiff was employed subject to the defendant council's regulations as to sick pay, and he was, therefore, entitled to his full salary during the whole period of his absence through illness.

(ii) the plaintiff's claim was barred in respect of salary accruing due more than 6 months before the issue of the writ, the defendant council being entitled to the protection of the Public Authorities Protection Act, 1893.

[EDITORIAL NOTE. The question here is whether the council's regulations relating to sick pay were to be implied in the contract of service. That being decided not to be the case, the question under the regulations does not arise, but the point under the Public Authorities Protection Act, 1893, does become material.

AS TO PUBLIC ASSISTANCE OFFICERS, see HALSBURY, Hailsham Edn., Vol. 25,

Cases referred to :

- (1) *Marrison v. Bell*, [1939] 1 All E.R. 745; Digest Supp.; 160 L.T. 276.
- (2) *Niblett v. Midland Ry. Co.* (1907), 96 L.T. 462; 34 Digest 86, 639.
- (3) *Littlejohn v. London County Council*, [1938] 1 K.B. 78; [1937] 3 All E.R. 43; A
Digest Supp.; 106 L.J.K.B. 488; 157 L.T. 128.
- (4) *Clarke v. Lewisham Borough Council* (1902), 67 J.P. 195; 38 Digest 109,
781.
- (5) *Sharlington v. Fulham Guardians*, [1904] 2 Ch. 449; 38 Digest 109, 783;
73 L.J.Ch. 777; 91 L.T. 739.
- (6) *Bradford Corp'n. v. Myers*, [1916] 1 A.C. 242; 38 Digest 110, 784; 85 L.J.K.B. B
146; 114 L.T. 83; *affg.*, [1915] 1 K.B. 417.
- (7) *McManus v. Bowes*, [1938] 1 K.B. 98; [1937] 3 All E.R. 227; Digest Supp.;
107 L.J.K.B. 51; 157 L.T. 385.
- (8) *Cuckson v. Stones* (1858), 1 E. & E. 248; 34 Digest 71, 483; 28 L.J.Q.B. 25;
32 L.T.O.S. 242.
- (9) *Warburton v. Co-operative Wholesale Society, Ltd.*, [1917] 1 K.B. 663; C
12 Digest 378, 3122; 86 L.J.K.B. 529; 116 L.T. 107; 10 B.W.C.C. 93.
- (10) *Storey v. Fulham Steel Works Co.* (1907), 24 T.L.R. 89; 12 Digest 377, 3121.
- (11) *Maloney v. St. Helens Industrial Co-operative Society, Ltd.*, [1933] 1 K.B. 293;
Digest Supp.; 102 L.J.K.B. 85; 148 L.T. 196.
- (12) *The Moorcock* (1889), 14 P.D. 64; 12 Digest 611, 5048; 58 L.J.P. 73;
60 L.T. 654.
- (13) *Reigate v. Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K.B. 592;
34 Digest 99, 739; 87 L.J.K.B. 724; 118 L.T. 479.
- (14) *Milford Docks Co. v. Milford Haven Urban District Council* (1901), 65 J.P.
483; 38 Digest 109, 780.

ACTION for (i) a declaration that the plaintiff, a senior poor law relieving E
officer, was entitled, for the whole period of an illness whereby he was
incapacitated from performing his duties, to the full amount of his
salary, without any deduction being made on account of his absence
through his illness, (ii) an account of the amount found due to the
plaintiff by reason of such deduction, and (iii) payment of the amount so F
found due. The facts are fully set out in the judgment.

John G. Foster for the plaintiff.

Kenneth Diplock for the defendants.

Foster : Wages continue during sickness until the contract of service
is terminated, unless there are special terms of the contract to the G
contrary, or unless the employee is estopped by doing something in-
consistent with receiving such wages : *Cuckson v. Stones* (8) and *Marrison*
v. Bell (1). The court will be reluctant to imply such special terms,
but, if it does so, the plaintiff is protected by the Public Assistance
Order, 1930, art. 162, which prohibits any reduction of a senior poor H
law relieving officer's salary without the consent of the Minister of
Health, which in this case has not been obtained. [Counsel referred to
Littlejohn v. London County Council (3), *Niblett v. Midland Ry. Co.* (2),
Warburton v. Co-operative Wholesale Society, Ltd. (9), *Storey v. Fulham*
Steel Works Co. (10), *Maloney v. St. Helens Industrial Co-operative Society*,

Ltd. (11), *The Moorcock* (12), *Reigate v. Union Manufacturing Co. (Ramsbottom)* (13), *Clarke v. Lewisham Borough Council* (4), *Sharpington v. Fulham Guardians* (5) and *McManus v. Bowes* (7).]

A *Diplock* : Where a person enters the employment of a public authority under a contract of service which, on the face of it, does not purport to contain all the terms of his employment, he must be presumed to have agreed to the general regulations of the authority applicable to his case. If the defendants were wrong in making the deduction, they are entitled to the protection of the Public Authorities Protection Act. It was a statutory employment, although the parties were left free to fix some of the terms of the contract. [Counsel referred to *McManus v. Bowes* (7) and *Bradford Corp'n. v. Myers* (6).]

B *Foster*, in reply : Even if the defendants were bound to make the contract, they are not entitled to the protection of the Act in respect of those terms which were of a private nature, and which were fixed by the parties themselves. [Counsel referred to *Milford Docks Co. v. Milford Haven Urban District Council* (14).]

C CROSSMAN, J. : The question raised in this action is whether the plaintiff, Roy Compton, who is a senior poor law officer within the meaning of the Public Assistance Order, 1930, art. 144, employed by the defendants, the West Ham County Borough Council, is entitled to the full amount of his salary in respect of the period from and including Mar. 8, 1936, up to and including Sept. 13, 1936, without any deduction being made on account of his absence through illness. Then a further question arises—namely, whether or not, if the plaintiff is so entitled, his right to bring an action to recover the amount to which he is entitled is barred by the Public Authorities Protection Act, 1893.

D In Oct., 1934, the plaintiff was appointed by the defendant council to be relieving officer in charge of No. 6 relief district at a salary of £310 per annum, rising by four annual increments of £20 and a fifth increment of £15 and a sixth increment of £20 to a maximum salary of £425 per annum. The plaintiff's appointment was effected in the following way. The first step was the issue of an advertisement on Sept. 19, 1934, by the defendant council in the following terms :

E Town Hall, West Ham, E.15. Applications are invited from members of the staff for the appointment of a relieving officer at the salary of £310 per annum, rising by four annual increments of £20, one of £15, and a final increment of £20, to a maximum of £425, subject to the abatement in accordance with the resolutions of the council for the time being in force, at present 2½ per cent., from the first £200 ; 3½ per cent. from the next £100, and 5 per cent. from the next £250. Candidates must possess the relieving officer's certificate of the Poor Law Examinations Board and the person appointed will be required to devote the whole of his time to the duties of the office and to reside within the relief district. The appointment will be subject to the provisions of the Local Government and Other Officers' Superannuation Act, 1922. Forms upon which application must be made can be obtained at the Public Assistance Offices, or will be forwarded upon receipt of a stamped and addressed foolscap envelope, and must be returned not later than 10 a.m. on Monday, Oct. 1, 1934. Canvassing the members of the council is prohibited and will disqualify.

That was signed by the town clerk, and I am told it was posted up in the offices of the council.

I understand that a form of application for the appointment was supplied at the same time in the following form :

County Borough of West Ham Public Assistance Committee. Instructions to be observed with reference to applications for the appointment of relieving officer.

Then there was a form attached which was to be filled up in the handwriting of the candidate and forwarded to the town clerk not later than the date stated in the advertisement. I do not think that I need read the details of that form. It was filled up by the applicant and signed by him on Sept. 26, 1934. That is the second step in the events which constituted the appointment of the plaintiff. The third step was that on Oct. 2, 1934, the staff sub-committee of the defendant council reported as follows :

Appointment of Relieving Officer. That they [the sub-committee] have also had under consideration 13 applications received for the appointment of relieving officer and have selected the following candidates to attend before the public assistance committee. . . .

The first person named is the plaintiff. His name and address are given, and his "present appointment" is described as "first assistant to relieving officer, No. 2 district." Below is a statement of the salary. I have already mentioned that. The figures are set out as I have given them, and they are followed by the words "subject to the appropriate abatement." Then it says :

Candidate must possess the relieving officer's certificate of the Poor Law Examinations Board.

On Oct. 9, 1934, when the fourth step was taken, the public assistance committee of the defendant council reported as follows :

That they have received and adopted the following reports of the staff sub-committee : In connection with the report under date Oct. 2, 1934 (p. 2437), having interviewed the 3 selected candidates, they have under the powers conferred upon them by the adoption of cl. 13 of their report under date Sept. 11, 1934 (p. 2170), appointed Mr. Roy Compton [the plaintiff] to the position of relieving officer at the salary of £310 per annum rising by four annual increments of £20, one of £15, and a final increment of £20, to a maximum of £425 per annum, subject to the appropriate abatement in accordance with the resolutions of the council for the time being in force.

On Oct. 23, 1934—this is the fifth step—the last-mentioned report was adopted by the defendant council. The last step, I think, is that on Oct. 17, 1934, the public assistance officer of the defendant council writes instructing the plaintiff to take over the No. 6 district on Monday, Nov. 5, 1934. Finally—and this appears to have been a necessary part of the appointment—on Oct. 25, 1934, the defendant council reported to the Ministry of Health by letter in the following terms :

In accordance with the Public Assistance Order, 1930, art. 162 (1), I beg to inform you that the council have appointed Mr. Roy Compton as relieving officer, in the place of Mr. F. A. Wadsworth, superannuated, at the salary of £310 per annum, rising by four annual increments of £20, one of £15, and a final increment of £20, to a maximum of £425 per annum, subject to the appropriate abatement in accordance with the resolutions of the council for the time being in force.

That is signed by the town clerk and addressed to the secretary of the

Ministry of Health. Those are the circumstances in which the plaintiff was appointed to the office which he still holds.

From Dec. 6, 1935, up to and including Sept. 13, 1936, the plaintiff was ill, and was unable to discharge the duties of his office. Up to and including Mar. 7, 1936—that is, the first 3 months of the period mentioned—the defendant council paid the plaintiff his salary at the full rate, but from Mar. 8, 1936, up to and including Sept. 13, 1936, the defendant council paid the plaintiff his salary at half the full rate only. The defendant council contend that the plaintiff was employed under a regulation contained in a minute of the defendant council dated Jan. 28, 1913, and in a minute of July 22, 1919. The minute of Jan. 28, 1913, is to the following effect, so far as it is material. A resolution was moved by Alderman Littler, and as an amendment it was moved by Councillor Gawthorn. The part which is material is under para. (e) A (i), in the following terms :

All insurable officers appointed by resolution of the council and all insurable clerks, caretakers, and others who have not been appointed by resolution of the council but who are certified by the chief officer of the department in which they are serving to be on the established staff of the council, shall be declared to be on the established staff, and that the sick allowance accruing to these officers under the Act shall be augmented to provide full pay during the first 13 weeks, and half-pay during the second 13 weeks of sickness in any one period of 12 months, provided nevertheless that such additional benefits shall cease concurrently with the sick allowances receivable under the Act.

Under para. B (g), it was further resolved as follows :

That the necessary steps be at once taken to notify all the council's employees of the foregoing decisions. This was seconded by Councillor Bacon, and . . . it was declared to be carried.

That is what happened on Jan. 28, 1913.

The second regulation or minute to which I have referred—that of July 22, 1919, the date when it was adopted by the council—is to the following effect :

That they have received and considered a letter from the secretary of the West Ham Corporation Employees' Federal Council asking that all employees after 12 months' service be classed A1 for sick allowance as paid by the council and recommend that the minute of the council, No. 10 (e) A (i), under date Jan. 28, 1913 (Vol. XXVIIa, p. 446), be made applicable to employees who have been continuously employed by the council for 12 months.

That is dated July 11, 1919, but was adopted by the council on July 22, 1919. The defendant council contend that the provisions as to sick pay contained in these minutes were implied terms of the plaintiff's employment with them.

The law as between employers and employees as to sick pay has recently been considered by the Court of Appeal in *Marrison v. Bell* (1). I think that the position at common law is now fairly clear. It is that an employee is entitled to payment of his full wages while he is temporarily incapacitated by sickness unless there is a special term in the contract of employment providing otherwise, or there is some implied term in the contract, or the employee is estopped from claiming his full

wages by some act on his part which is inconsistent with his right to full wages. It is common ground in this case that there is no express term as to sick pay in the plaintiff's engagement. The question is, was there an implied term, or is the plaintiff estopped in some way from setting up that he is entitled to the full wages? It was suggested at the beginning of the hearing of this case that this matter was a test case, but, on consideration, after hearing the case, I think that it is really a question of fact, and depends on the particular circumstances of the case. I have carefully considered the documentary evidence in this case and the facts admitted by the parties, and I have heard the oral evidence of the plaintiff. I find nothing in this case corresponding to the membership of a friendly society the rules of which provide that the employee shall not be entitled to sick pay during illness while he was receiving full wages from the railway company, as occurred in *Niblett v. Midland Ry. Co.* (2), which could estop the plaintiff from claiming his salary at the full rate during his temporary absence owing to sickness.

I find that, when the plaintiff was appointed in 1934, he did not know of the sick-pay regulations which had been adopted by the defendant council, and, having regard to all the circumstances, I hold that there is no sufficient ground for implying as a term of the plaintiff's contract of employment the provisions as to sick pay which the defendant council had adopted.

In these circumstances, it is unnecessary for me to consider the second point raised by the plaintiff—namely, that, by reason of the Public Assistance Order, 1930, art. 162, the defendant council are bound to pay the plaintiff the half of his salary which was kept back, on the ground that such keeping back was a deduction within art. 162 (2), and that *Littlejohn v. London County Council* (3) applies, it being admitted that the consent of the Minister of Health was not obtained to the keeping back of the half of the salary. That is a point which I do not propose to determine. It is unnecessary, I think, in the circumstances, to determine that. In my judgment, the plaintiff is entitled to a declaration as asked for by para. 4 of the prayer in the statement of claim :

A declaration that from and including Mar. 8, 1936, to Sept. 30, 1936, he was entitled to the full amount of his salary, without any deduction being made on account of his absence through illness.

When I say that he is entitled to the declaration, that is subject to the point which I am going to consider now, as to whether his right of action in respect of this was barred by the Public Authorities Protection Act, 1893. Apart from that, however, I think that he would be entitled to that declaration.

The defendant council relied upon the provisions of that Act. Sect. 1 of that Act provides as follows :

Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default

in the execution of any such act, duty, or authority, the following provisions shall have effect: (a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within 6 months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof. . . .

A Counsel for the defendant council says that the keeping back from the plaintiff of the half of his salary which was kept back was an act done in pursuance or execution or intended execution of an Act of Parliament, and that, the action not having been commenced within 6 months next after the act so done, the action does not lie. Counsel for the plaintiff says that the Act does not apply because the action is for breach of contract, and he relies upon *Clarke v. Lewisham Borough Council* (4) and *Sharlington v. Fulham Guardians* (5).

B The statement in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 26, p. 294, para. 612, in the article on "Public Authorities and Public Officers," and in the section which is concerned with the execution of a statute, duty or authority, dealing with the Public Authorities Protection Act, 1893, is as follows :
C

The performance, or breach, of a contract which a public authority has the power, but not the duty, to make, is not within the protection [of the Public Authorities Protection Act].

D I think that that is a correct statement of the law, and I think that it also would be correct to take that in an inverted form, and to say that the breach of a contract which a public authority has the duty to make is within the protection of the Act. However, that does not make it at once possible to see how that applies to the present case, because the question is, what was the act done here in respect of which this action is
E brought? I think that it is only a breach of contract which a public authority has the power, but not the duty, to make which is not within the Act. I think that this appears from *Bradford Corpn. v. Myers* (6) and *McManus v. Bowes* (7).

F I find it difficult, really, to construe the authorities, and to arrive at the law applicable to this case from them. I think that a breach of a contract which a public authority is by statute bound to make does come within the Public Authorities Protection Act, 1893, and, as the defendant council were, by the Public Assistance Order, 1930, art. 142 (1), bound to make the appointment of the plaintiff, I hold that an action for breach of the
G terms of that appointment is an action within sect. 1 of the Act of 1893. Art. 142 provides as follows :

(1) The council shall appoint a district medical officer for every medical relief district and a relieving officer for every general relief district formed pursuant to art. 20.

H Thus, the appointment of the plaintiff was an appointment which the defendant council were bound to make under the Act. The action here has arisen in consequence of that appointment, and it seems to me that the best conclusion at which I can arrive as to the meaning of sect. 1 of the Act is that the section does apply to an action which is to remedy a breach of a contract which the defendant council were bound to make in

pursuance of the Poor Law Act, 1930, and the regulations thereunder. I should say that, under the Poor Law Act, 1930, s. 136 (2), the articles contained in the Public Assistance Order, 1930, have the same effect as if they were enacted in the Poor Law Act, 1930.

The only question left is to what extent the action is barred by the Act of 1893. I think that it must follow that, with regard to all moneys which became due to the plaintiff prior to Sept. 1, 1936, the action does not lie. It lies only as regards moneys which became due after that date. There has been some discussion as to how these moneys became due and payable. It seems to me that I have to consider how the salary was payable, and I hold, on the admitted facts, having regard to the way in which the plaintiff had been dealt with by the defendant council, that the salary was payable monthly, and that it is only in respect of sums which became due in the months within that period that the plaintiff is at the present moment actually entitled to recover. However, the plaintiff is entitled to a declaration as asked by para. 4 of the statement of claim, and, if the parties can agree a figure, there will be an order for payment of the actual sum to which he is entitled.

Judgment for the plaintiff with costs.

Solicitors: *Stutfield & Son* (for the plaintiff); *E. E. King* (for the defendants).

[*Reported by CHARLES SHELLEY, Esq., Barrister-at-Law.*]

Re CAREW, CHANNER v. FRANCKLYN.

[CHANCERY DIVISION (Simonds, J.), June 7, 1939.]

Executors—Legacies—Abatement—Annuities—Annuities in nature of settled legacies—Rights of annuitant.

The testatrix by her will directed her trustees to pay the income of her residuary estate to her sister for life, and after her death to pay out of the residuary trust fund certain legacies, and two annuities of £500 each free of duty, with a gift over of the capital sum in the case of each of the annuities. The estate was insufficient to pay the legacies and provide a fund for the payment of the annuities:—

HELD: (i) the annuities were settled legacies of such sums as would, when invested in 2½ per cent. consols, produce the yearly sum of £500 each. As settled legacies, they were subject to abatement in the same way as any other legacy, and they would abate rateably with the other legacies.

(ii) as between the tenant for life and the reversioner of each legacy, the former was entitled for life only to the interest on the sum which had been so abated.

[EDITORIAL NOTE.] The importance of this decision lies in the consideration of the two previous decisions recently given on the same subject. The judge has not found it possible in this case to follow the methods of adjustment laid down in either of the previous cases, and it is clear that, in adjusting the rights of the parties, strict regard must be had to the terms of the will. The matter is really one of construction.

AS TO ABATEMENT OF ANNUITIES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 358, 359, para. 669; and FOR CASES, see DIGEST, Vol. 23, pp. 420-423, Nos. 4913-4937.]

Cases referred to :

- A (1) *Re Nicholson, Chadwyck-Healey v. Crawford*, [1938] 3 All E.R. 270; Digest Supp.
 (2) *Re Farmer, Nightingale v. Whybrow*, [1939] 1 All E.R. 319; Digest Supp.; 160 L.T. 59.
 (3) *Re Richardson, Richardson v. Richardson*, [1915] 1 Ch. 353; 23 Digest 420, 4914; 84 L.J.Ch. 438; 112 L.T. 554.
- B ADJOURNED SUMMONS for the determination of the method of abatement to be applied to annuities to be paid out of residue, the will directing the trustees to hold, after the cesser of the annuity, the capital of the annuity upon certain trusts. The facts are fully set out in the judgment.
- C *G. R. Upjohn* for the plaintiffs, the executors and trustees of the will of the testatrix.
Herbert Hart for the annuitants.
L. W. Byrne for five defendants, legatees under the will.
Maurice Berkeley for the remaining legatees.
Upjohn stated the facts.
- D *Hart* : The rights of the annuitants here are paramount, and, until these are satisfied, the remaindermen's rights do not take effect. The reversioners are not to rank equally with the annuitants. There is a right here which acquires value in the event of a deficiency. The annuitant has a right to advance of the corpus. The gift of capital fails. The annuitant must be paid the actuarial value of the £500 annuity abated, without any competition from those entitled in remainder. [Counsel referred to *Re Nicholson, Chadwyck-Healey v. Crawford* (1) and *Re Farmer, Nightingale v. Whybrow* (2).]
- E *Byrne* : The sums to come into the abatement calculation should be treated as if the testatrix had given legacies to produce these annuities and then settled them : *Re Richardson, Richardson v. Richardson* (3). Each gift should be treated as a settled legacy sufficient to produce £500 per annum free of duty, and then reduced proportionately, the fund abating with the other legacies. This case is distinguishable from *Re Nicholson, Chadwyck-Healey v. Crawford* (1) and *Re Farmer, Nightingale v. Whybrow* (2), as the testatrix here is providing settled legacies.
- F *Berkeley* : The will contemplates the setting aside of two funds, each capable of producing £500 per annum. There is no express power to resort to capital here, as in *Re Nicholson, Chadwyck-Healey v. Crawford* (1) and *Re Farmer, Nightingale v. Whybrow* (2). The fair course is that both the annuitants' and remaindermen's interests should abate rateably, the case being regarded as one of settled legacies. There is no precise authority on this type of case. In *Re Nicholson, Chadwyck-Healey v. Crawford* (1), there were words which would entitle the annuitant to be paid the full annuity, even in the event of an abatement.

SIMONDS, J. : In this case, the testatrix, Rose Maud Carew, died on June 2, 1934, having made her will on Jan. 27, 1927. By her will she made a residuary devise and bequest of all her real and personal estate not otherwise disposed of upon trust for sale, and she directed that the net income arising from her residuary trust fund as therein defined should be paid to her sister Blanche during her life for her separate use without power of anticipation. Her sister Blanche, the life tenant, survived her, and died on Oct. 31, 1938. The testatrix further directed that after the death of her sister her residuary trust fund should be held upon certain trusts—namely, to pay to each of the children of one John Warrington Carew (other than Gerald Carew) who should be living at the death of the survivor of herself and her sister the sum of £250 free of duty, then to pay to her cousin Mary Brenda Francklyn, a party to these proceedings, during her life, the yearly sum of £500 free of duty, and after her death to hold the capital representing such yearly sum of £500 upon such trusts as Mary Brenda Francklyn should by will appoint, and, if she should die intestate, to hold such capital and the income thereof upon the trusts thereafter declared in favour of the children of John Warrington Carew. Then there was a similar direction with regard to the payment of a similar yearly sum to her cousin Leila Caroline Francklyn, and a similar disposition of the capital representing such yearly sum. Then there was a direction to pay a number of other pecuniary legacies of substantial amounts, and finally there was a direction to hold the residue of the residuary trust fund, subject to the payment of the duty on the reversionary legacies bequeathed by the will, upon trust to pay and divide the same amongst all or any the children or child of John Warrington Carew, other than Gerald Carew, who should be living at the death of her sister, and, if more than one, in equal shares.

That appears to be a simple enough disposition, but the difficulty which has arisen is due to the fact that the testatrix has over-estimated the value of her estate, which is quite inadequate to provide the legacies which she has given subject to her sister's life interest and also the capital sums which are necessary to provide the two yearly sums of £500.

Before I come to consider what, in those circumstances, has to be done, I think that it is necessary to see, without regard to that position, the true construction of this will. The only point upon which any difficulty arises is as to the true meaning and effect of the disposition in favour of Mary Brenda Francklyn and a similar disposition in favour of Leila Caroline Francklyn with a gift over of the capital sum mentioned in each case.

It is to be noticed that the testatrix, whilst not directing that a sum shall be set aside to provide the yearly sum of £500, yet has proceeded upon the assumption that such a sum has been set aside, for she directs her trustees to pay her cousin during her life the yearly sum of £500 free of duty, and, after her death, to hold the capital representing such yearly sum of £500 upon trusts. It appears to me that I must construe

A that as being a settled legacy of such a sum as will, when invested, produce the yearly sum of £500. By "when invested," I mean when invested in $2\frac{1}{2}$ per cent. consols, so that, with all reasonable certainty, the trustees may know that that sum will produce the £500. It might be, of course, that, by reason of a capital levy, or something of that kind, that sum might be reduced. However, I do not think that I am concerned to take such eventualities into account. I must regard this as nothing more than a settled legacy of a capital sum adequate to produce £500, of which, therefore, the annuitant may be regarded as the life tenant, and the persons entitled to the reversion as reversioners in the ordinary sense.

B That being so, I then have to consider what results from the inadequacy of the estate, and, since I have come to that conclusion, it seems to me that the answer is a simple one. This is a settled legacy, but a settled legacy is subject to abatement in just the same way as any other legacy. The amount of it will be ascertained in the way I have described, and it will abate rateably with the other legacies.

C I will assume, then, a legacy the amount of which has been ascertained, and which has abated in the way which I have described. Then the question arises as to what is to be done with that sum so ascertained, as between the tenant for life and the reversioner of the legacy. Again, it seems to me that the answer to that must be quite clear. Treating this, as I do, as a matter of construction, as an ordinary settled legacy, it is clear that the life tenant is entitled to the interest during her life of the sum which has been so abated, and, instead of getting her £500 per annum produced by a capital sum adequate to produce £500 per annum, she will get whatever is produced by this abated sum, which may be something substantially less than £500 per annum, but that is the result of an abatement of all the benefits which are given by the testatrix to the several objects.

I am conscious that, in coming to the conclusion to which I have come, F I have not reached at least the same result as that which was reached by CROSSMAN, J., in *Re Nicholson, Chadwyck-Healey v. Crawford* (1) or by FARWELL, J., in *Re Farmer, Nightingale v. Whybrow* (2), but, as was pointed out by CROSSMAN, J., and equally by FARWELL, J., this is primarily a question of construction, the answer to which must turn upon the G particular language used in the will under review, and here I do not find the words which FARWELL, J., found, enabling him to say that the rights of the persons whom I have called the reversioners could be defeated for the benefit of the person who might be called an annuitant or life tenant. Equally I do not find anything in this will which would justify H me in taking the course—which CROSSMAN, J., took in *Re Nicholson, Chadwyck-Healey v. Crawford* (1)—of first of all finding a settled legacy of so much and treating that amount as subject to abatement, but then giving to the annuitant the whole amount of her annuity, so as possibly to exhaust the whole of the settled fund so abated. Ultimately, as I have already said, the question must turn upon the language of the

particular will, and in this case I can find nothing which would justify me in treating the disposition of the testatrix as anything other than a settled legacy, with a life tenant and reversioners, whose interests must abate in the same way as those of any other life tenant and reversioners.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Moger & Couch*,
Wiveliscombe (for all parties).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

ALEXANDER v. J. DICKINSON & SONS, LTD.

[COURT OF APPEAL (Clauson and Luxmoore, L.JJ., and Macnaghten, J.),
April 24, May 18, 1939.]

Workmen's Compensation—Accident—Unexplained death—Night watchman found gassed—Workmen's Compensation Act, 1925 (c. 84), s. 1 (1).

The husband of the applicant was a night watchman employed by the respondents. On June 26, 1938, he was found dead in a cabin provided for his use, his death being due to gas poisoning. There were two gas points in the cabin, each controlled by a tap, and both taps were turned on, the windows being closed and the door locked. The county court judge held that it was not necessary for him definitely to find suicide, as the cause of death was a matter for conjecture, and he accordingly held that the application should be refused. The applicant appealed to the Court of Appeal:—

HELD (MACNAGHTEN, J., dissenting): the evidence must be taken as establishing that in the course of his employment the workman was properly in a place to which some particular risk attached, his death being capable of explanation solely by reference to that risk. It was, therefore, legitimate, notwithstanding the absence of evidence as to the immediate circumstances, to attribute the accident to that risk, but any inference as to the origin of the accident could be displaced by evidence tending to prove the contrary. The matter should, therefore, be remitted to the judge in order that he might reconsider the proper inferences to be drawn from the evidence.

[EDITORIAL NOTE. This case in one aspect of it turns upon the distinction between inference from facts and mere guess or conjecture. Another aspect of the case, and of equal interest to the first, is the question whether or not the judge had necessarily to come to a definite conclusion on the question of suicide. MACNAGHTEN, J., in a dissenting judgment, is of opinion that, if the probabilities of suicide were evenly balanced, it was the duty of the judge to find for the employers. The majority have, however, taken the opposite view.

AS TO PROOF OF ACCIDENT, see WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 101-105; and FOR CASES, see DIGEST, Vol. 34, pp. 325, 326, Nos. 2658, 2659.]

Cases referred to:

- (1) *Simpson v. London, Midland & Scottish Ry. Co.*, [1931] A.C. 351; Digest Supp.; 100 L.J.P.C. 98; 144 L.T. 730; 24 B.W.C.C. 1.
- (2) *Rosen v. Quercus S.S. Owners*, [1933] A.C. 494; Digest Supp.; 102 L.J.K.B. 427; 148 L.T. 532; 26 B.W.C.C. 286.
- (3) *Lancaster v. Blackwell Colliery Co., Ltd.* (1919), 89 L.J.K.B. 609; 34 Digest 324, 2647; 122 L.T. 162; 12 B.W.C.C. 400.
- (4) *Rigling v. Minister of Munitions* (1921), 14 B.W.C.C. 1; 34 Digest 324, 2650.

- (5) *Gray v. Sopwith Aviation Co., Ltd.* (1918), 88 L.J.K.B. 329; 34 Digest 325, 2659; 119 L.T. 194; 11 B.W.C.C. 63.
- (6) *Moore (A. G.) & Co. v. Barkey*, [1923] A.C. 790; 34 Digest 324, 2651; 93 L.J.P.C. 63; *sub nom. Barkey v. Moore & Co.*, 130 L.T. 45; 16 B.W.C.C. 176.
- (7) *Lawrence v. George Matthews (1924), Ltd.*, [1929] 1 K.B. 1; Digest Supp.; 97 L.J.K.B. 758; 140 L.T. 25; 21 B.W.C.C. 345.
- (8) *Thom (or Simpson) v. Sinclair*, [1917] A.C. 127; 34 Digest 320, 2619; 86 L.J.P.C. 102; 116 L.T. 609; 10 B.W.C.C. 220.

A

B

APPEAL from a decision of His Honour JUDGE RICHARDSON at the Sunderland County Court, dated Jan. 24, 1939. The facts are fully set out in the judgment of MACNAGHTEN, J.

J. Alun Pugh for the appellant.

J. Charlesworth for the respondents.

C

D

E

Pugh: If the deceased's employment brings him to a spot which turns out for any reason to be dangerous, and death results from that danger, a *prima facie* case is established. If the deceased is doing his proper work at the time when the accident occurs, then he is within the statute. If there is a risk incidental to a man's work, and death is due to that risk, there is a case to answer. A watchman is in the position of a domestic servant, and, if he is found dead from an external cause, there is a *prima facie* case to answer. The judge ought to have come to the conclusion that it was more probable that the death was the result of an accident. There is a legal presumption in the widow's favour against suicide: *Rigling v. Minister of Munitions* (4). [Counsel referred to *Gray v. Sopwith Aviation Co., Ltd.* (5), *Moore (A. G.) & Co. v. Barkey* (6), *Lawrence v. Matthews (George) (1924), Ltd.* (7) and *Thom (or Simpson) v. Sinclair* (8).] Unless there is evidence that this was a deliberate act, the judge is wrong in law, and should have said that the man was at his work and died as a result of an escape of gas.

F

G

Charlesworth: The applicant must show that the accident arose out of and in the course of the employment. In this case, that can only be an inference of fact. The facts justify the finding that the taps were turned on deliberately. That was the only reasonable inference on the facts of this case, and it is not open to this court to upset the judge as long as there was evidence to support his findings. A definite finding of suicide was not necessary. [Counsel referred to *Gray v. Sopwith Aviation Co., Ltd.* (5), *Lancaster v. Blackwell Colliery Co., Ltd.* (3) and *Simpson v. London, Midland & Scottish Ry. Co.* (1).]

H

Pugh, in reply: The only doubt is as to whether the taps were turned on intentionally or unintentionally. If the matter stops there, the applicant has proved her case. In the absence of a definite finding that the turning on of the taps was a deliberate act of the deceased, the case is established.

CLAUSON, L.J.: The judgment which I am about to read is that of LUXMOORE, L.J., and myself. This is a claim by the widow of a work-

man who died on June 27, 1938, in the watchman's cabin in which he was employed as a watchman at the employers' works, the death being caused by gas asphyxiation. There was a supply of gas in the cabin with two controlling taps. Both taps were open when the body was found. The windows were closed but not locked, and the door was locked.

The judge took the view that it was not necessary for him definitely A to find suicide, as, apart from the theory of suicide, he considered himself justified in holding that the cause of death remained a matter of conjecture or guess, and that, accordingly, the widow's application ought to be refused. In our judgment, the case should be referred back to the judge for reconsideration. B

It appears to us that the evidence sufficiently establishes that in the course of his employment the workman was properly in the cabin, and that the cabin was a place to which a risk attached by reason of the fact that there was gas present there which, by some accidental or negligent manipulation of the taps, might escape and cause gas asphyxia- C tion. The asphyxiation in the present case appears to us to have been an accident capable of explanation solely by reference to that risk, within the meaning of the language used by LORD TOMLIN in *Simpson v. London, Midland & Scottish Ry. Co.* (1). It would, therefore, in our judgment, have been legitimate for the judge, notwithstanding the D absence of evidence as to the immediate circumstances of the death, to attribute the accident to that risk if he was satisfied that there was not sufficient evidence of suicide, and accordingly to hold that the accident arose out of the workman's employment. The judge seems, however, to have approached the case on the footing that, if he excluded E suicide, the cause of the deceased's death ought to be treated as a matter of conjecture and guess, with the result that he ought to hold that the widow had not discharged the onus upon her. In our view, it is at least open to the gravest doubt whether he had adequately in mind the bearing upon the case before him of the language of LORD TOMLIN in *Simpson v. F London, Midland & Scottish Ry. Co.* (1), as expounded in *Rosen v. Quercus S.S. Owners* (2).

We are not satisfied that the judge definitely rejected the evidence of suicide. He seems to have thought (but in our view erroneously) that he might keep an open mind on that subject. In our judgment, the G matter should be referred back to the judge with a view to his reconsidering the proper inferences to be drawn from the evidence, and with an intimation of the view of this court that the evidence must be taken as establishing that in the course of his employment the workman was properly in a place to which some risk particular thereto—namely, H asphyxiation by gas—attached, and that the accident—namely, his death by asphyxiation—is capable of explanation solely by reference to that risk, and that it is therefore legitimate, notwithstanding the absence of evidence as to the immediate circumstances of the accident, to attribute the accident to that risk, but that any inference, whatever it may be,

as to the origin of the accident may be displaced by evidence tending to show otherwise. The employers must pay the costs of the appeal, and the costs of the original hearing will be left to be dealt with by the judge on the rehearing.

- A MACNAGHTEN, J. : I regret to say that I am unable to concur with the decision at which CLAUSON and LUXMOORE, L.JJ., have arrived. I think that my error must be due to a misunderstanding of the judgment of the county court judge, but, since I dissent from their view, it is necessary that I should state briefly the reasons for my dissent.
- B John Thomas Alexander, a man some 62 years of age, was employed by the respondents, J. Dickinson & Sons, Ltd., as a watchman at their engine-works in Sunderland. He was on duty there on the night of June 26, 1938. About 5.20 a.m. on June 27, he was found dead in the Quay cabin, a place provided by the respondents for the use of their watchmen.
- C Gas had recently been installed in the Quay cabin, and the cause of Alexander's death was asphyxiation. If those were the only known facts, there could be no doubt but that the rule laid down by LORD TOMLIN in *Simpson v. London, Midland & Scottish Ry. Co.* (1), at p. 369, would apply. The man had died at his post from a peril attached to that
- D position, and, therefore, in the absence of any evidence to the contrary, it would necessarily follow that he had met with an accident arising out of and in the course of his employment.

- In these circumstances, his widow commenced proceedings against the respondents in the Sunderland County Court for compensation under
- E the Workmen's Compensation Acts. The respondents disputed her claim on the ground that Alexander had committed suicide. The only question at issue before the county court judge was whether the death of Alexander was due to an accident—some undesigned mishap—or was a case of suicide. At the hearing before the county court judge, there was, in
- F addition to the general presumption against suicide, evidence that Alexander was a man of "cheery" disposition, that on the night when he died he was "just as usual," and that there was no reason at all why he should wish to kill himself. On the other hand, there was evidence tending to show that he committed suicide. There were two gas-points
- G in the Quay cabin, each controlled by a tap. Alexander had himself turned on both those taps, and it was, to say the least, improbable that he could have turned on both by accident. Moreover, he had locked the door of the cabin, and the windows were closed.

- In cases such as this, when the question at issue cannot be determined
- H with certainty one way or the other, the principles to be applied have, I think, been laid down clearly, and were summarised by LORD BIRKENHEAD, L.C., in *Lancaster v. Blackwell Colliery Co., Ltd.* (3). In that case, the workman, who was employed as a banksman at a colliery, died after an operation for strangulated hernia. The strangulated hernia was undoubtedly due to an accident, and the question at issue was whether or

not the accident arose out of and in the course of his employment. There was evidence tending to show that the accident occurred when the man was at work at the colliery, and, on the other hand, there was evidence tending to show that the accident occurred when he was at home. The county court judge decided the case in favour of the workman's widow. The Court of Appeal reversed his decision, on the ground that it was equally doubtful whether the accident had happened at his work or at his home. The House of Lords restored the decision of the county court judge, on the ground that there was evidence on which a reasonable man could hold that it was more probable that the accident had occurred when the man was at work. LORD BIRKENHEAD, L.C., in the course of his opinion, said, at p. 406 :

The principles which have to be applied to facts like these are now well settled ; they have been declared on numerous occasions by your Lordships, and they may be very easily summarised. If the facts which are proved give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture, then, of course, the applicant fails to prove his case, because it is plain that the onus in these matters is upon the applicant. But where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities as to their respective value, and where a reasonable man might hold that the more probable conclusion is that for which the applicant contends, then the arbitrator is justified in drawing an inference in his favour. That view of the law has been stated in this House repeatedly, and it is not open to challenge to-day.

In the present case, the county court judge, after stating that the presumption was, of course, against suicide, and after setting out the facts proved or admitted before him, summed up the matter as follows :

In view of all the circumstances, it seems to me quite impossible to find as a matter of proved fact that all the extraordinary facts which were proved arose in a purely accidental manner, and were not at any rate more probably due to the deliberate acts of the deceased. I agree that there would appear to be no reason why the deceased should wish to commit suicide, and I do not think it is necessary for me definitely to find that he did commit suicide. It is sufficient for me to say that the cause of the deceased's death remains a matter of conjecture or guess which would not justify my making an award in favour of his widow.

The language of the county court judge, is I think, quite plain. He found that the applicant had failed to prove that her husband's death was due to an accident. On the contrary, after comparing and balancing the probabilities on one side and the other, he thought that the more probable conclusion was that the man had committed suicide. Having come to that conclusion, he was, I think, quite right in stating that it was not necessary for him to find as a fact that the man committed suicide. It was not even necessary for him to find that suicide was more probable than was accident. If he had thought that the probabilities were evenly balanced, it would, in my view, have been his duty to give his decision in favour of the respondents. I therefore think that this appeal should be dismissed.

Appeal dismissed.

Solicitors : *Isadore Goldman & Son*, agents for *R. R. Crute & Son*, Sunderland (for the appellant) ; *Taylor, Willcocks & Co.*, agents for *G. N. Cook*, Sunderland (for the respondents).

[*Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.*]

OLD GATE ESTATES, LTD. v. TOPLIS & HARDING & RUSSELL.

[KING'S BENCH DIVISION (Wrotesley, J.), **May 15, 16, 17, 18, 22, 1939.**]

Agency—Professional agent—Duty to use care and skill—Valuation of property—Valuer instructed by promoters of company to be formed—Duty to company—Principle in M'Alister (or Donoghue) v. Stevenson.

Negligence—Valuation of property—Valuer instructed by promoters of company to be formed—Duty to company—Principle in M'Alister (or Donoghue) v. Stevenson.

A block of flats was purchased by the promoters of the plaintiff company, and, in the course of the promotion of the company, and before the company was actually formed, the promoters employed a member of the defendant firm to value the property. The valuation turned out to be too high, by reason of the fact that wrong figures relating to the rates payable on the property were supplied to the valuer. These figures were supplied to the valuer by two of the promoters. The company sued, claiming damages for negligence in the valuation. As the valuation was made before the company was formed, the claim in contract failed, and it was contended that the defendants had made this valuation knowing that it was to be used for the purposes of the company, and therefore owed a duty to the company to take proper care in making the valuation. This contention was based on the doctrine of *M'Alister (or Donoghue) v. Stevenson* (3):—

HELD: the doctrine in *M'Alister (or Donoghue) v. Stevenson* (3) is confined to negligence which results in danger to life, limb or health, and does not extend to the facts of this case.

[EDITORIAL NOTE.] There was an attempt in this case to extend the doctrine of *M'Alister (or Donoghue) v. Stevenson* (3) to the case of a valuation of property, but, although it is admitted that the doctrine has recently been extended in various directions, it is here said to be confined to cases in which the negligence of which complaint is made results in danger to life, limb or health.

AS TO THE PRINCIPLE IN *M'Alister (or Donoghue) v. Stevenson*, see HALSBURY, Hailsham Edn., Vol. 23, pp. 632-634, para. 887; and FOR CASES, see DIGEST, Supp., Negligence, Nos. 361a-364l.]

Cases referred to:

- (1) *Natal Land, etc., Co. v. Pauline Colliery Syndicate*, [1904] A.C. 120; 9 Digest 638, 4213; 73 L.J.P.C. 22; 89 L.T. 678.
- (2) *Kelner v. Baxter* (1866), L.R. 2 C.P. 174; 9 Digest 637, 4209; 36 L.J.C.P. 94; 15 L.T. 213.
- (3) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.
- (4) *Malfrut v. Nozal, Ltd.* (1935), 51 T.L.R. 551; Digest Supp.
- (5) *Stennett v. Hancock and Peters*, [1939] 2 All E.R. 578; Digest Supp.
- (6) *Earl v. Lubbock*, [1905] 1 K.B. 253; 36 Digest 63, 408; 74 L.J.K.B. 121; 91 L.T. 830.
- (7) *Le Lievre v. Gould*, [1893] 1 Q.B. 491; 36 Digest 10, 26; 62 L.J.Q.B. 353; 68 L.T. 626.

ACTION for damages for negligence on the part of Russell, a member of the defendant firm, in making a valuation. The facts are fully set out in the judgment.

J. W. Morris, K.C., and *C. L. Henderson* for the plaintiffs.

Gilbert Beyfus, K.C., and *Montague Berryman* for the defendants.

WROTTESELEY, J. : Ewbank, a chartered accountant, in Mar., 1935, conceived the idea of selling for Griggs, who had built and owned it, a block of flats and shops called Dudley Court, in Upper Berkeley Street, London. Ewbank got from Griggs figures of income and outgoings with a view to putting the proposition before a purchaser and then approached Hutton, a chartered surveyor and chartered land agent, A who inspected the property and thought that he could get someone to float a company to buy the building, which was held on a lease of 90 years or thereabouts. He was told that the price for which Griggs was looking was about £160,000 or £170,000, and the figures he got were the figures contained in a document marked " Private and confidential " and B dated Jan., 1935. It has figures relating to what are called actual outgoings, charges recoverable from tenants for electricity and refrigeration.

Hutton in turn knew Russell, who is the member of the defendant firm concerned in this action. Hutton discussed the value of this block of flats and shops with Russell in a friendly way, in order to get confirmation C of his idea that £160,000 or £170,000 was a reasonable price. Anyhow, by Sept., 1935, Russell had seen the property, and, with the aid of Ewbank's figures, which had been shown to Russell either by Hutton or by Procter, Russell roughed out a valuation. In the meantime, Hutton had been to Procter for help on the financial side. Procter was a D chartered accountant, but he does not, I think, practise as a chartered accountant now, though he is a recognised expert in dealing with, and managing, property of this kind. Procter in turn went to Kinross, who was at that time a director of the Cheviot Trust, Ltd., and understood and carried on the promotion of companies. When first E approached, I think in September, Kinross, after having looked the matter over, and formed quite a favourable view of it, said that in view of the continental crisis the matter had better be postponed until December. It was revived again some time in December.

Hutton's idea was, first of all, to raise by far the larger part of the F purchase price, which was to be paid to Griggs, by a mortgage of the property, and to raise the balance by the flotation of a company and the issue of shares to shareholders. This proposal of Hutton's was adopted and approved by all concerned—namely, Ewbank, Hutton, Procter and Kinross. With this aspect of the case Russell was not concerned. G Hutton had reserved Russell for the role of a person who was to appear as the independent valuer in the prospectus when the prospectus came to be issued, and this was, indeed, held out by Hutton to Russell as an inducement to him to give his advice and friendly assistance in September, when he made his first visit to the premises H and roughed out that first valuation. Hutton had, therefore, to negotiate a loan, and this he did. The scheme was that Griggs was to part with the property for £166,000. The purchasers were to be Procter and Hutton, calling themselves the Prochut Management Co. (an unlimited company), and also Frederick Ewbank and the Cheviot

Trust, Ltd. Those four parties or persons were to be the purchasers, and the scheme was that they should purchase the property from Griggs for that sum of money and on the same day should sell it to the company which was to be floated at this time. The value to be put upon the property to the company was a figure of £205,727, and the money was to be found in this way. First of all, there was to be a mortgage for £128,865. Then there was to be preference capital of £40,000 raised by the issue of 6 per cent. cumulative preference shares of £1 each. Then in addition there was to be some ordinary capital, £20,000 being given to the four men who had planned the enterprise—the four persons or parties I have mentioned—and some 40,000 ordinary shares of 5s. each being issued to the public.

That, of course, involved a prospectus, and the keystone of this prospectus, to use Russell's appropriate language, was to be Russell's valuation, which must speak as to both the maintainable income and the capital value of the property, which was to be sold to the company for £186,000 by those four persons who purchased it from Griggs, the £20,000 profit taking the form of ordinary capital issued to those four parties in four equal shares.

In December, Hutton got the approval of Kinross, as representing the Cheviot Trust, Ltd., to the employment of the defendants in this action in the role of valuers. As I have said, one of the partners of that firm, Russell, had already helped Hutton in a friendly way in September and December. In January, therefore, Russell was instructed to value the property, and was given to understand that he was not to receive the full scale fee. There is a conflict of evidence as to why Russell was told this. Having regard to the evidence, I have come to the conclusion that I can and do believe Russell, and that he was told, when the question of fee was raised, and when he was first instructed formally by Hutton and Procter, soon after Jan. 10, that they would supply him with the figures, and that his fee, therefore, would not be the scale fee.

A letter was written by Procter to Russell on Jan. 23, 1936, which enclosed the up-to-date figures promised to be supplied about the middle of January. That letter is as follows :

I return the schedule of flat tenancies and particulars of gross rents and outgoings which you handed me this morning and send at the same time an up-to-date schedule of tenancies which has been supplied by the owner [Griggs] and particulars of the gross rents and outgoings which Hutton and I have been into and agreed. There are one or two points in connection with the whole matter which I think it would be a good idea for the three of us to discuss personally, and when you have had another look at the property, shall be very pleased to come along if you would telephone through.

The particulars of gross rents and outgoings which Procter said that he and Hutton had gone into and agreed contained an error which has led to the trouble in this action.

Both Hutton and Procter are men experienced in this kind of thing, as those figures show, and Russell, when he was instructed, was told by

two people, each of whom was quite competent to collect the figures for him, that in fact they would collect those figures and supply them to him. Unfortunately, however, as I have said, those figures contained an important error, which was due to an oversight. The deduction in respect of rates was a stale figure, and was not up-to-date. It was in fact about £1,100 too small. This error resulted in Russell forming an estimate as to the maintainable income from this property which was about £1,100 greater than that which it would have been if he had had the true figure. By reason of that error, Russell's opinion as to the capital value of the premises was about £14,000 too high, the number of years' purchase used for this calculation by Russell being, I think, 14·3 years. A B

A deficit was found at once. An inquiry which was instituted by the chairman of the company revealed that the defendants had underestimated the outgoings by £1,100 in respect of rates. He, therefore, having discovered this error, took advice, and the board brought these proceedings alleging negligence against the defendant Russell, and claiming on behalf of the company that the defendants should pay to the company the value of the error as it has been capitalised in the statement of claim. C

There is no doubt as to the persons from whom this error emanated. It emanated from Procter and Hutton, and originally, I suppose, from Ewbank. The plaintiffs say, however, that Russell, one of the defendants, should have disregarded those figures and made his own inquiries, and they say that failure to do that was a neglect by him of his duty to the company. The defendants agree that in an ordinary valuation it would be negligent for a valuer to value a property without himself collecting the material upon which the valuation is made, such as the income and the outgoings, but they say that this was not an ordinary valuation, and that what Russell did was what he was asked to do by the only people with whom he dealt—namely, Hutton and Procter—which is true. Hutton and Procter are claimed by the plaintiffs to have purported to act as agents for, and on behalf of, the proposed company in instructing the defendants, and it does seem a little difficult in those circumstances for the company now to say that the defendant was in the wrong because he acted on the instructions given to him by the persons who were purporting to act as their agents before the company was formed, because, of course, there was at that time no means by which anybody could find out what this non-existing company did think except through these self-appointed agents. Even supposing Russell were wrong and negligent in accepting these figures, there arises the question as to whether or not he neglected any duty that he owed to the company. In so far as his duty was the result of the retainer which he had received from Hutton and Procter, it was a retainer from them, and, therefore, any contractual position in which he stood was one which connoted a duty towards his clients Hutton and Procter, and probably not, I think, to D E F G H

Kinross, who only promised to pay, and gave no instructions, except, at the last moment to write into the valuation which had been prepared the name of a certain company. However, even if he were liable to Kinross—and I think that Kinross does seem to have suffered in this case—Hutton and Procter were Kinross's agents, and Kinross is no
A better off than either Hutton or Procter.

It is agreed in this case that there can be no ratification by the company, and it is unnecessary for me to refer to the authority on that—namely, *Natal Land, etc., Co. v. Pauline Colliery Syndicate* (1).

Those being the facts—that Russell was instructed by Hutton and
B Procter, purporting to act in advance for a company to be formed, and was told that he would be paid by whoever did pay him at less than the scale fee, but, on the other hand, that he had to remember that they would find him the figures, which meant that he would be saved that trouble—the question now arises whether or not, in that state of facts,
C the plaintiff company can successfully bring an action against the defendant firm, of which Russell is a member.

I proceed now to deal with the submissions of law on either side. The plaintiffs put their case in two different ways, in the main. In the first place, they say that, although it is quite true that there can be no ratification of a contract which pretends to have been, or which is pretended to have been, made between a person and a non-existing company, but one
D which afterwards comes into existence, it has always been true also that a company, when it comes into existence, can make contracts the same as those contracts which were of no force when they were made before.
E They point to the terms of the valuation as showing that really here there took place a new contract between the defendant valuers, on the one hand, and the company, on the other hand, which was constituted by the valuation being sent by the defendants to the directors of the company and by the acceptance by those directors, or by the company, of the
F valuation. It was suggested—perhaps not very forcibly, but it was suggested, I think—that the law of estoppel applied here, and that, having regard to the terms of the valuation, the defendants could not be heard to say that they had not been instructed by the company.

I will now read the valuation. It is addressed to the directors of the
G Old Gate Estates, Ltd., Farleigh House, Lawrence Lane, E.C.2, and is dated Feb. 11, 1936 :

Dudley Court, Upper Berkeley Street, W.1. In accordance with your instructions [i.e., those of the directors of the company], we have made a survey of the property known as Dudley Court to be acquired by your company. The property comprises a block of 7 shops and 105 flats, situated within a few minutes' walk of Hyde
H Park, held on lease for a term of 90 years from Mar. 25, 1932, at a ground rent of £2,500 per annum. A portion of the ground floor has been let to the Midland Bank, Ltd., on lease for 90 years (less 10 days) from Mar., 1932, and one shop has been let on lease for a term of 7, 12 or 21 years from June, 1935. Of the 105 flats situated on the 8 upper floors, 101 are let (and occupied) on agreements or leases at moderate inclusive rentals, ranging from £97 to £243 per annum. In our opinion the annual income derivable from this property should be the sum of £21,786, and we estimate that, after making due allowance for outgoings, including ground rent, rates, wages, lighting, heating, insurance, maintenance and voids, but before allowing for income

tax, the net annual income should be £14,175. In our opinion the value of this property to your company is the sum of £205,727.

It is said, therefore, by the plaintiffs, that the defendants have alleged that they had received instructions from the directors of Old Gate Estates, Ltd., and that, therefore, in accordance with the principles of the law of estoppel, they cannot now be heard to deny it—that they were so instructed, and that they cannot, therefore, be heard now to set up that they were in fact instructed by Hutton and Procter long before the company was formed. The law of estoppel is that, if a person tells a lie to another person, and that person to whom the lie is told believes the lie, and acts upon it, the person who told the lie cannot in a court of justice in this country afterwards be heard to tell the truth. That, as I understand it, is the law of estoppel. It will be seen, however, that it is necessary, before that principle can be invoked, that the person to whom the lie has been told, and who has acted upon it, shall have believed the lie. When one looks at this case, it is perfectly clear that the directors of Old Gate Estates, Ltd., or three of them, at any rate—namely, Kinross, Hutton and Procter—knew quite well (and I have no doubt that Ogle must have known quite well) that no instructions ever were given by the company. The only instructions given were those given by Hutton and Procter, and, to some extent, by Kinross later, just before the company was formed. Therefore, the law of estoppel cannot be invoked in this case, because the directors to whom the statement was made were not deceived. Of course they were not deceived, because even Ogle knew that the company had instructed nobody, because the company had only just been born. Thus, the law of estoppel cannot be invoked.

I therefore ask myself whether there is any other reason why I should ignore the true facts of the case. I know of no such principle, and therefore I must deal with the matter upon the real and true facts. That is to say, as I have said, the instructions were given, not by the company, but by Hutton and Procter, and Russell's carelessness, therefore, was not his own carelessness at all, but the carelessness of those who instructed him. Therefore, as it seems to me, in so far as the case might have been based on contract, it is impossible to base it, as between the company and Russell of the defendant firm, on contract, because the only contract which ever existed was a contract with a self-appointed person purporting to act for a company which had not yet come into existence. Therefore, of course, on the principle laid down in cases like *Kelner v. Baxter* (2), there can be no ratification when there never was an enforceable or, indeed, any contract.

That does not dispose of the matter entirely, however, because counsel for the plaintiffs suggests that there is another cause of action here, a cause of action which arises from the facts of the case, and which can be based upon the fact that Russell, when he gave that valuation, knew quite well that it was going to be used for the purpose of a company, to be put into the prospectus of a company. It is suggested that, knowing that,

it was his duty to take care, and that he had a duty towards the company to take care, and that this cause of action is similar to that in *M'Alister (or Donoghue) v. Stevenson* (3), and is justified by the language there used by LORD ATKIN. The way it is put is this. Russell knowing that his name was to be used at the foot of the valuation to be issued to the public at large, it was his duty, whatever instructions he had received from Procter and Hutton, to go into the matter himself, and that, although the company cannot now, as I hold, sue him, none the less he is culpable on the principle laid down by the House of Lords in *M'Alister (or Donoghue) v. Stevenson* (3). The passage upon which counsel for the plaintiffs relied is at p. 580 :

At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "*culpa*," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour ; and the lawyer's question, Who is my neighbour ? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour ? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

That, I think, is the passage upon which, not unnaturally, the plaintiffs rely in this case. However, it is always dangerous to take a passage out of its context, and to see whether any given set of facts can be brought inside that statement, and, if so, to say to oneself : " Here is a cause of action." That observation is, I think, applicable to the endeavour in this case to frame a cause of action upon that particular passage in the opinion of LORD ATKIN. As a matter of fact, what was decided in *M'Alister (or Donoghue) v. Stevenson* (3) is, I think, quite clearly and succinctly set out in the headnote :

By Scots and English law alike the manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.

I draw attention to the words " defect likely to cause injury to health."

That case has, in point of fact, been applied twice recently to a set of facts which was not exactly the same, once by BRANSON, J., and once by LEWIS, J. They are interesting applications of that principle to facts by no means the same as those dealt with by the House of Lords in *M'Alister (or Donoghue) v. Stevenson* (3). In 1935, *Malfroot v. Noxal, Ltd.* (4), a case of the negligent fitting of a sidecar to a motor cycle, came up for discussion, and in that case LEWIS, J., applied the principle of *M'Alister (or Donoghue) v. Stevenson* (3) to that set of facts. It will be observed that, if one takes a sidecar and negligently attaches it to a

motor cycle, although perhaps neither of the two things can be called a thing dangerous in itself, it is obvious that, if one does not do it rightly, one is creating something which is a source of danger to the user. More recently still, in *Stennett v. Hancock and Peters* (5), decided in Mar., 1939, BRANSON, J., applied the same principle to a garage-owner, one of whose servants had carelessly replaced a wheel on a lorry. As in the former case, the result was that there was an accident, due to the negligent way in which this particular work was done. There, again, BRANSON, J., applied the principle of *M'Alister (or Donoghue) v. Stevenson* (3) to the facts of that case. Again, there one has something which, if the act is not properly done—and a motor car has not yet become regarded as a thing dangerous in itself, although I have no doubt that it is quite possible to make out a good case for so regarding it—may be dangerous. At least it is a dangerous thing when a wheel is carelessly attached to it. In passing, I see that BRANSON, J., distinguished *Earl v. Lubbock* (6), and I cannot help thinking that *Earl v. Lubbock* (6) would not be decided to-day as it was then—at any rate, if it were properly pleaded. The thing which runs through these cases alike, however, both in those applications of the principle and in the original case of *M'Alister (or Donoghue) v. Stevenson* (3) itself, is that that which was negligently created or put into circulation was something which was dangerous either to life or limb—those are, I think, the very words of LORD ATKIN himself and the other learned Lords who delivered opinions, or the opinions of the majority, in *M'Alister (or Donoghue) v. Stevenson* (3)—or else was a thing which, carelessly handled, carelessly made, or carelessly mended, would become dangerous to life or limb or health. I think that to-day it is as true as it was in 1893, when *Le Lievre v. Gould* (7) was decided, that, to use the words of BOWEN, L.J., at p. 502 :

It is idle to refer to cases which were decided under totally different aspects, and upon totally different considerations of the law. Take, for example, the case of an owner of a chattel, such as a horse, a gun, or a carriage, or any other instrument, which is in itself of such a character that, if it be used carelessly, it may injure some third person who is near to it ; then it is as plain as daylight that the owner of that chattel, who is responsible for its management, is bound to be careful how he uses it. Exactly in the same way with regard to the owner of premises. If the owner of premises knows that his premises are in a dangerous condition, and that people are coming there to work upon them by his own permission and invitation, of course he must take reasonable care that those premises do not injure those who are coming there.

A little later, BOWEN, L.J., says, at p. 502 :

How has it [the case of a certificate given by an architect] any application to the present case ? Only, I suppose, on the suggestion that a man is responsible for what he states in a certificate to any person to whom he may have reason to suppose that the certificate may be shown. But the law of England does not go to that extent : it does not consider that what a man writes on paper is like a gun or other dangerous instrument, and, unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly.

I think that that is as true to-day as it was when it was said by BOWEN, L.J., and that there is nothing in *M'Alister (or Donoghue) v. Stevenson* (3) which makes that bad law. The exceptions laid down by *M'Alister (or*

Donoghue v. *Stevenson* (3)—the exceptions to the rule that a man is obliged to be careful only to those to whom he owes a duty by contract—are, as I understand the decision in that case, confined to negligence which results in danger to life, danger to limb, or danger to health, and, this being no one of those, I think that the plaintiffs have no cause
 A of action on the analogy of *M'Alister (or Donoghue) v. Stevenson* (3).

That disposes, I think, of all the various points which were put before me, and it is therefore unnecessary for me to deal with the question of damages in this case.

Judgment for the defendants with costs.

B Solicitors: *Pontifex, Pitt & Co.* (for the plaintiffs); *Berrymans* (for the defendants).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

C H. C. BERRY, LTD. v. BRIGHTON AND SUSSEX BUILDING SOCIETY.

[CHANCERY DIVISION (Farwell, J.), May 12, 1939.]

Landlord and Tenant—Agreement for lease—Acceptance—“Subject to a lease to be drawn up by our clients’ solicitors.”
 D

An offer to take a 3 years’ lease of premises was accepted on behalf of the landlord, subject, *inter alia*, “to a lease to be drawn up by our clients’ solicitors” :—

HELD: the agreement amounted to nothing more than an agreement to enter into a contract at some future time, and was, therefore, void.

E [EDITORIAL NOTE. This case is very similar to that of *Raingold v. Bromley* (1), but the terms of the acceptance here—“subject to a lease to be drawn up by our clients’ solicitors”—might be construed to mean that the terms had been agreed and only required to be put into a legal form. This view of their meaning is, however, not accepted, and the expression is treated as being equivalent as “subject to contract.”

F AS TO NECESSITY FOR AGREEMENT OF ALL TERMS OF LEASE, see HALSBURY, Hailsham Edn., Vol. 20, p. 42, para. 47; and FOR CASES, see DIGEST, Vol. 30, pp. 371-374, Nos. 343-371.]

Case referred to :

(1) *Raingold v. Bromley*, [1931] 2 Ch. 307; Digest Supp.; 100 L.J.Ch. 337; 145 L.T. 611.
 G

ACTION for specific performance of an agreement contained in two letters of Mar. 9, 1938. The defendant company in their defence alleged, *inter alia*, that there was never any concluded agreement. The facts are fully set out in the judgment.

H W. P. Spens, K.C., and Max Holdsworth for the plaintiffs.
 H. B. Vaisey, K.C., and C. D. Myles for the defendants.

FARWELL, J. : This is an action by the plaintiffs, H. C. Berry, Ltd., claiming specific performance of an agreement which is contained in certain letters, and for damages and other relief. The defence raises

various grounds, but the defence in short is that there is not, and never has been, a concluded agreement.

The plaintiffs have a lease of certain premises in Waterloo Street, in the city of Birmingham, which was granted to them on Nov. 4, 1927, for a term of 21 years at a rent of £550 for the first 7 years, £600 for the next 7 years, and £650 for the last 7 years. There was also an additional payment to be made in each year of £60 for lighting, cleaning, and so on. The term was 21 years from June 24, 1927, and was terminable at 7 or 14 years. In 1938, the plaintiffs had given notice to determine the lease at the expiration of the 14 years, and that notice would expire in 1941, so that in 1938 they had some 3 years, or a little over 3 years, left of their term. It was the ground floor of these buildings. They had vacated the premises, and were anxious to find a tenant for the remainder of the term. The matter was put by the plaintiffs into the hands of an agent in Birmingham, Mr. Pepper. A Mr. Colman, who had heard from Mr. Pepper of these premises being available if terms could be arranged, made an offer to take the premises, not on his own behalf, but on behalf of the defendants, or so he alleged, in a letter addressed to Mr. Pepper, dated Mar. 9, 1938, which reads as follows :

On behalf of my clients, the Brighton and Sussex Building Society, I wish to make an offer for the above premises of £560 per annum for 3 years, tenant paying rates but the landlord paying the cost of the heating which, I understand, is £60 : the term to commence on Apr. 25 next.

In reply to that letter, a letter on the same date was written on behalf of Mr. Pepper, the plaintiffs' agent :

20, Waterloo Street, Birmingham.

We are instructed by our client to accept your offer of even date, namely, £560 per annum on a 3 years' lease inclusive of heating charges, exclusive of rates and water rate, subject to (i) the superior landlord's consent, (ii) your clients' references being satisfactory, (iii) to a lease to be drawn up by our clients' solicitors. We understand the premises are to be used as offices for a building society.

It is alleged that those two letters constitute an enforceable contract which the plaintiffs are entitled to have enforced by this court. After those letters, matters proceeded. There was considerable correspondence between the respective solicitors on each side, and the terms of a draft lease were sent from one to the other. Certain alterations were made, and finally the respective solicitors had, I think, agreed as to the form which the lease would take. The defendants were unable to get what I think they wanted—namely, an option to extend the lease, or, rather, a new lease at the end of the period—from the superior landlord, and they finally said that they were not proposing to go on with the matter. The plaintiffs, perhaps not unnaturally, felt indignant at that. They had had long negotiations, extending over several weeks, with the defendants, and at the last moment, as it were, the defendants refused to carry out what the plaintiffs thought was a contract into which they had entered. As I say, perhaps not unnaturally, the plaintiffs took the view that they were entitled to insist upon the defendants

carrying out their bargain. On that, the plaintiffs issued the writ, and the matter has come before the court.

Counsel for the plaintiffs has opened the case to me and has told me the facts, but he has said perfectly fairly, and I think rightly, that there is one difficulty in his way which he must get over if he is to proceed
A successfully with this action. That one difficulty is that the acceptance of the offer was a conditional acceptance. I leave out the first two conditions, to which I need not refer for this purpose, but the third condition is that the agreement is subject "to a lease to be drawn up by our clients' solicitors." Counsel for the plaintiffs says that that
B means, as a matter of construction, that, the moment the solicitors have agreed as to the form of the lease, the condition is fulfilled, and the contract is a binding contract, which his clients are entitled to enforce. On the other hand, it is said that this in effect is nothing more than a contract to enter into a contract, which, the authorities have established
C now quite plainly, is not a binding contract at all.

The question has been the subject-matter of the decision in *Raingold v. Bromley* (1), a decision of P. O. LAWRENCE, L.J., sitting as a judge of first instance, which is in some ways very like the present case. The terms of the alleged contract in that case were not precisely the same
D as those in the present one, but the reasoning of the judge seems to me to cover completely this present case, and, if I may say so with great respect, I entirely agree with the reasoning of P. O. LAWRENCE, L.J., in that case. In any event, even if I did not take that view, I should feel some difficulty in dissenting from the opinion he there expressed.
E In the case before P. O. LAWRENCE, L.J., the terms of the alleged acceptance of the offer were as follow, [p. 308]:

Referring to our conversation this morning on the telephone, we confirm that subject to the terms of a lease, our client is prepared to accept your offer . . .

F In dealing with this question which I have to consider, P. O. LAWRENCE, L.J., says, at pp. 315, 316:

It has been argued . . . that such an agreement amounts to a concluded agreement to grant a lease conditional upon the parties agreeing the term of the lease, and when the parties or their solicitors have reached an agreement as to the terms to be included in the proposed lease the original agreement to grant the lease is absolute. In my opinion this argument is fallacious. An agreement to grant a
G lease which is conditional on an agreement being reached as to the terms to be contained in it is not an enforceable agreement. The subject-matter of the suggested agreement is the granting of a lease, and if the terms of the lease are not agreed but are left to future negotiation and agreement, the original agreement amounts to nothing more than an agreement to enter into a contract at some future time. It is not as if the alleged agreement in the present case were an agreement defining all the essential terms of the lease subject only to the approval by the solicitors of the form of the lease; in such a case it might be held that there was
H a concluded agreement leaving merely the terms of it to be reduced into proper form by the solicitors. Even on the plaintiff's construction the agreement is one which leaves all the terms of the lease to be subsequently negotiated, and is therefore too vague to be enforceable. The matter, however, does not rest there, for in my opinion the true construction of the expression "subject to the terms of a lease" is that contended for on behalf of the defendant. The expression, I think, means "subject to the terms to be contained in a lease executed by the lessor," and therefore implies that a lease has to come into existence and has to be executed by the lessor

before any binding agreement is reached. The expression "subject to the terms of a lease" is in my opinion at least as strong as "subject to contract," and was inserted in the letter of Dec. 9 in order to keep the matter open until a lease had actually been executed by the defendant. If this be so, no concluded bargain would be reached until the lease had been executed by the defendant, even although the negotiations as to the terms to be contained in the lease had been brought to a conclusion by agreement between the solicitors of the parties.

In my judgment, the reasoning of that passage in the judgment is conclusive in this case. It is said on behalf of the plaintiffs, however, that in that case the condition was "subject to the terms of a lease," and that those words differ from the words which I have before me—"subject to . . . a lease to be drawn up by our clients' solicitors"—and that that is different, in that it imports into this letter a term that this is to be a binding contract, subject to a condition, which condition is fulfilled as soon as the solicitors on each side agree as to the terms of the lease. In my judgment, that is not a true construction of this letter. The letter says: ". . . subject to a lease to be drawn up by our clients' solicitors." The terms of the lease, the essential conditions of the lease, are not stated in this letter, and are left for future negotiation and for determination, the lease itself being drawn up by the respective solicitors.

In my judgment I cannot distinguish this case from the case before P. O. LAWRENCE, L.J., and, until the lease has been executed by the parties, neither party is bound, and either party can escape at any moment, as in fact the defendants did, by refusing to go on with what was nothing more than negotiation for the purpose of leading up to the granting of a lease, and, until that lease was executed, there was nothing which either party was entitled to enforce as a binding contract. In those circumstances, and for those reasons, there is nothing to be done in this case but to dismiss it with costs.

Action dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *James, Kentish & Atkins*, Birmingham (for the plaintiffs); *Thomas Eggar & Son*, agents for *Nye & Donne*, Brighton (for the defendants).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

LEGGE v. FLETTONS, LTD.

[KING'S BENCH DIVISION (Lawtence, J.), May 11, 12, 1939.]

Income Tax—Profits from trade—Construction of private siding—Sale and resale of siding—Consideration on resale paid in annual instalments out of railway company's share of freight—Capital payment.

By an agreement between a railway company and a brick company, the railway company constructed certain sidings for the use of the brick company, who were to pay the cost of the construction of the sidings, but, after the completion of the sidings, the railway company was to repurchase the sidings in the following manner. If the gross traffic receipts from the traffic of the brick company exceeded £15,000

per annum, the railway company were to pay to the brick company a sum equal to 5 per cent. of the railway company's proportion of such gross receipts, and the total amount of such payments was not to exceed the actual cost incurred by the railway company in laying the sidings. Under this agreement, which could be terminated by either side by giving 12 months' notice, the railway company paid to the brick company in one year the sum of £794. It was contended that this sum should be brought into account in computing the profits of the brick company for that year :—

HELD : the sum in question, though, at the time of payment, made by reference to the railway company's share of freight, was in its nature a capital sum, and should not be included in the profits of the brick company.

B [EDITORIAL NOTE. The difficulty in construing this agreement was in the fact that it could be terminated by notice given by either side, so that it was not certain that the whole consideration for the resale would ever be paid, and thus the resale, as a sale, might remain uncompleted. This, however, has been held not to alter the position, and the payment for the resale remains capital in the hands of the brick company, and not an annual payment in the nature of profits.

C AS TO TRADE RECEIPTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 147-149, paras. 306-308 ; and FOR CASES, see DIGEST, Vol. 28, pp. 22, 23, Nos. 120-122.]

Cases referred to :

- (1) *Westcombe v. Hadnock Quarries, Ltd.* (1931), 16 Tax Cas. 137 ; Digest Supp.
- (2) *Inland Revenue Comrs. v. Ramsay* (1935), 154 L.T. 141 ; Digest Supp. ; 20 Tax Cas. 79.

D CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court. Fletttons, Ltd. (hereinafter called the company), were carrying on the business of brick manufacturers, and in Dec., 1933, they entered into an agreement with the London, Midland and Scottish Railway Co. for the provision of certain private sidings at their works. The agreement provided that, in consideration of £1,000 paid by the company to the railway company, the latter agreed to lay the sidings at the works of the company. As soon as the materials required for the sidings were brought to the site, the company were to pay a further sum of £1,615 to the railway company. If the cost of the making of the siding was then found to have exceeded the total sum of £2,615, the company were to pay the balance to the railway company, and, on these payments being made, the property in the sidings was to pass to the company. If, after the sidings had been brought into use, the gross traffic receipts to and from the brickworks amounted to or exceeded £15,000 in a period of 12 months, the railway company were to pay the company a sum equal to 5 per cent. of the railway company's proportion of such gross receipts, but the total amount of such payments was not to exceed the actual cost incurred by the railway company in laying the sidings. By these payments the railway company were to repurchase the sidings, and, when this payment of the total cost had been made, the property in the sidings was to pass to the railway company. Until the sidings became the property of the railway company, the company was to pay £1 per annum as an acknow-

ledgment for the use and occupation of the land of the railway company upon which the sidings were situate. The agreement was terminable by either side on 12 months' notice in writing. In the year ending Oct. 1936, the railway company, under the terms of this agreement, paid the company £794, and it was contended that this sum should be included in the computation of the company's profits for the purpose of income tax for that year. The commissioners held that, in construing the agreement, first, there was a purchase of the property in the sidings by the company, and then, in certain circumstances, a repurchase by the railway company by instalments measured by reference to the amount of freight passing. In their opinion, the instalments paid by the railway company were made to enable the railway company to regain the property in the sidings, and constituted payments of capital, and were not, therefore, to be included in the computation of the profits of the company for the purposes of income tax.

The Attorney-General (Rt. Hon. Sir Donald Somervell, K.C.) and Reginald P. Hills for the appellant.

R. W. Needham, K.C., and J. S. Stronge for the respondents.

LAWBENCE, J. : In this case, the special commissioners decided that a sum of £794, paid in Oct., 1936, to the respondent company by the London, Midland and Scottish Railway Co. under an agreement of Dec. 5, 1933, was a payment in the nature of capital, and need not be included in the computation of the respondents' profits. The Crown, relying principally upon the similarity of the facts in *Weston v Hadnock Quarries, Ltd.* (1), appeal.

In my opinion, the decision of the commissioners in the present case was correct. As LORD WRIGHT, M.R., said in *Inland Revenue Commrs. v Ramsay* (2), at p. 94 :

The decision in any particular case can only be arrived at by considering what is the substance of the transaction in question, and what is the substance of that transaction can only be ascertained by a careful consideration of the contract which embodies the transaction.

The agreement in question provided that sidings should be laid by the railway company at the cost of the respondents. After the cost had been paid by the respondents, the property in the sidings should pass to the respondents. By cl. 3, the agreement provided that, if, in the period of 12 months :

... the gross receipts for the carriage of traffic by rail to and from the undersaid works shall amount to or exceed £15,000 (the company should pay) to the traders a sum equal to 5 per cent. of the company's proportion of such gross receipts, provided that the aggregate amount which the company shall be liable to pay to the traders under this clause shall not exceed the actual cost incurred by the company in laying in the sidings.

By cl. 4, the agreement provided that, as soon as the company shall have paid to the traders under cl. 3 :

... sums equal in the aggregate to the actual cost incurred by the company

in laying the sidings, the ownership of the sidings shall pass from the traders to the company.

By cl. 10, it was provided as follows :

A Until the sidings shall become the property of the company the traders shall pay to the company the sum of £1 per annum by way of acknowledgment for the use and occupation of the land [on which the sidings were situated].

B By cl. 24, the agreement was terminable on 12 months' notice. By cl. 25, upon the termination of the agreement, the company were at liberty "at the cost of the traders to disconnect the sidings from their railway, and to take up and remove the materials thereof," rendering to the traders, if the sidings belonged to the traders, the amount (if any) by which the proceeds of any such disposal exceeded the aggregate of any amounts then already paid by the company to the traders under cl. 3 of the agreement.

C Upon the construction of this agreement, the commissioners came to the conclusion, first, that there was a purchase of the property in the sidings by the company, and then in certain circumstances a repurchase by the railway company by instalments measured by reference to the amount of freight passing, and that :

D . . . the instalments paid by the railway company were made to enable it to regain the property in the sidings, and constituted payments of capital.

I come to the same conclusion. I think that the provisions of the agreement as to the property in the sidings distinguish this case from *Westcombe v. Hadnock Quarries, Ltd.* (1).

E The facts relied upon by the Crown—namely, that the present agreement might be terminated before any sum had been paid by the railway company under cl. 3, in which event the respondents would only be paid the proceeds of the disposal of the materials of the sidings less the cost of removal, and that the gross receipts might never amount to the sum of £15,000 referred to in cl. 3—do not, in my opinion, alter the character of the payment to be made under cl. 3, any more than the fact that, in *Inland Revenue Comrs. v. Ramsay* (2), there may have been no profits, or the fact that the price of £15,000 might never have been obtained, altered the character of the payment.

G Counsel for the appellant contended that there was here no sale of sidings, nor any antecedent debt, such as there was in *Ramsay's* case (2) and in some of the other cases cited. In my judgment, however, the substance of the transaction embodied by the agreement was that new sidings should be constructed, that, on construction, the ownership therein should pass, on payment by the traders of what were, in my view, capital payments, and that, on repayment of those sums, the ownership in the sidings should pass to the railway company. In my view, that is equivalent to a sale and resale of a capital asset, and the sums paid as the price of such resale, although measured at the time of payment by reference to the railway company's share of freight, arc,

in my opinion, in their nature capital sums. The appeal, therefore, will be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellant); *Bridge, Sanderson & Co.* (for the respondents).

[*Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.*] A

COPEMAN v. COLEMAN (FOR COLEMAN MINORS).

[KING'S BENCH DIVISION (Lawrence, J.), **May 24, 1939.**] B

Income Tax—Disposition in favour of children—Disposition by allotment of shares in company—"Settlor"—"Settlement"—Finance Act, 1936 (c. 34), s. 21 (1), (9) (b) (c).

In 1935, a company was formed by the respondent to take over his business with a capital of £1,000 in £1 shares which were equally held by the respondent and his wife. On Mar. 18, 1937, at an extraordinary general meeting, the capital of the company was increased to £6,000, and it was provided that 25 preference shares should be created of £200 each, entitled to a 10 per cent. preferential dividend and to participate with the ordinary shares equally in the surplus. These preference shares were allotted to the relations of the respondent and his wife, and two such shares were allotted to their two children in consideration of a payment of £10 each in cash. It was proved that the children had had in their own names certain savings certificates, which would have provided the moneys to pay for these shares. By this issue of shares, therefore, the company obtained £250 capital. On Mar. 31, 1937, a dividend of 20 per cent. was declared, free of tax, and the respondent's children each received the sum of £40. Claims were then put forward by the respondent for return of the tax on the sum of £40 for each of the children. Shortly afterwards, a resolution was passed to call up £40 per preference share. The question was whether or not the transaction by which these shares were created and issued, and in consequence of which this income was paid to the children, fell within the provisions of the Finance Act, 1936, s. 21 :—

HELD : this was not a *bona fide* commercial transaction. The respondent was a "settlor," and the transaction was a "settlement," within the meaning of sect. 21 (9) (b) (c). E

[EDITORIAL NOTE.] This is a decision under the new section dealing with settlements made upon infants for the purpose of avoiding the payment of income tax. The section—the Finance Act, 1936, s. 21—seems to have been purposely drawn in very wide terms, and in the present case the decision is merely that the facts of the case bring it within the section, no general classification of the cases which fall within the section having been attempted. G

AS TO DISPOSITIONS IN FAVOUR OF CHILDREN, see HALSBURY, *Hailsham Edn.*, Vol. 17, pp. 268-270, para. 538 ; and FOR CASES, see DIGEST, Supp., *Income Tax*, Nos. 575a, 575b.]

CASE STATED under the Finance Act, 1927, s. 41, and the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax for the Hundred of Hemlingford, Warwickshire, for the opinion of the High Court of Justice. H

In 1935, a company was formed by the respondent to take over his business with a capital of £1,000 in £1 shares which were equally held by

the respondent and his wife. On Mar. 18, 1937, at an extraordinary general meeting, the capital of the company was increased to £6,000, and it was provided that 25 preference shares should be created of £200 each, entitled to a 10 per cent. preferential dividend and to participate with the ordinary shares equally in the surplus. These preference shares were allotted to the relations of the respondent and his wife, and two of them to their two children in consideration of a payment of £10 each in cash. It was proved that the children had had in their own names certain savings certificates, which would have provided the moneys to pay for these shares. By this issue of shares, therefore, the company obtained £250 capital. On Mar. 31, 1937, a dividend of 20 per cent. was declared, free of tax, and the respondent's children each received the sum of £40. Claims were then put forward by the respondent for return of the tax on the sums of £40 for each of the children. Shortly afterwards, a resolution was passed to call up £40 per preference share. The question was whether or not the transaction by which these shares were created and issued, and in consequence of which this income was paid to the children, fell within the provisions of sect. 21.

On behalf of the respondent, it was contended that (a) the income in respect of which the repayment of income tax was claimed was, in each case, the income of the child, (b) the company allotted the shares to the children, (c) the children purchased the shares by the sale of savings certificates which had been in their possession since Jan. 4, 1933, and (d) the claimant was not the settlor within the meaning of the Finance Act, 1936, s. 21.

On behalf of the appellant, it was contended that (a) the resolution of Mar. 1, 1937, and the allotment of the £200 redeemable preference shares constituted an arrangement of assets, (b) the arrangement of assets was a settlement within the meaning of the Finance Act, 1936, s. 21, and (c) the respondent and his wife had provided funds, directly or indirectly, for the purpose of that settlement, and were settlors within the meaning of the section, notwithstanding the fact that the shares were issued by the company.

The commissioners allowed the claims, and the Crown appealed.

The Attorney-General (Rt. Hon. Sir Donald Somervell, K.C.), J. H. Stamp and Reginald P. Hills for the appellant.

Leonard Stein for the respondent.

LAWRENCE, J. : This is a question which arises under the Finance Act, 1936, s. 21, and relates to the construction of sect. 21 (1) and the definitions in sect. 21 (9). Sect. 21 (1) provides as follows :

Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year and not as the income of any other person.

The question is whether or not the transaction by which these shares were created and issued, and in consequence of which this income was paid to the children, falls within the provisions of sect. 21. The word "settlement" in sect. 21 is defined in subsect. (9), which provides as follows :

In this section . . . (b) the expression "settlement" includes any disposition, trust, covenant, agreement, arrangement or transfer of assets. . . . A

The Crown contends that, on the facts of this case, only one conclusion can be reached—namely, that this transaction by which these shares were created and allotted to the preference shareholders, including the children, was not a *bona fide* commercial transaction, and was a "settlement" within the definition in subsect. (9). In the first place, the Attorney-General relies upon the fact that the children could not have been called upon to pay up the unpaid capital of £190 per share. In the next place, he relies upon the fact that there can have been no genuine intention to raise capital, as the company received only £250, and immediately distributed within a fortnight £1,000. He drew my attention also to the resolution creating the shares, which provides that all or any of the rights of the preference shareholders : B

. . . may at all times be added to, reduced abrogated or otherwise modified or varied with the consent of the company in general meeting . . . the company shall at all times have the right to create any further capital ranking in priority to this preference capital both as regards capital and dividend . . . C D

He also drew my attention to the provision that the preference shareholders had the right to have one vote for each fully-paid share in the event only of the fixed preferential dividend being more than 3 years in arrear. Those provisions, he submitted, showed that the whole transaction was not a *bona fide* commercial transaction at all. He also submitted that such a transaction does not cease to be a settlement within the meaning of the definition clause because some negligible consideration is paid for it, and that, in order to be excluded from the section, it must be a *bona fide* commercial transaction. E F

The question as to whether or not the respondent is a settlor turns upon the definition in sect. 21 (9) (c), which provides as follows :

. . . the expression "settlor," in relation to a settlement, includes any person by whom the settlement was made or entered into directly or indirectly, and in particular (but without prejudice to the generality of the foregoing words of this definition) includes any person who has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement. G

The Attorney-General contends that the respondent was a person by whom the settlement was made or entered into indirectly, and that, in any event, he was a person who provided the funds indirectly for the purpose of the settlement. That is to say, by using the legal framework of a company which he and his wife entirely controlled, he made the settlement in consequence of which his children derived this income, and also he indirectly provided the funds for the purpose of the settlement. H

Counsel for the respondent, who has taken every possible point which could be made in favour of the respondent, submits that such a transaction as this does not fall within the definition of "settlement," that there is no finding of fact in this case that this was not a *bona fide* settlement, that there was a contract for the £250, and that, on the winding up, the preference shareholders would get only what they paid up, and the fact that they only paid £10 tends to show that it was a *bona fide* commercial transaction, because of the provision as to the possible abrogation of their rights. He points also to the fact that there is no finding that it was not their money which was paid for the shares. As to the meaning of the word "settlor," he contends that the shareholders in that company who may control the company cannot be regarded as settlors within the meaning of the subsection in question.

It is true that the commissioners, who decided in favour of the respondent, have not found as a fact that this transaction was not a *bona fide* commercial transaction. They have expressed their decision without making any specific finding upon this topic, simply allowing the claims. In my opinion, it is impossible to come to any other conclusion than that this was not a *bona fide* commercial transaction, and it appears to me that there was a disposition within the meaning of the definition in subsect. (9), or an arrangement in the nature of a disposition within the meaning of that subsection. I am also of opinion that the respondent was a settlor within the meaning of subsect. (9) (c). I am unable to see how the word "indirectly" can be limited in the way which is suggested so as to exclude the settlements which are made through the interposition of the company. For these reasons, I allow the appeal with costs.

Appeal allowed with costs. Claims disallowed.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Capel Cure, Glynn Barton & Co.* (for the respondent).

[*Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.*]

JOHN JAKUES & SON, LTD. v. CHESS (A FIRM).

[CHANCERY DIVISION (Crossman, J.), May 16, 17, 18, 19, 23, 24, 25, 26, 1939.]

Trade Marks and Trade Names—Passing off—"Staunton chessmen"—"Genuine Staunton chessmen"—"Genuine."

The plaintiffs and their predecessors in business had since 1849 made chessmen of a particular design and quality which they called the Staunton chessmen. The defendant firm, which publishes a magazine and sells chessmen, in the issues of their magazine of Sept., 1937, and Oct., 1937, respectively, advertised for sale "genuine Staunton chessmen," and in the issue of Dec., 1937, they advertised for sale "Staunton chessmen." These chess sets were not manufactured by the plaintiffs, who thereupon commenced this action, contending that the name "Staunton," and *a fortiori* the words "genuine Staunton," meant their goods exclusively. They sued for an injunction to restrain the defendant firm from passing

off other sets of chessmen under these names as the plaintiffs' goods, and they also claimed damages. The defendant firm denied that the words complained of referred exclusively to the plaintiffs' goods, and contended that they meant no more than chessmen of a particular pattern:—

HELD: (i) although most dealers understood the word "Staunton" to refer to the plaintiffs' goods, most chess players understood it to refer merely to a design, and therefore the plaintiffs had not established that in the market as a whole the word denoted their chessmen exclusively.

(ii) nevertheless, as the word was to some extent ambiguous, the addition of the word "genuine" was calculated to remove the doubt and to lead to the belief that the word was used as referring to the plaintiffs' goods, and an injunction might be granted restraining the defendants from describing their chessmen as "genuine Staunton."

[EDITORIAL NOTE.] In the present case, there was a distinction between the understanding of dealers in the trade of the name "Staunton" and that of the general public interested in chess. It was only dealers in the trade who would in any way associate this name with the plaintiffs' business. This being so, it was felt that the word "genuine" added to the name "Staunton" must form a combination which would be calculated to make the trade, at any rate, believe that the goods so described were products of the plaintiffs' business.

AS TO TRADE NAMES OF GOODS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 638-647, paras. 947-956; and FOR CASES, see DIGEST, Vol. 43, pp. 271-279, Nos. 1062-1106.]

Cases referred to:

- (1) *Leahy, Kelly & Leahy v. Glover* (1893), 10 R.P.C. 141; 43 Digest 169, 253.
- (2) *Spalding & Brothers v. Gamage (A. W.), Ltd.* (1915), 84 L.J.Ch. 449; 43 Digest 264, 1018.
- (3) *Burgess v. Burgess* (1853), 3 De G.M. & G. 896; 43 Digest 286, 1155; 22 L.J.Ch. 675; 21 L.T.O.S. 53.
- (4) *Reddaway v. Banham*, [1896] A.C. 199; 43 Digest 277, 1098; 65 L.J.Q.B. 381; 74 L.T. 289.
- (5) *Edelsten v. Edelsten* (1863), 1 De G.J. & Sm. 185; 43 Digest 217, 614; 7 L.T. 768.
- (6) *Iron-Or Remedy Co., Ltd. v. Co-operative Wholesale Society, Ltd.* (1907), 24 R.P.C. 425; 43 Digest, 300, 1248.
- (7) *Havana Cigar & Tobacco Factories, Ltd. v. Oddenino*, [1924] 1 Ch. 179; 43 Digest 279, 1106; 93 L.J.Ch. 81; 130 L.T. 428; *affg.*, [1923] 2 Ch. 243.
- (8) *Boake (A.), Roberts & Co., Ltd. v. Wayland (W. A.) & Co., Re Boake (A.), Roberts & Co., Ltd.'s, Trade Marks* (1909), 26 R.P.C. 251; 43 Digest 227, 713.
- (9) *Borthwick v. Evening Post* (1888), 37 Ch.D. 449; 13 Digest 223, 616; 57 L.J.Ch. 406; 58 L.T. 252.
- (10) *St. Mungo Manufacturing Co. v. Viper & Recovering Co.* (1910), 27 R.P.C. 420; 43 Digest 222, 669.
- (11) *Re Gramophone Co.'s Application*, [1910] 2 Ch. 423.
- (12) *A.-G. and General Council of Medical Education of United Kingdom Registration v. Barrett Proprietaries, Ltd.* (1932), 50 R.P.C. 45; Digest Supp.
- (13) *Ford v. Foster* (1872), 7 Ch.App. 611; 43 Digest 231, 747; 41 L.J.Ch. 682; 27 L.T. 219; *reusg.* S.C. *sub nom.* *Re "Ford's Eureka Shirt," Ford v. Foster*, 20 W.R. 311.

ACTION for (i) an injunction to restrain the defendants, their servants and agents from passing off or attempting to pass off sets of chessmen

not of the plaintiffs' manufacture as and for the plaintiffs' chessmen by advertising, offering for sale, selling, supplying or otherwise dealing with as "genuine Staunton chessmen" or "Staunton chessmen" chessmen not manufactured by the plaintiffs, (ii) delivery up of all labels, leaflets and other advertising matter the use of which would
 A be a breach of the above injunction, and (iii) damages. The facts are fully set out in the judgment.

F. E. Bray, K.C., and *James Mould* for the plaintiffs.

J. Silverman and *Victor K. Wolff* for the defendants.

Mould: No one has a right to represent his goods as the goods of
 B someone else: *Spalding & Brothers v. Gamage (A. W.), Ltd.* (2). There is no need for the plaintiffs to prove that anyone has in fact been deceived, or to prove that anyone will be deceived. If the word "Staunton", when applied to chessmen, means the plaintiffs' goods, the offence of the defendants' advertisement proves itself. *A fortiori*, the words
 C "genuine Staunton" mean the plaintiffs' goods. The law provides against the deception of the ordinary unwary purchaser. [Counsel referred to *Boake (A.), Roberts & Co., Ltd. v. Wayland (W. A.) & Co.* (8).]

Silverman: The plaintiffs must prove that the word "Staunton"
 D has a particular significance in the market, and that there is real likelihood of deception: *Borthwick v. Evening Post* (9). The word "genuine" is only relevant if the plaintiffs show that "Staunton" refers to their goods. The defendants say that it means the genuine pattern. The plaintiffs are known as makers of expensive chess sets. The defendants' sets were so cheap that nobody was deceived, owing to the disparity
 E in price: *St. Mungo Manufacturing Co. v. Viper & Recovering Co.* (10). [Counsel referred to *Re Gramophone Co.'s Application* (11), *A.-G. and General Council of Medical Education of United Kingdom Registration v. Barrett Proprietaries, Ltd.* (12) and *Havana Cigar & Tobacco Factories, Ltd. v. Oddenino* (7).]

F Bray, K.C., in reply: If "Staunton," or "genuine Staunton," means the plaintiffs' goods, references to price do not modify the fact that the description which the defendant has used involved a misrepresentation. [Counsel referred to *Ford v. Foster* (13), *Havana Cigar & Tobacco Factories, Ltd. v. Oddenino* (7), *Reddaway v. Banham* (4) and *Leahy, Kelly & Leahy*
 G *v. Glover* (1).]

CROSSMAN, J.: In this action, the plaintiffs' case is that the name "Staunton" or "genuine Staunton" used upon or in connection with sets of chessmen indicate chessmen of the manufacture of the plaintiffs
 H or their predecessors exclusively. The defendants' case is that the name "Staunton" or "genuine Staunton" used on or in connection with sets of chessmen indicate chessmen of a certain design or pattern, and nothing more.

On Mar. 1, 1849, a certain Nathaniel Cook, who was probably a member of the firm the business of which was taken over by the plaintiffs when

they were incorporated in 1900, registered a design for a set of chessmen under the Copyright of Designs for Ornamenting Articles of Manufacture Act, 1842. This design is substantially the same as that known as the Staunton design. The protection afforded by the registration lasted for 3 years only. On Aug. 11, 1852, one Howard Staunton, who was a noted chess player at that time, authorised Nathaniel Cook to make use of a facsimile of his signature to attach to the boxes of what are described as "the Staunton Chessmen." I find that since 1849 or thereabouts the plaintiffs or their predecessors have made sets of chessmen of the Staunton design, and have advertised them as the Staunton chessmen made by the plaintiffs, and that some, though not all, of the well-known dealers in games in England, and a very few chess players, regard the name "Staunton," when applied to chessmen, as indicating chessmen manufactured by the plaintiffs, and distinguish chessmen of Staunton design made by persons other than the plaintiffs by calling them Staunton pattern chessmen. I find, however, that very many distinguished chess players regard the name "Staunton," when applied to chessmen, as indicating chessmen of the particular design or pattern known as the Staunton pattern, and nothing more. The defendant publishes a magazine called *CHESSE*, and in the number dated Sept. 14, 1937, he published the following advertisement on the back page :

Genuine Staunton chessmen. Highest quality. Having ordered in large quantities, we are able to offer our readers sets of chessmen at lower prices than are obtainable anywhere else. You save shillings at a time by buying from us. We are prepared to stake our reputation on the statement that these sets are identical with those offered by the best dealers in the trade at prices 20 per cent. to 50 per cent. higher. Send us 1½d. in stamps for a specimen piece (on the understanding that you will return it after examination).

Then follows a list of sets of chessmen described by a figure and a letter, with the height of the king, a description of the sets and of the box, and the prices. The prices vary from 2s. 6d. per set to 14s. 6d. per set. Then it says :

Send orders direct to Chess, Sutton Coldfield, England, making cheques or money orders payable to Chess.

Then at the bottom there are the following words :

We can also supply boards at competitive prices.

What I have read is the substantial part of the advertisement. The defendant's business of Chess is in fact carried on by Mr. Baruch Harold Wood, who is really the defendant in this action, and when I speak of the defendant I mean Mr. Baruch Harold Wood.

On Sept. 16, 1937, a letter was sent to the defendant as follows :

Will you please supply me with one set of genuine Staunton chessmen No. 2C, at the price of 3s. post free, as advertised in your issue of Sept. 14, 1937. I enclose postal order to the value of 3s. herewith, and shall be glad to receive this set by return.

That letter, which is signed "D. Wargrave," was in fact written by a Mr. Dudley Wargrave Poupart, who was in the employ of the plaintiffs

as a sales manager, and was addressed to "Messrs. Chess, Sutton Coldfield, England." In reply to that letter, the writer received a letter dated Sept. 17, 1937, from the defendant, and a box of chessmen which are admittedly not of the plaintiffs' manufacture but were made by a certain M. Ernest Vincent of Dortan, in France. Mr. Poupart A had ordered a set at the price of 3s. I should have said, when referring to the advertisement, that after the price of 2s. 6d. appear the words "Postage, 6d.," so that he was really ordering a 2s. 6d. set, and the set which he in fact got was admittedly one of the defendant's 2s. 6d. sets.

B The defendant writes on Sept. 17 as follows :

Herewith your chess set, all except the white king. The demand for these chess sets has taken us rather by surprise, and this is the last in stock at this size ; unfortunately we have abstracted the white king from it to serve as a sample for another gentleman in London [Plaistow, E.]. I am writing to him now to ask him to post the king on to you without the least delay and it should arrive not many hours after this package. If either the white king or any other piece is in the least damaged, please let me know, and I will replace it at once. C

Then there is a suggestion that Mr. Poupart should become an annual subscriber to CHESS, the magazine.

On Sept. 21, 1937, a letter was sent to the defendant by a Mr. A. W. D Gates, who was also in the employ of the plaintiffs :

Please send me by return one of your sets of genuine Staunton chess as advertised. Postal Order No. ^D₇₃ 045358 for 3s. is enclosed herewith.

In reply, the writer received a letter dated Sept. 22, signed by Mr. Wood, E as follows :

Owing to one of my letters to the manufacturer of the sets in France having gone completely astray, I have none of the size you require in stock. However, I have written off to him asking him to send you a set direct and you should get this by Saturday. There will be a small customs charge to pay on delivery. As recompense for this I shall send you a copy of the October number of CHESS unless F you would rather have the amount in stamps. It will only be a few pence and they may waive it altogether. Why not enrol as a direct subscriber to CHESS ?

That is a similar suggestion to that in the letter to Mr. Poupart. The letter is signed : " B. H. Wood."

Then on Oct. 2, Mr. Gates got another letter from the defendant apologising for the delay in supplying the set and saying : " The set G cannot possibly be more than a day or two longer in coming." A letter from the French manufacturer explaining the delay, and so putting the matter off for the moment, was enclosed. Subsequently, Mr. Gates received a set of chessmen of the same kind as the set received by Mr. H Poupart—that is to say, a set of chessmen admittedly not of the plaintiffs' manufacture.

In the number of CHESS dated Oct. 14, 1937, the defendant published the following advertisement :

Genuine Staunton chessmen and wooden boards. Highest quality. Repeat orders by return of post and expressions of delighted approval from all sides have testified to the public's appreciation of this new venture of ours. We order direct from

the manufacturer in France, restrict ourselves to a low profit margin and take full advantage of the depreciation of the franc. Result—the best value in Great Britain.

Then there is the same sort of statement as before about being able to provide them at a much lower price than other people, and the advertisement continues as follows :

We are prepared to stake our reputation on the statement that these sets are identical with those offered by the best dealers in the trade at prices 20 per cent. to 50 per cent. higher.

Then again the list of sets is set out, and there is a direction to send orders direct to Chess, Sutton Coldfield, England.

On Nov. 9, 1937, the writ in this action was issued, there having been no previous communication either between the plaintiffs and the defendant or between their respective advisers. On Nov. 11, 1937, the writ was served on the defendant with the statement of claim. I should say that there had been a number of CHES issued in November in which no advertisement of this sort appears. In the number of Dec. 14, 1937, however, this advertisement appears :

Read what purchasers say about our chess sets and boards.

Then there are a number of quotations of delighted approval from various people, and underneath these are the following words :

Buy now or you may miss the biggest chess bargain of a century : Terms : cash with order . . . Staunton chessmen.

On this occasion the word "genuine" is omitted. Otherwise I think that the advertisement is in substantially the same form. At the bottom are the following words :

Send orders direct to Chess, Sutton Coldfield, England.

It appears now that the defendant is, and always has been, quite willing to use the word "pattern" with "Staunton," describing the chessmen he sells as of "Staunton pattern." It also appears that the plaintiffs do not object to the defendant using the words "Staunton pattern," and the plaintiffs' only witness from among their own officers and employees stated in evidence that he saw no objection to the defendant describing his chessmen as "Staunton" so long as he did not put the word "Staunton" in inverted commas, or prefix to it the word "genuine." Unfortunately, however, owing, I think, to the fact that there was no communication between the parties previous to the commencement of this action, the action has been brought and it has been heard at very great length, and I have no doubt that considerable expense has been incurred, and it is now necessary for me to decide the respective legal rights of the plaintiffs and the defendant, though I feel that the matter as between them might have been perfectly well settled by an arrangement which would not really seriously have interfered with either party, and without either party giving up anything for which they really very much cared.

The first thing which the plaintiffs have to establish in order to succeed in any part of the claim which they have made is well stated by HERSCHELL, L.C., in *Leahy, Kelly & Leahy v. Glover* (1), where, after referring to a claim for passing off such as is made in this action, he says, at p. 155 :

A Now, my Lords, what is the foundation of a claim of this description ? It is that the party alleging it should prove in the first instance that any name which he claims as his trade name has been so exclusively used in connection with his manufacture, or with the goods which he sells, that his goods have come to be known in the market by that name; that any one using that name would intend to refer to his goods; and that any one to whom the name was used would understand that his goods were referred to.

B In a case which has been referred to, *Spalding & Brothers v. Gamage* (A. W.), *Ltd.* (2), LORD PARKER, again discussing a passing-off action, said, at p. 449 :

C The action in which this appeal is brought is what is known as a passing-off action, and having regard to the arguments which have been addressed to your Lordships I think it well to say a few words as to the principle on which such actions are founded. This principle is stated by TURNER, L.J., in *Burgess v. Burgess* (3), and by LORD HALSBURY, L.C., in *Reddaway v. Banham* (4), in the proposition that nobody has any right to represent his goods as the goods of somebody else. It is also sometimes stated in the proposition that nobody has the right to pass off his goods as the goods of somebody else. I prefer the former statement, for, whatever doubts may be suggested in the earlier authorities, it has long been settled that actual passing-off of the defendant's goods for the plaintiff's need not be proved as a condition precedent to relief in equity either by way of an injunction or an inquiry as to profits or damages : *Edelsten v. Edelsten* (5) and *Iron-Or Remedy Co., Ltd. v. Co-operative Wholesale Society, Ltd.* (6). Nor need the representation be made fraudulently. It is enough that it has in fact been made, whether fraudulently or otherwise, and that damages may probably ensue, though the complete innocence of the party making it may be a reason for limiting the account of profits to the period subsequent to the date at which he becomes aware of the true facts. The representation is in fact treated as the invasion of a right giving rise at any rate to nominal damages, the inquiry being granted at the plaintiff's risk if he might probably have suffered more than nominal damages.

E I think that those two passages which I have read indicate what I have to consider in arriving at a conclusion as to the rights of the parties F in this case.

The question about which I have first of all to satisfy myself is the meaning of the word "market" in the statement of the law by LORD HERSCHELL, L.C., and the meaning of it especially where there is a difference, as I am going to find there is in this case, between the dealers G dealing in this particular commodity of chessmen and the general public. For that reason, I must obviously limit it to the chess-playing public, and to persons concerned with chess.

I finally refer to what was said by RUSSELL, J., in *Havana Cigar & Tobacco Factories, Ltd. v. Oddenino* (7). That is the well-known case H of the Corona cigar, in which the suggestion was that Mr. Oddenino, a well-known restaurateur, had offended against the plaintiffs' rights in selling as a Corona cigar something which was not made by the plaintiffs' firm. RUSSELL, J., said, at p. 249 :

Each side called numerous witnesses, who may be divided into three classes : (1.) witnesses in the trade who deal with persons in the trade ; (2.) witnesses who

deal with the public; (3.) members of the cigar-smoking public. The first class is not, to my mind, of such importance as the other two. Persons in the trade in their dealings *inter se* know exactly what they want to describe and how to describe it. It is not astonishing, therefore, to find that among such persons both brands and size names are always used in conjunction, unless some particular context renders the use of one or the other superfluous or unnecessary. The other two classes of witnesses are the important ones, for they are in a position to testify by experience to the habits of the public, the phrases used by them in asking for goods, the interpretation put on such phrases by the retailers, and the acceptance or repudiation of such interpretation by the user of the phrases. A

I come to the conclusion in this case that the market which has to be considered is the general market, not only of the general chess-playing public, but also of the dealers in chessmen, and that I must consider them all, though, as RUSSELL, J., says, the dealers who deal with the public, and the public themselves, are more important than persons in the trade who only deal with other people in the trade—that is, dealers in the trade. B

After a very careful consideration of the documentary and oral evidence which has been adduced in this case, I find that the plaintiffs have not established that in this market as a whole the name “Staunton” does denote chessmen made by the plaintiffs. I have been very favourably impressed by the witnesses who have been called by the defendant. Most of them are chess players of note and of wide experience, not only of the game of chess, but also of other chess players, and they all say that to them the word “Staunton,” when applied to chessmen, denotes a particular pattern, meaning the pattern known as the “Staunton pattern,” and does not denote a particular manufacturer. On the other hand, the plaintiffs’ witnesses do, most of them, tell me that to them the name “Staunton” means the plaintiffs’ manufacture, and that “Staunton chessmen” mean chessmen made by the plaintiffs, and nothing else. The plaintiffs’ witnesses are nearly all persons engaged in the trade and who have been in fact accustomed to dealing with the plaintiffs, but the plaintiffs called three witnesses who were not engaged in the trade. They were persons who had been brought into special contact with the plaintiffs. One witness in particular, Mr. Jack George Nabarro, stated that he associated “Staunton” with the plaintiffs. In cross-examination, however, he said that he had visited the plaintiffs’ showrooms 3 years ago, and that before that “Staunton” would have meant to him “Staunton pattern” only. C D E F G

In my judgment, the plaintiffs have failed to establish the first thing which they have to establish so far as regards the use of the word “Staunton”—namely, that the word “Staunton” means in the market, when applied to chessmen, chessmen made by the plaintiffs, and, in my judgment, the plaintiffs are not entitled to stop the defendant from using the word “Staunton” alone in connection with chessmen. H

I think, however, that in the present case I must have regard to the fact that the evidence of the class of dealers differs from the evidence of the class of chess players. Just as in *Havana Cigar & Tobacco Factories, Ltd. v. Oddenino* (7) the word “Corona,” when applied to cigars, was to

some extent ambiguous—sometimes meaning a cigar made by the plaintiffs and sometimes meaning a cigar of a particular shape or size—so in the present case I think that the word “Staunton” as applied to chessmen is to some extent ambiguous. Certainly to a considerable number of traders it means chessmen made by the plaintiffs. To chess players generally, however, it means chessmen of the design known as “Staunton.” In these circumstances, I find that the use of the word “genuine,” when attached to the word “Staunton,” must be calculated to lead to the belief that the term is used to mean “made by Jaques & Son, Ltd.,” the plaintiffs.

As a result of the whole case, I find that the plaintiffs are not entitled to stop the defendant from describing his chessmen as “Staunton” alone, but that they are entitled to stop the defendant from describing his chessmen as “genuine Staunton.” In those circumstances, the plaintiffs are entitled to an injunction, but not to the whole of what they ask.

Injunction granted.

Solicitors : *Radford, Frankland & Mercer* (for the plaintiffs) ; *Sparks, Russell, Isard & Co.*, agents for *W. Ritson Morry, Sutton Coldfield* (for the defendants).

[Reported by CHARLES SHELLEY, Esq., Barrister-at-Law.]

REGIER v. CAMPBELL-STUART.

[CHANCERY DIVISION (Farwell, J.), May 16, 17, 18, 1939.]

Agency—Secret profits—Termination of agency—Agent's duty to act honestly and faithfully—Non-disclosure of secret profit—Duty to account.

R., who wished to buy a house suitable for conversion into flats, instructed C.-S. to furnish her with particulars of houses suitable for that purpose. Shortly afterwards, C.-S. inspected a leasehold house, and, on inquiry, ascertained that it could be purchased for £2,000. He thereupon procured his brother-in-law to be his nominee to purchase the house for himself for £2,000, and then entered into a fictitious transaction with his brother-in-law, under which he purported to buy the house from his brother-in-law for £4,500. C.-S. told R. that he had bought the house for £4,500 and would sell it to her for £5,000, and R. accordingly bought the house from C.-S. for that amount :—

HELD : the termination of C.-S.'s authority to find a house by C.-S. selling to R. his own house did not terminate his duty as agent to act honestly and faithfully to his principal R., and, though not precluded from himself buying the house if he wished to sell it to his principal, he was bound to give her the fullest possible information, both as to the true price he had paid to the vendors and as to the amount he wanted, showing the profit, if any, which he would acquire as the result of the sale.

[EDITORIAL NOTE.] In this case, it was contended that the secret profit complained of was made after the agent's authority had been determined. Although this was so, it was held that the agent was liable to account for the secret profit, since it was made in transactions which were all one with that which he was employed to effect.

AS TO SECRET PROFIT BY AGENT, see HALSBURY, Hailsham Edn., Vol. 1, pp. 251-254, paras. 425, 426; and FOR CASES, see DIGEST, Vol. 1, pp. 475-478, Nos. 1572-1593.]

ACTION for damages for fraudulent misrepresentation and for an account of all profits obtained by the defendant without the plaintiff's knowledge or consent in his capacity as agent for the plaintiff. On behalf of the defendant, it was contended, *inter alia*, that the relationship of principal and agent was determined at the time when a duty of disclosure was alleged to exist. The facts and arguments are fully set out in the judgment.

J. Norman Daynes, K.C., and *Hon. Denys B. Buckley* for the plaintiff. *E. Holroyd Pearce* for the defendant.

FARWELL, J.: The plaintiff in this action, a Russian widow who has been twice married, lives now principally in Switzerland, and, although she appears to understand English, she does not speak it with any great ease. There is a son of her first marriage, a Mr. Georges Yablonsky, who lives in this country and has done so for the last 3 years. He is married, and he and his wife both speak and understand English without difficulty. The defendant's occupation appears to be that of a dealer in land and houses.

The story begins in Dec., 1937. The son of the plaintiff, who was at one time employed as an engineer by an American firm, is now occupied in dealing in furs. He and his wife met the defendant on a social occasion. The defendant, his wife and the plaintiff's son's wife apparently became on good terms, and the son and the defendant also were on terms of social friendship. The son and his wife informed the defendant and his wife that they were anxious to find a house in London which would be suitable for conversion into flats, in one of which flats the son and his wife could live. The son (when I say the son I mean the plaintiff's son throughout) has no experience at all in dealing in houses or property in London, and, although he is a business man in the sense that he has been an engineer employed by a big firm, and now deals in furs, he is not experienced in any way in buying or selling houses or land in this country. He knew that the defendant had had, as he says, a long experience in that sort of business, and he asked the defendant to assist him to find a house which would be suitable for the purpose he desired. The defendant agreed to do so, and he did send him particulars of houses from time to time. In January, or at the beginning of January, the defendant or his wife heard of and inspected a house known as The Red House on Bayswater Hill, now known as 140, Bayswater Road. The defendant's wife, I think, on the first occasion inspected it, and they had particulars of the house from the agents, John Wood & Co. The house was a leasehold house, having some 40 years to run, at a ground rent of £125, and the price, as stated in the particulars, was £4,250. On the particulars which were sent to the defendant, however, there was added a note to the effect that £2,500

would be accepted. The lease in question belonged to certain trustees, who had put it in the hands of the agents to dispose of it. Acting on the instructions of the trustees, the agents had offered the property for sale by auction early in 1937. There was no serious bid, and the house was left in the hands of the agents to dispose of at the best price which they could obtain. For some months, they had the house on their books. They had not received any serious offer at all, and no doubt the trustees were getting very anxious to dispose of the property. Therefore, when the defendant, through his wife, inquired whether the price of £2,000 would be accepted for the lease, he was informed by the agents, no doubt acting on the authority of the vendors, that that price would be accepted. I think that there is little doubt that at that price the lease was something in the nature of a bargain. Having ascertained that that price would be accepted, the defendant proceeded to contract to buy the house for himself. He did not enter into a contract personally with the vendors, however, but had the contract taken in the name of his brother-in-law, one Harold Brown. On Jan. 10, 1938, a contract was entered into between Harold Brown and the vendors for the sale to Harold Brown of the lease at the price of £2,000. Harold Brown, whom I have seen in the witness-box, admitted without any hesitation that he had no sort of interest in the house at all, and that he did not find any part of the deposit of £200 which was paid. He never paid nor received any part of any consideration at all in respect of that transaction, nor in respect of the one which I am about to mention, and, to do the defendant justice, he himself was ready to admit that Harold Brown was nothing but a nominee for him, and that the defendant himself was the person who had contracted, and that, as between himself and Harold Brown, he was the person liable for the contract. The defendant says—and he is corroborated in this respect by his wife—that, when he entered into the contract to buy the house through Harold Brown, he was doing so on behalf of his wife. That is to say, according to his story, he had always intended, or had for some years intended, to make some sort of provision for his wife by way of settlement, and this house he intended to employ for that purpose, so that he and his wife could live in one of the flats in the house, when completed, and let the others, thus obtaining a revenue for the wife as well as a home for themselves rent free. That story is not corroborated in any way by any document, and it originates wholly from the defendant and his wife.

The next step in these transactions was this. On Feb. 16, 1938, a contract was entered into by the defendant and Harold Brown by which the defendant purported to buy and Harold Brown purported to sell the lease in question for the sum of £4,500. It will be noticed that Harold Brown was nothing but the nominee of the defendant, as the defendant himself admits. The transaction was, therefore, a purely bogus transaction. It was a fictitious transaction, and without any real substance at all. However, the contract was entered into for the purpose, as the

defendant said without any hesitation in the witness-box, of deceiving the bank, from which he proposed to obtain an advance on the security of the contract. The defendant said himself that, if the contract was a contract for £2,000, he would get only a small advance, whereas, if the contract appeared to be one for £4,500, he would be able to obtain a much more substantial advance from his bank. That may have been one of the defendant's motives, but, in my judgment, the true motive of this transaction was the hope that, by representing the property as having been purchased by him for £4,500, he would be able to sell it, if possible, to the plaintiff at a very handsome profit to himself. He did not pass on the particulars of this house to the plaintiff or her son until after the contract had been entered into with Harold Brown. The contract having been taken in Harold Brown's name at some time about, or possibly slightly before, Jan. 19, 1938, the defendant and his wife informed the plaintiff's son that they had purchased this house, and invited him and his wife to go and see it, which they did on more than one occasion. There is a dispute as to whether the first visit to the house was before or after the plaintiff herself returned to this country. It may well be that the plaintiff's son and his wife have made a mistake in this respect in their evidence, but I think that it is at least likely that the house was visited by them on some occasion or occasions before the plaintiff saw it herself. However that may be, on Jan. 19 the plaintiff returned to this country, and, together with the defendant and his wife and her son and her daughter-in-law, she went to the house and went all over it. The son and his wife were both extremely attracted by the house. They thought that it was exactly the sort of house which they wanted, and in that the plaintiff agreed. The son and his wife were anxious to acquire it, but the defendant told them that he had bought it for himself and his wife, and that his wife was not prepared to let it go. The effect of the difficulty which was put in their way by the defendant and his wife in purchasing the house no doubt made them only the more anxious to obtain it. They pressed the defendant to let them buy the house, and it was finally agreed that he would sell the house to them for the sum of £5,000. He told the plaintiff that the house had cost him £4,500, and that he was willing to part with it to the plaintiff at a sum of £5,000, which would give him £500 partly as profit and partly as remuneration for his services. He also said that in that case he would assist the plaintiff in preparing the necessary plans for the alteration of the house and in getting from the head landlord the licence required for making the alterations, and that he would do his best to obtain an extension of the lease for a term of 10 years. The result of that was that on Feb. 24, 1938, a contract was entered into between the defendant and the plaintiff by which the plaintiff agreed to buy and the defendant agreed to sell the house for a sum of £5,000. That contract having been entered into, and a deposit having been paid, the defendant proceeded to borrow from his bank on the security of that contract—that is, the contract between himself and

the plaintiff—a sum of £3,000, which would enable him to pay off the amount which was due to his vendors under the original contract of Jan. 10, and to have a certain amount of money over which he could apply to other purposes. He did in fact, on the security of that contract, acquire that money in that way. After the contract had been entered
A into, matters took the usual course. Solicitors were employed on each side, and there was apparently no difficulty about the matter. There was some question as to whether it would be possible to get the extension of the lease, but I do not think that it is necessary to travel through a somewhat voluminous correspondence which took place. It will be
B enough to say that ultimately the plaintiff discovered what the true facts of the position were. When she had discovered those facts, it was open to her to repudiate the contract on the ground of fraudulent misrepresentation. However, she did not take that course, nor was she bound to do so. What she did was to accept the bargain, but she claimed
C damages and an account of the profits which the defendant had made as a result of these transactions. I have now to determine whether the plaintiff is entitled to the relief she seeks in the circumstances.

It has been argued by counsel for the defendant, who has conducted this case with both moderation and ability, that the fact that the defendant told the plaintiff before the contract with the plaintiff was entered
D into that he himself was the vendor of the property was sufficient to determine the agency between himself and his client, and he cited authorities for that purpose. I cannot doubt that at any rate up to that time there did exist a relationship of principal and agent between the
E plaintiff and the defendant. No doubt the scope of that agency was limited. What the defendant had undertaken to do for the son of the plaintiff, who was no doubt acting on her behalf throughout, was to provide particulars of any houses of which he should hear which he thought might be suitable for the purpose which the plaintiff had in mind and which
F had been communicated to the defendant. He was an agent to that extent. Of course, he was not an agent for the purpose of signing any contract on the plaintiff's behalf, or doing more than assisting in the way which I have mentioned. That there was the relationship of principal and agent to that limited extent, however, I think is quite plain. No doubt it is true
G that, where there is a relationship of principal and agent, an agent may terminate that relationship by himself selling to his principal property which belongs to himself so long as the principal knows that the property does in fact belong to the agent, and that the agent is intending to sell his own property. However, in my judgment, that must be limited to
H the proposition that it is the duty of every agent to act honestly and faithfully to his principal, and, if the agent conceals most material facts from his principal, and by a fraud obtains an advantage for himself by purporting to sell, or by selling, property which is his own, then, in my judgment, the duty which lies upon him is not ended by such a contract, and he remains liable to account for any secret profit which he has made

as the result of his transactions between himself and the principal. In the present case, I cannot feel any doubt that the whole of these transactions between the plaintiff and the defendant and Harold Brown were in fact a contrivance for the purpose of enabling the defendant to obtain a handsome profit as the result of his dealing with the house, and in the hope—I think the very living lively hope—that the profit would be obtained from the plaintiff, who had, through her son, conveyed to him the information as to the nature of the house which she desired to buy, which knowledge the defendant was using for the purpose, or in the hope, of obtaining, as I have said, a handsome profit for himself. The position, it seems to me, was this. The defendant ought, I think, if he acted quite strictly, to have passed on the information about the The Red House directly to the plaintiff through her son, and ought to have given the plaintiff an opportunity of buying the house from the original vendors. I do not think, however, that the relationship of principal and agent between the parties necessarily precluded the defendant from entering into a contract to buy the house himself. Nevertheless, if he was proposing to resell it to the plaintiff, he was bound to give the plaintiff the fullest possible information both as to the true price which he had paid to the vendors for the house which he was selling and as to the amount which he wanted, showing the profit, if any, which he would require as the result of the sale. If the plaintiff, knowing all those facts, and fully acquainted with the whole of the true position, chose then to enter into a contract to buy the property from the defendant, even at a profit, I doubt if the defendant would have done anything for which he could be held legally liable. In my judgment, however, the moment the true transaction by which the defendant acquired this property was concealed from the plaintiff, and deliberately concealed by means of a fraud from the plaintiff, and the plaintiff was induced to buy the property by reason of that fraud, and in the honest belief that the defendant had paid £4,500 for the property, that was something the defendant was doing in direct breach of his duty as agent, and he cannot escape from the liability which results therefrom merely by saying: “At the time when I contracted to sell the property to the plaintiff, I myself was the owner of the property, and the plaintiff was aware of that situation, because I told her.” In my judgment, if that were permissible, and if an agent could escape from his liability by a trick of that sort, then it would leave the door open for many other gross frauds, and would be, in my view, directly contrary to the principle which is perfectly well established—namely, the necessity for an agent to act honestly and faithfully towards his principal.

In those circumstances, it follows that the plaintiff is entitled to the relief which she seeks. I do not think that it is necessary in this rather unhappy and sordid story to travel through it at any greater length. The facts as I find them in this case are in a very small compass, and in my judgment, the facts as I find them lead to the result, and to the only possible result, that the plaintiff is entitled to recover from the defendant

whatever profit the defendant made as a result of the dealings which he had in connection with this lease between himself and the plaintiff. What I propose to do in this case is to direct that an account be taken of all profit obtained by the defendant without the plaintiff's knowledge or consent in his capacity as agent for the plaintiff, and the defendant must pay the costs of the action.

Solicitors : *Evill & Coleman* (for the plaintiff); *Glover, Scott & Apthorpe-Webb* (for the defendant).

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. FRED'S SECURITIES CO.

[KING'S BENCH DIVISION (Lawrence, J.), May 8, 9, 1939.]

Income Tax—Undistributed income—Apportionment of income—"Interest corresponding to his interest in the assets of the company available for distribution among the members in the event of a winding up"—Method of apportionment of income to be adopted—Finance Act, 1937 (c. 54), s. 14 (3).

The capital of the respondent company was divided into 18 A ordinary shares of £100 each, of which 9 had been issued, 400 B ordinary shares of 10s. each, and 980 preference shares of £100 each. The holders of A and B ordinary shares were entitled to share equally in any dividend, and, on a winding up, to be repaid the nominal value of their shares *pari passu*, after which the B ordinary shares were entitled to be paid £400 per share, and then the preference shareholders were entitled to be paid the nominal amount of their shares. The company's income from investments for 1936-37 was £1,284, and the value of the assets was taken from the balance sheet to be £71,322. On this assumption, in a winding up, the A ordinary shareholders would have got £900 and the B ordinary shareholders the remainder, leaving nothing for the preference shareholders, the B shareholders' claims not being satisfied in full. The question arose as to the proper method of apportioning the income :—

Held : the words in the Finance Act, 1937, s. 14 (3)—"interest in the assets of the company available for distribution among the members in the event of a winding up"—clearly pointed to regard being had to all the assets which were in fact available for distribution at the time, and the income should be apportioned as to 900/71,322 of £1,284—namely, £17—to the A ordinary shareholders, and the balance to the B ordinary shareholders.

[EDITORIAL NOTE.] The problem of apportioning the income of a company among its members has now become a familiar one, and the present case turns upon the Finance Act, 1937, s. 14 (3), which provides that there must be attributed to each member "an interest corresponding to his interest in the assets of the company available for distribution among the members in the event of a winding up." It was held by the special commissioners that the income must be apportioned as if it were the sole asset distributable among the members by a liquidator, having due regard to the rights and priorities attaching to the various classes of shares. The court has found that this is not the result of sect. 14 (3), and that the proper method is a proportionate one, without reference to any priorities, since no such reference is made in the Act.

AS TO APPORTIONMENT OF INCOME OF COMPANIES, see HALSBURY, Hailsham Edn., Vol. 17, p. 295, paras. 583, 584; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 674r-674w.]

SPECIAL CASE STATED under the Finance Act, 1922, Sched. I, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The respondent company was an unlimited company incorporated on Oct. 22, 1936, and was admittedly an investment company within the meaning of the Finance Acts, 1936 and 1937. The nominal share capital of the company was £100,000, divided into 18 A ordinary shares of £100 each, 400 B ordinary shares of 10s. each and 980 half per cent. preference shares of £100 each. Under the articles of association, the preference shares conferred the right to a fixed preferential dividend of 10 per cent., and then the A and B ordinary shares were to rank *pari passu* for dividend. In a winding-up, the A and B ordinary shares were to rank *pari passu* for a return of capital up to the amount paid thereon and in priority to the preference shares, and, further, the B ordinary shares were entitled to a further payment up to £400 for each share, in so far as the assets sufficed, and in priority to any return of capital in respect of the preference shares, and, after the repayment of the capital paid up on the preference shares, were entitled to any surplus assets then remaining. The issued share capital and the shareholders of the company as at Apr. 5, 1937, were as follow :

Class of Shares	Registered Holder	Number held	Nominal value
A ordinary shares	Charles Trust, Ltd.	9	£900
B ordinary shares	F. C. Brown Clark	199	£100
	Mrs. E. A. F. Brown Clark ..	1	
Preference shares	F.C. B.C. Holdings, Ltd. ..	690	£69,000
			£70,000

The actual income received from investments of the company for the year of assessment 1936-37 was £1,284, and it was assumed that the value of the assets as at Apr. 5, 1937, available for distribution among the members in the event of a winding up was, as appeared from the company's balance sheet on June 30, 1937, £71,322. On this assumption, the distribution of the assets would have been, as to A ordinary shares, £900, and, as to B ordinary shares, £100 plus £80,000, making £81,000 in all, but, there being insufficient assets to satisfy the claims of the B ordinary shareholders in full, the distribution to them would be restricted to £70,422, and the preference shareholders would get nothing. In these circumstances, the special commissioners, in making an apportionment of the income of the company, had regard in particular to the Finance Act, 1937, s. 14 (3), which provides as follows :

Where a direction is given under the Finance Act, 1922, s. 21 (1), with respect

to an investment company, the special commissioners, in determining the respective interests of the members for the purpose of apportioning income in accordance therewith under Sched. I, para. 8, to that Act, may, if it seems proper to them so to do, attribute to each member an interest corresponding to his interest in the assets of the company available for distribution among the members in the event of a winding up.

A They then calculated that the interest of the A ordinary shareholders was 900/71,322 of £1,284—namely, £17—and that that of the B ordinary shareholders was the balance—namely, £1,267, divisible as to £1,260 13s. 4d. to Mr. Clark and as to £6 6s. 8d. to Mrs. Clark.

The respondent appealed against this apportionment, and contended,
B first, that the words of the subsection “an interest corresponding to” did not mean that such interest could be expressed as a proportion of the assets. A member was not entitled to a proportion of the assets, and, moreover, the proportionate basis could not be applied without ascertaining the true value of the net assets available for distribution
C among the members in the event of a winding up, which in all probability would materially differ from the value shown in the balance sheet at a particular date. Secondly, that the assets available for distribution amongst the members in the event of a winding up would be the balance of assets after making provision for liquidation expenses, and, in this
D case, providing for the sur-tax assessed on the company and the costs incidental to disputing and settling that liability. Until this liability was ascertained, it was not possible to make an apportionment on the basis adopted by the special commissioners who first apportioned the income, and, further, until the apportionment was made, it was not
E possible to ascertain the sur-tax liability, which would be a deduction from the assets available for distribution in the event of a winding up. Thirdly, that, in a case where the interest of one body of members was a priority, and a limited interest, if the words “an interest corresponding to” were to be construed as giving a proportionate interest in the whole
F of the assets, in the circumstances of this particular case the section was impossible of application. Fourthly, that, in the application of subsect. (3) the value of the assets is immaterial, the only relevant considerations being the respective rights of the shareholders in the event of a winding up and the amount of the income which has to be
G apportioned. Fifthly, the respondent contended that the income should therefore be apportioned as follows—namely, to the holders of A ordinary shares £900, to the holders of B ordinary shares, Mr. Brown Clark £382 2s., and Mrs. Brown Clark £1 18s.

The appellants contended that, for the purposes of subsect. (3), the
H interest of a member in the income must correspond to his interest in the assets, and that the basis which had been adopted by the special commissioners was the correct basis upon which to arrive at the apportionment.

The commissioners allowed the appeal of the respondents, and apportioned the income in accordance with their contentions.

The Attorney-General (Rt. Hon. Sir Donald Somervell, K.C.) and Reginald P. Hills for the appellants.

F. Heyworth Talbot for the respondents.

LAWRENCE, J. : This case involves a question upon the construction of the Finance Act, 1937, s. 14 (3), under which the special commissioners : A

Where a direction is given under the Finance Act, 1922, s. 21 (1), with respect to an investment company . . . in determining the respective interests of the members for the purpose of apportioning income in accordance therewith under Sched. I, para. 8, to that Act, may, if it seems proper to them so to do, attribute to each member an interest corresponding to his interest in the assets of the company available for distribution among the members in the event of a winding up. B

The special commissioners in the present case proceeded under that section to arrive at the interest of the shareholders in the respondent company by applying the proportion which their interest in the total assets available for distribution bore to the income which had to be apportioned. C

The respondent company is admittedly an investment company within the meaning of sect. 14 (3). Its capital was divided into 18 A ordinary shares of £100 each, 400 B ordinary shares of 10s. each, and 980 $\frac{1}{2}$ per cent. preference shares of £100 each. The A ordinary shares and the B ordinary shares were entitled to share equally in any dividend, D after a small dividend paid upon the preference shares. On a winding up, the A and B ordinary shares were entitled to be repaid the nominal value of their shares *pari passu*. Thereafter, the B ordinary shares were entitled to be paid £400 per share. After that distribution, the preference shareholders were entitled to be repaid the nominal amount E of their shares, and thereafter the B ordinary shares were entitled to any surplus assets remaining.

The income from the investments of the company for the year in question—namely, 1936-37—was £1,284. The value of the assets was assumed from the balance sheet, by the special commissioners who first F heard the case, to be £71,322, and no objection to that assumption was made at the hearing of the appeal. The special commissioners who first heard the case found that in such circumstances, on a winding up, the A ordinary shareholders would have got £900, and that the B ordinary shareholders would have got the remainder, but that, as there were G insufficient assets to satisfy the claims of the B shareholders, the preference shareholders would have got nothing. Accordingly, they apportioned the sum of £1,284 by applying a proportion of 900/71322 of £1,284, which made £17, and apportioned that sum to the A ordinary shareholders, the balance—namely, £1,267—to the B ordinary share- H holders, and nothing to the preference shareholders, the assets not being sufficient to cover the rights of the A ordinary shareholders and the B ordinary shareholders upon a winding up.

On appeal by the respondent company to the special commissioners, it was held that that method of apportioning the income was wrong,

and the judgment of the special commissioners on appeal was thus expressed :

A We are of opinion that, for the purposes of the Finance Act, 1937, s. 14 (3), the interest of each member " corresponding to his interest in the assets of the company available for distribution among the members in the event of a winding up " must be ascertained by apportioning the income as if it were the sole asset distributable among the members by a liquidator, having due regard to the rights and priorities attaching to the various classes of shares. We, therefore, allow the appeal and apportion the income as follows: A ordinary shares, £900; B ordinary shares, Mr. Brown Clark [a shareholder] £382 2s. and Mrs. Brown Clark £1 18s.

B In other words, the special commissioners' on appeal have divided up the amount of the income by attributing to the A ordinary shareholders and the B ordinary shareholders *pari passu* the nominal amount of their shareholding—namely, £900 and £100—and attributing to the B ordinary shareholders the remainder of the income—namely, £284.

C In support of the judgment of the special commissioners of appeal, counsel for the respondent contended that, though the words " corresponding to " may cover the proportionate method adopted by the special commissioners of first instance in certain cases, they do not authorise such a method in the circumstances of this case, where, on a winding up, the A ordinary shareholders were entitled to receive £900 out of the first £1,000 of assets. He contended that it was necessary for the commissioners, in carrying out the provisions of sect. 14 (3), always to follow the priorities which were laid down for the distribution of assets on a winding up. The result of his contention is that the interest in the income of the B ordinary shareholders which is said to correspond to their interest in the assets of the company available for distribution does not in reality correspond at all, because, whereas the A shareholders' interest in the assets available for distribution on winding up was £900 out of some £70,000 odd, and the B shareholders' interest was £70,000 less £900, yet the method adopted and contended for by the respondent results in the income being apportioned to the A shareholders as to £900 and to the B shareholders as to £382.

F In my opinion, such a result ought not to be reached, if the words of the section do not compel such a construction. In my opinion, the words " corresponding to " are apt to describe the proportionate method which was adopted by the commissioners of first instance. By using that proportionate method, the commissioners have arrived at an interest of the various shareholders in the income which does in fact correspond to their interest in the assets of the company available for distribution on a winding up, whereas the method adopted by the special commissioners on appeal disregards altogether the interest of the B shareholders in the whole of the assets available for distribution on a winding up, with the exception of the first £1,284 of those assets.

H The section does not in terms refer to priorities, or to the order in which the assets may be available for distribution in the winding up. In my opinion, the words

interest in the assets of the company available for distribution . . . in the event of a winding up

clearly point to regard being had by the commissioners to all the assets which are in fact available for distribution at the time. I think that the method adopted by the special commissioners of first instance does no violence to the wording of the section, and achieves the result which the section appears to contemplate, whereas the method adopted by the commissioners on appeal does not appear to me to achieve that result, and has only been arrived at by disregard of all the assets available for distribution except the amount of the income for the year. For these reasons, I am of opinion that the appeal ought to be allowed with costs.

Appeal allowed with costs, and apportionments confirmed.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Richard Furber & Son* (for the respondents).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

TWICKENHAM CORPORATION v. SOLOSIGNS, LTD.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Lewis, J.J.), May 15, 1939.]

Public Health—Advertisements—Regulation—Amenities of public park—Validity of bye-law—Advertisements Regulation Act, 1907 (c. 27), s. 2 (2).

The respondents exhibited on a flank wall of certain premises three advertisements, of which only one related to the trade or business carried on upon those premises. The premises were within 50 yds. of a public park, and the advertisements were visible from that park. The local authority, acting under powers granted to them by the Advertisements Regulation Act, 1907, s. 2, had passed a bye-law providing that advertisements should not be exhibited within 50 yds. of specified public parks so as to be visible from them unless such advertisements related to the trade or business carried on upon the premises:—

HELD: the bye-law was *intra vires* the local authority, although it did not contain any provision requiring that the amenities of the neighbourhood had to be injuriously affected in order to constitute an offence thereunder.

[EDITORIAL NOTE.] The objection to the bye-law in this case was that it did not make reference to the injurious affection of the amenities of the public park, a matter which is specifically referred to in the Act under which the bye-law was made. On this point, LEWIS, J., has felt difficulty in coming to the same view as that of the other judges, but, having regard to their views, he has not felt justified in dissenting.

AS TO BYE-LAWS RESTRICTING ADVERTISEMENTS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 518-521, paras. 1099-1105; and FOR CASES, see DIGEST, Vol. 38, p. 178, Nos. 201-204.]

Cases referred to:

- (1) *Kruse v. Johnson*, [1898] 2 Q.B. 91; 13 Digest 326, 631; 67 L.J.Q.B. 782; 78 L.T. 647.
- (2) *Bailey v. Williamson* (1873), L.R. 8 Q.B. 118; 36 Digest 252, 43; 42 L.J.M.C. 49; 28 L.T. 28.

APPEAL by way of case stated from the decision of a court of summary jurisdiction at Brentford. An information was preferred on behalf of the appellant corporation, under the bye-laws made by them under the Advertisements Regulation Acts, 1907 and 1925, against the respondent company, charging them with having exhibited between
A July 25, 1938, and Dec. 7, 1938, an advertisement within a distance of 50 yds. from a public park known as The Green, Twickenham, so as to be visible from that park, contrary to bye-law No. 9.

The bye-laws, which were confirmed by the Secretary of State on June 13, 1933, stated that they were made :

B . . . for regulating, restricting, or preventing the exhibition of advertisements in such places and in such manner or by such means as to affect injuriously the amenities of a public park or pleasure promenade.

By bye-law No. 9, it was provided as follows :

C No person shall exhibit any advertisement within a distance of 50 yds. from any public park or pleasure promenade specified in the first schedule to these bye-laws so as to be visible from such park or promenade.

The public parks and pleasure promenades specified in the first schedule to the bye-laws included The Green, Twickenham. Then, by bye-law No. 13, it was provided as follows :

D Bye-laws 9, 11 and 12 shall not apply to advertisements in the window of a shop or house, or to any advertisement relating to the trade or business carried on . . . upon or in relation to the building or ground in or upon which such advertisement is exhibited or to any property therein . . .

The Advertisements Regulation Act, 1907, s. 2, provides as follows :

E Any local authority may make bye-laws . . . (2) for regulating, restricting, or preventing the exhibition of advertisements in such places and in such manner, or by such means, as to affect injuriously the amenities of a public park or pleasure promenade, or to disfigure the natural beauty of a landscape . . .

The following facts were proved or admitted at the hearing of the information. Between July 25, 1938, and Dec. 7, 1938, the respondents
F exhibited an advertisement on the flank wall of premises known as 88, The Green. Three different posters had been exhibited between those dates, relating respectively to the DAILY MAIL, a cinematograph entertainment, and Oxo. The advertisement was within 50 yds. of The Green, and was visible from it. One of the things advertised—
G namely, Oxo—was sold in a grocer's shop situated in the building on which the advertisement was exhibited.

On behalf of the respondents, it was contended that bye-law No. 9 was invalid because it failed to give effect to the provisions of the Advertisements Regulation Act, 1907, s. 2 (2), and was *ultra vires*,
H that it was inequitable in that the distance of 50 yds. therein specified was arbitrary, and that the advertisement was within the exception to bye-law No. 9 contained in bye-law No. 13.

On behalf of the appellants, it was contended that the bye-law was *intra vires*, and that the exception to bye-law No. 9 contained in bye-law No. 13 was inapplicable in the circumstances of the case. The justices

considered that bye-law No. 9 was *ultra vires*, and they dismissed the information.

The corporation appealed.

Erskine Simes for the appellants.

A. M. Lyons, K.C., and *John Davidson* for the respondents.

LORD HEWART, L.C.J. : The question for decision here is as to the right view for us to take of the determination at which the justices arrived on the validity of bye-law No. 9. I have come to the conclusion, not without careful consideration of the controversy, that the particular bye-law is, as was contended by counsel for the appellants, *intra vires*. I quite recognise that there is much to be said on the other side. The authority on this class of case, which has been recognised for a long time, is *Kruse v. Johnson* (1), the headnote of which summarises the pith of the judgments :

In determining the validity of bye-laws made by public representative bodies, such as county councils, the court ought to be slow to hold that a bye-law is void for unreasonableness. A bye-law so made ought to be supported unless it is manifestly partial and unequal in its operation between different classes, or unjust, or made in bad faith, or clearly involving an unjustifiable interference with the liberty of those subject to it.

In that case, LORD RUSSELL OF KILLOWEN, L.C.J., began by distinguishing the kind of case with which the court was then dealing from the kind of case with which the court frequently had to deal, and said, at pp. 98-99 :

I have thought it well to deal with these points in some detail, and for this reason— that the great majority of the cases in which the question of bye-laws has been discussed are not cases of bye-laws of bodies of a public representative character entrusted by Parliament with delegated authority, but are for the most part cases of railway companies, dock companies, or other like companies, which carry on their business for their own profit, although incidentally for the advantage of the public. In this class of case it is right that the courts should jealously watch the exercise of these powers, and guard against their unnecessary or unreasonable exercise to the public disadvantage. But, when the court is called upon to consider the bye-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, “benevolently” interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction. But, further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them, and in the manner which to them shall seem meet, I think courts of justice ought to be slow to condemn as invalid any bye-law, so made under such conditions, on the ground of supposed unreasonableness. Notwithstanding what COCKBURN, C.J., said in *Bailey v. Williamson* (2), at p. 124, an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the court to condemn bye-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, “Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.”

It seems to me that considerations of that kind are applicable to the present case. Here the corporation have made the bye-law for the supposed benefit of the public making use of a public place within the jurisdiction of the corporation. It is the kind of bye-law which ought to be regarded in the light of those observations of LORD RUSSELL OF

A KILLOWEN, L.C.J., which I have quoted.

It was said, *per contra*, that it cannot be right to make a universal rule affecting every sort of advertisement exhibited within a distance of 50 yds. from a park and in such a position as to be visible from that park, and that there cannot be any magic in the precise distance of

B 50 yds. It was said, too, that some advertisements so exhibited may offend some far-fetched notions of æsthetic propriety, but may really be essentially harmless. It was said, further, that this bye-law involves at least the possibility of an unfair discrimination between the advertisement exhibited by one man and that exhibited by another. The

C section in question begins by giving power to make bye-laws for the regulation and control of hoardings and similar structures used for the purpose of advertisement when they exceed 12 ft. in height. Part of the ingenious argument to which we have listened was devoted to the

D precise distance of 50 yds. and its applicability, *mutatis mutandis*, to the provision that a structure is not to exceed 12 ft. in height. The question at once leaps to the mind, why the figure of 12 ft. ? Why not 13 ft., or

11 ft., or any number of feet which the section might have selected as suitable ? It is after those provisions about the regulation and control of hoardings that the section goes on to provide that any local authority

E may make bye-laws for regulating, restricting, or preventing the exhibition of advertisements in such places, and in such manner, or by such means, as to affect injuriously the amenities of a public park or pleasure promenade, or to disfigure the natural beauty of a landscape.

The real *gravamen* of the argument on the part of the respondents was

F that the bye-law in question omitted to provide that, in order that an offence should be committed, there had to be in fact injurious affection. I cannot help thinking that that is a real mistake. The section provides for a class of conspicuous advertisements, which may be regulated,

G restricted, or prevented if they are exhibited in such places and in such manner as to affect injuriously the amenities of a public park or pleasure promenade. It seems to me that it would be putting on the local authority an almost intolerable burden if it were necessary to prove in each particular case that a particular advertisement did affect injuriously the amenities of a public park.

H It is quite obvious that the bye-law, following the wording of this section, might have been so framed as to give to justices the power, and therefore the duty, to decide with reference to a particular advertisement whether or not it came within the mischief sought to be prevented by the Act. That would have been one method. Another method would have been to empower the local authority to make a bye-law of

general scope which would permit the exhibition of advertisements in fact injuriously affecting the amenities of a public park so long as they were more than 50 yds. distant from the public park. On the other hand, a bye-law might have been made providing that any person who exhibited an advertisement in such a place or in such a manner or by such means as to affect the amenities of a public park would commit an offence. A
 The question for this court, however, is not whether or not a bye-law so framed—or, indeed, any other bye-law framed in any other way—might have been as good as, or better than, the present one, but whether or not the absence of words providing that there must be injurious affection renders the bye-law invalid as being *ultra vires*. There is something B
 to be said for both methods. Where, in pursuance of this Act, a local authority has made a bye-law in the terms of the present bye-law, I do not think that we ought to be astute to find possible difficulties or grievances to which the administration of that bye-law might give rise. I am far from suggesting that the case is an obvious case, but, regard C
 being had to the powers and duties of the local authority, and to their special knowledge and means of knowledge, I think that the bye-law ought to be supported. I think, therefore, that the appeal ought to be allowed.

HUMPHREYS, J. : I am of the same opinion. So far as the argument based on the exemptions in bye-law No. 13 is concerned, I have nothing to add to what has been said by my Lord. With regard to the main point, I desire to add a few words of my own. I read sect. 2 (2) of the Act of 1907 as authorising a local authority to make bye-laws regulating, restrict- E
 ing, or preventing the exhibition of such advertisements as, by reason of the place, the manner, or the means of their exhibition, can be said to affect injuriously the amenities of a public park or pleasure promenade. In my view, no discrimination is permitted as to the nature or class of advertisement. It is with regard to the place and manner of the exhibi- F
 tion, or the means by which the exhibition is effected, that the bye-law may regulate, restrict, or prevent such exhibition. No doubt the bye-law must be confined to such exhibition as would affect injuriously the amenities of a public park. I think that the local authority who framed this bye-law must be assumed so to have intended. G

The question in this case, as it appears to me, is whether or not the local authority are entitled to form—and, having formed, the view that the exhibition of any advertisement in a place in close proximity to, and visible from, a named public park will affect injuriously the amenities of that public park. If so, the bye-law is *intra vires* the H
 local authority. The addition to the bye-law, as suggested in the argument of counsel for the respondents, of the words “so as to affect injuriously the amenities of a public park” would leave the question of injurious affection to be decided in each case by a court of summary jurisdiction. This might well lead to divergence of views among different

benches of magistrates with regard to the exhibition of advertisements in the same place, since the question of injurious affection is not so much a matter of law, or even of fact, as a matter of taste and opinion. Bye-law No. 9 might have been framed with the addition of those words, but, in my opinion, a bye-law so framed would have been ineffective for the purpose for which it was intended. I adopt the language of LORD RUSSELL OF KILLOWEN, L.C.J., in *Kruse v. Johnson* (1), at p. 100 :

Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.

And, I would add, better than magistrates.

I think that it must be admitted that we are bound to treat this bye-law as good until the contrary is shown. So much follows from the language of sect. 3 of the Act, which provides as follows :

(1) A bye-law made under this Act shall not have any effect until confirmed by the Secretary of State, and shall not be so confirmed until at least 30 days after the local authority have published it in such manner as the Secretary of State may by general or special order direct. (2) The Secretary of State shall, before confirming any bye-law, consider any objections to it which may be addressed to him by persons affected or likely to be affected thereby. (3) The Secretary of State may, before confirming any bye-law, order that a local inquiry be held with respect to the bye-law or with respect to any objections thereto.

This bye-law has in fact been approved and confirmed by the Secretary of State, and the onus is clearly on those who assert that such a bye-law is invalid because *ultra vires*. I find nothing in the Act of Parliament restricting the generality of the powers given to a local authority to prevent the exhibition of advertisements in places where their exhibition may injuriously affect the amenities of a public park, and I see no reason why a local authority may not determine where in its borough such places are to be found.

I do not myself think that there is anything in this construction which is at variance with the doctrine enunciated by MATHEW, J., in his dissenting judgment in *Kruse v. Johnson* (1), the test, according to him, being whether or not the bye-law is reasonable and certain. It seems to me that this bye-law is reasonable and certain. Nor can this bye-law be said to be at variance with the doctrine which is to be found in the judgment of LORD RUSSELL OF KILLOWEN, who, by way of tests to be applied to bye-laws in order to ascertain their validity or otherwise, observed that a bye-law must not be partial, or unequal, or manifestly unjust, or involve such oppressive or gratuitous interference with the rights of those subject to it as could find no justification in the minds of reasonable men. I therefore agree with the decision proposed by my Lord.

LEWIS, J. : I have felt considerable doubt in this case, and I was impressed by an argument, which seems to me to be attractive, that power is given to a local authority only to make bye-laws dealing with

the exhibition of a certain class of advertisements—namely, those advertisements the exhibition of which in certain places and in a certain manner and by certain means do injuriously affect the amenities of a public park or pleasure promenade. It was said that sect. 2 of the Act of 1907 gives no power to the authority to make bye-laws with regard to advertisements which, in certain places, and in a certain manner, and by certain means, do not injuriously affect such amenities. The bye-law here in question sweepingly condemns the exhibition of all advertisements in a certain place—that is to say, within 50 yds. of certain public parks, if visible therefrom, even if they do not affect injuriously the amenities of those parks. Unless every advertisement exhibited within the prescribed distance and visible from a park can be said to affect injuriously the amenities of that park, the bye-law in question deals with advertisements exhibited within that radius and visible from the park, whether or not they affect injuriously the amenities of the park. A B

For my own part, I can conceive that there might be exhibited an advertisement which would not affect injuriously the amenities of a park, but, indeed, might well enhance them. Unless this conception is an impossible one, it may be said that the bye-law legislates for the exhibition of advertisements which do not fall within the category of advertisements in respect of the exhibition of which the authority is empowered to legislate. Unless power is given by the section for the local authority to say that all advertisements exhibited within 50 yds. of a park, and visible therefrom, do injuriously affect the amenities, without considering their character, or whether or not they are artistic or harmless, it may be said that bye-law No. 9 is *ultra vires*. I have found great difficulty in construing the section as giving such powers to the local authority unless an extremely benevolent view is taken. It is to be observed that that burden is certainly placed on justices, or a similar body, by bye-law No. 11, which deals with advertisements which disfigure the natural beauty of the landscape. On an allegation of a breach of that bye-law, I conceive that the prosecution would have to prove that the advertisement did in fact disfigure the natural beauty of the landscape, and the matter would have to be decided by the justices. However, having regard to the views expressed by the two other members of this court, I do not feel justified in dissenting, and I therefore do not dissent from the conclusion at which they have arrived. C D E F G

Appeal allowed.

Solicitors: *E. G. Stray*, Town Clerk, Twickenham (for the appellants); *Hall, Brydon & Chapman* (for the respondents). H

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

MULHOLLAND & TEDD, LTD. v. BAKER.

[KING'S BENCH DIVISION (Asquith, J.), May 19, 22, 1939.]

Negligence—Fire—Accidental fire—Escape of fire to adjoining premises—Principle in Rylands v. Fletcher—Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 86.

A The plaintiffs and the defendant occupied adjoining shops. The defendant was informed that a rat had been seen in the yard of his premises, and that it had taken refuge in a drainpipe. In attempting to catch this rat, the defendant collected some sheets of newspaper, lit them, and placed them at the end of, or inside, the pipe. A portion of burning paper fell to the ground, and ignited combustible material. B The flame quickly spread to a packing-case impregnated with paraffin which burnt fiercely. Inside or near this packing-case were an empty paraffin drum and a full drum containing 20 gallons of paraffin, both of which exploded. By the force of the explosion, the full 20-gallon drum was thrown on to the iron stairs of the plaintiffs' premises, and damage was caused to the plaintiffs' stocks of shoes by the heat, smoke and water resulting from the fire and from the efforts made to extinguish it:—

C HELD: the plaintiffs were entitled to recover damages from the defendant, because the fire was caused by his negligence. The principle in *Rylands v. Fletcher* (1) applied, and extended to liability for consequences of the escape of the water used to put out the fire and the heat and smoke from that fire.

D [EDITORIAL NOTE. Where a fire is the result of an act of the occupier of premises, a plaintiff must show that that act was negligent in order to recover in respect of any damage resulting from the fire. That is the result of the provisions of the Fires Prevention (Metropolis) Act, 1774, s. 86, and the cases decided upon it. It being decided that the fire in the present case was not an accidental one within the meaning of those provisions, it was not really material to consider whether the principle of *Rylands v. Fletcher* (1) applied, but it is held, following *Musgrove v. Pandelis* (2), that the principle is applicable to a case of this kind. E

AS TO NEGLIGENCE IN REGARD TO FIRE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 624-627, paras. 875-881; and FOR CASES, see DIGEST, Vol. 36, pp. 53-55, Nos. 333-340.]

F Cases referred to:

- (1) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, 311; 37 L.J. Ex. 161; 19 L.T. 220; *affg.* (1866), L.R. 1 Exch. 265; *revsg.* (1865), 3 H. & C. 774.
- (2) *Musgrove v. Pandelis*, [1919] 2 K.B. 43; 36 Digest 193, 343; 88 L.J.K.B. 915; 120 L.T. 601.
- G (3) *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co.*, [1921] 2 A.C. 465; 36 Digest 192, 332; 90 L.J.K.B. 1252; 126 L.T. 70; *affg.*, [1920] 2 K.B. 487.

H ACTION for damages for loss of, and injury to, the plaintiff company's property caused by fire, smoke and water resulting from the alleged negligence of the defendant. The facts are fully set out in the judgment.

J. F. F. Platts Mills for the plaintiffs.

A. D. Russell-Clarke for the defendant.

Platts Mills: The Fires Prevention (Metropolis) Act, 1774, does not apply, as the fire here was due to the defendant's negligence. Further, the statute does not apply for the reason that the explosion of the

paraffin and the escape of burning paraffin and products of combustion constituted the escape of a substance likely to do harm within the rule of *Rylands v. Fletcher* (1). In *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co.* (3), at pp. 499, 500, LORD STERNDALÉ, M.R., said that, under the principle of *Rylands v. Fletcher* (1), a person who brings dangerous substances upon premises and carries on a dangerous trade with them is liable if, though without negligence on his part, those substances cause injury to persons or property in their neighbourhood. SCRUTTON, L.J., sitting as an additional judge in the court below, in the *Belvedere Fish Guano Co.* case (3), said that, under the decision in *Rylands v. Fletcher* (1), the persons responsible for the presence and use of these dangerous ingredients must keep them in at their peril, and were liable if, though without negligence of their own, these substances escaped and did damage. It follows that the *Belvedere Fish Guano Co.* case (3) is an authority for stating that the strict rule of liability in *Rylands v. Fletcher* (1) is not limited to the escape of the substance, but extends also to the consequences of the escape.

Russell-Clarke : The *ratio decidendi* in the *Belvedere Fish Guano Co.* case (3) was that DNP was proved to be an explosive at high temperatures. Here it has not been proved that paraffin vapour is explosive. The drums may have burst owing to the expansion of vapour inside them, due to rise of temperature. There was no negligence here, as (i) the space was an open space, (ii) the floor and the adjacent wall were not inflammable, (iii) the packing-case was about 3 ft. away, and (iv) the dirt which was the real cause of the accident was not visible to the defendant. Paraffin is not a dangerous substance within the meaning of *Rylands v. Fletcher* (1). It is not inflammable till heated up to vaporising temperature, nor is its vapour highly explosive like that of petrol, which was the substance causing the damage in *Musgrove v. Pandelis* (2).

ASQUITH, J. : The plaintiffs claim from the defendant damages for injury to their premises caused by a fire which originated on the premises of the defendant. The plaintiffs are a limited company occupying a shop for the sale of boots and shoes at No. 110, High Street, Ruislip. The defendant occupies the adjoining shop, No. 112, High Street. Nos. 110 and 112 are similar in structure, and it will be sufficient to describe the structure of No. 112. The front of this shop faces east. Anyone entering it and passing through it to the back would find himself in a small enclosed yard. On his left hand, he would see a wall which bounds the yard to the south. Down this brick wall at the time of the fire there passed a drainpipe or gully. This pipe's open lower end was about 3 ins. from the stone floor of the yard. A person facing this pipe and looking to his right—that is, to the west—would see, just under 3 ft. away, a wooden packing-case, and, resting on it, a drum which had contained paraffin but was then empty. To the north and west of the yard I have mentioned, is a larger yard at a higher level, divided from

the smaller yard by a retaining wall, and accessible from it by three or four stone steps. Resting on the floor of this larger yard and its containing wall, immediately to the north of the empty drum I have mentioned was a second drum, which contained 20 gallons of paraffin.

A The fire originated in the small yard on Apr. 28, 1938 in the following circumstances. The defendant was told that a rat had been seen in the
B backyard and had taken refuge in the drainpipe I have mentioned. The defendant, being minded to destroy it, took some sheets of newspaper, thrust them up the lower open end of the pipe, and lit them. He may have lit them before doing so, but, in my view, it does not much
C matter whether he lit them before or after. The flame from the burning paper was communicated by some medium or agency, the nature of which is in dispute, to the packing-case less than 3 ft. away. The packing-case instantly caught fire, and burnt so fiercely that 5 buckets of water poured on it by the defendant, or by his orders, failed to affect it in the slightest
D degree. The empty drum (possibly containing some paraffin vapour) then exploded and knocked the defendant down. He went to telephone for the fire brigade. While he was so engaged, the second drum, containing the 20 gallons, burst, and was flung with its contents on to a landing on an iron staircase on the outside of the plaintiffs' premises. So great was
E the heat created that this staircase was in parts twisted, and the fire brigade had to spend much time cooling it before they could do anything effective. A wooden fence between No. 112 and No. 110 also burnt fiercely. Fumes, heat, smoke and water invaded No. 110, and, as is alleged by the plaintiffs, caused the damage to their stocks of shoes for which they claim in this action.

The plaintiffs put their claim originally on three alternative bases, (i) on the basis that the defendant negligently permitted fire to escape on to his premises, (ii) on the basis of nuisance, or (iii) on the basis of the rule in *Rylands v. Fletcher* (1). During the hearing, counsel for the
F plaintiffs abandoned the second ground and relied only on the first and third. As to the first ground, at common law the liability for injury done to a neighbour by fire escaping from one's own premises was a strict liability, independent of negligence. However, by reason of the Fires Prevention (Metropolis) Act, 1774, which exempts the defendant
G in the case of a fire beginning on his premises "accidentally" (a term which has been construed to mean "without negligence"), a plaintiff must now establish negligence. According to one view, if a fire has been lit intentionally, it is not an accidental fire, and is therefore not
H within the protection of the Act, but the duty of the householder is such that he must keep it from doing damage at his peril. I find that the fire which originated on the defendant's premises did not begin "accidentally" within the meaning of the Fires Prevention (Metropolis) Act, 1774, but was due to a negligent act on his part. When he ignited the paper, the packing-case on which stood the empty paraffin tank or drum was within 2 ft. 9 in. of that paper. This packing-

case was quite obviously impregnated with paraffin from drippings from the tap of the drum when paraffin had been drawn from it. The defendant admitted that inevitably there must have been such drippings. The packing-case was an intensely inflammable object, far more so than paraffin in its liquid form would be. The defendant knew, or ought to have known, of its condition when he lit the paper. As soon as he did so, a flame ran along the ground and ignited the packing-case. According to the witness Heath, the communicating medium between the two—the train of inflammable matter—was described to him by the defendant the day after the accident as being, or including, cotton waste. According to the defendant, it was inconspicuous and indeterminate refuse. However, to make the flame run 2 ft. 9 ins. in this way, it is highly probable that the substance, whatever it was, was itself soaked in paraffin seeping from the impregnated packing-case. Some such conclusion seems to me irresistible. Even if it were otherwise, however, there was something between the burning paper and the case which in fact enabled the flame so to spread, and this something must have been visible on careful inspection. A B C

The standard of care incumbent on a person lighting something within 3 ft. of an intensely combustible object such as this packing-case is high, and was not, I feel satisfied, complied with by the defendant here. If I am right, it follows that the plaintiffs are entitled to judgment for damages, the amount of which I shall consider later. D

If I am wrong in finding that the fire was caused by the negligence of the defendant, I still think that the plaintiffs are in this case entitled to succeed on the principle of *Rylands v. Fletcher* (1). The Fires Prevention (Metropolis) Act, 1774, which in effect provides that negligence is a condition of liability in the case of a fire spreading from a defendant's premises to a plaintiff's, has been held not to apply in cases in which the defendant has brought on his premises an object likely to do damage if it is not kept under control and that object catches fire or causes a fire: *Musgrove v. Pandelis* (2). In that case, it was held that a motor car containing petrol and ready to start was such an object. Fire originated somehow in the carburettor, without negligence, and spread to a whole garage, including the part occupied by the plaintiff, who sued and recovered. Paraffin is no doubt considerably less inflammable than petrol, yet it seems to me that 20 gallons of paraffin collected in a drum on the defendant's premises constituted a thing likely to do damage unless kept under proper control, and that the rule of strict liability laid down in *Rylands v. Fletcher* (1) applies. The analogy of *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co.* (3) seems to me to lead to the same result if the 20-gallon drum be held to have exploded owing to the fire and to have caused the damage by so exploding. E F G H

As to the damage, an assessor called for the plaintiffs estimated it at 15 per cent. of the value (taken at cost price) of the stock of boots and shoes on the plaintiffs' premises. This was arrived at by a sample method,

which seems to me sufficiently fair. Indeed, it is not easy to think of a practicable alternative. The figure so arrived at was £212 4s. 8d., and I give judgment for this sum with costs.

Judgment for the plaintiffs for £212 4s. 8d. with costs.

Solicitors: *Chamberlain & Co.* (for the plaintiffs); *David Wade & Co.*, Agents for *F. W. Brown*, Ruislip (for the defendant).

[Reported by CHARLES NEWTON, Esq., Barrister-at-Law.]

CROMWELL PROPERTY INVESTMENT CO., LTD. v. HUCKS.

B [COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), June 6, 1939.]

Practice—Costs—Disallowing costs of successful plaintiff—Writ issued without previous application five days after rent due—Costs awarded to defendant—R.S.C., Ord. 65, r. 1—R.S.C., Ord. 70, r. 1.

C The appellants were the landlords of the respondent. On Mar. 31, without previous application for the rent which fell due in advance on Mar. 25, they issued a specially indorsed writ in respect thereof, claiming the rent and £5 costs. On Apr. 13, the respondent, who had entered an appearance, tendered to the appellants' solicitors a sum equal to the amount of the rent. This they refused to accept unless the costs were paid at the same time, but later they accepted that sum generally on account. Upon the summons before the master, the master disallowed the appellants' costs of the writ, and ordered them to pay to the respondent her costs of the summons and the costs of entering an appearance, on the ground that the proceedings were vexatious, an abuse of the process of the court, and an unnecessary incurring of costs :—

D
E HELD: the master had jurisdiction to make the order, and, if he had no jurisdiction, the order was one which the court should uphold under R.S.C., Ord. 70, r. 1.

[EDITORIAL NOTE. The facts of this case show that the plaintiffs had proceeded to an action without previous application to the defendants for the rent, and within a few days of its becoming due. Further, the rent had been reserved as payable in advance. In these circumstances, the Court of Appeal have upheld an order which not only deprived the successful plaintiffs of their costs, but also gave the defendant her costs.

F AS TO DEPRIVING SUCCESSFUL PLAINTIFF OF HIS COSTS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 97, 98, paras. 182-185; and FOR CASES, see DIGEST, Practice, pp. 854-860, Nos. 3995-4046.]

G APPEAL by the plaintiffs from an order of ASQUITH, J., affirming an order of Master BAKER disallowing the plaintiffs' costs of a specially indorsed writ claiming one quarter's rent and costs. The plaintiffs were the landlords of the defendant, having recently purchased the reversion upon her lease. Before Mar., 1939, the defendant had always received from the previous landlord notice of her rent becoming due, and had been allowed some 21 days in which to make payment. The rent was payable in advance, and the defendant was a substantial person, well able to pay the rent. On Mar. 31, 1939, the appellants, not having made any previous application to the defendant for the rent which had accrued due in advance on Mar. 25, 1939, issued a specially indorsed writ

for the amount of that rent and £5 costs. The defendant entered an appearance, and later tendered to the appellants' solicitors the amount of the rent, but nothing in respect of costs. After first refusing this tender, the appellants' solicitors later accepted the amount tendered generally on account, and proceeded with the usual summons before the master for the costs. Upon the facts being placed before the master in an affidavit by the defendant, he disallowed the plaintiffs their costs of the writ, and gave the defendant her costs of the summons and of entering an appearance. He made this order on the ground that the proceedings were vexatious, an abuse of the process of the court, and an unnecessary incurring of costs.

The plaintiffs appealed to the judge in chambers, who affirmed the order of the master. The plaintiffs then brought this appeal to the Court of Appeal.

H. J. Astell Burt for the appellants.

R. A. L. Hillard for the respondent.

Astell Burt : The question is whether or not the master has jurisdiction to make the order. R.S.C., Ord. 65, expressly gives the court discretion as to costs, but subject only to the provisions of the other rules and orders. By R.S.C., Ord. 27, r. 2, the plaintiffs were in a position to enter final judgment for the amount claimed and costs. The plaintiffs' solicitors were entitled to refuse to accept the tender of the rent without the costs. The master had no jurisdiction to deprive the plaintiffs of the costs of the writ which the order expressly gave them.

Hillard was not called upon.

SCOTT, L.J. [His Lordship referred to the facts and the steps in the proceedings from the issue of the writ to the orders of the master]: Counsel for the appellants has relied upon a contention based upon R.S.C., Ord. 65, r. 1. That rule provides as follows :

Subject to the provisions of the Act and these rules, the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the court or judge . . .

The contention is that the words "subject to . . . these rules" restrict the exercise of the discretion of the court in cases where the rules say that judgment is to be given with costs. Particular reference is made to R.S.C., Ord. 27, r. 2, which provides as follows :

If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, deliver a defence, the plaintiff, subject as provided by r. 17 of this order, may, at the expiration of such time, enter final judgment for the amount claimed, with costs.

Counsel for the appellants submitted that this rule must be read as giving the plaintiff an absolute right to the costs in such a case, and that the effect of that order was in this case to prevent the master from having any jurisdiction to disallow the plaintiffs' costs in the circumstances. CLAUSON, L.J., has pointed out that that argument is in conflict with

the spirit of the rules as illustrated by R.S.C., Ord. 27, r. 15, which provides that judgment by default may be set aside upon such terms as to costs or otherwise as a judge may think fit, and, where an action has been set down on motion for judgment, it may be dealt with in the same way. Had the defendant postponed her application until the plaintiffs entered judgment, there would have been no question that the master would have had jurisdiction under R.S.C., Ord. 27, r. 15, to set aside that judgment. That being so, even if the master may have short-circuited the procedure, the matter comes within R.S.C., Ord. 70, r. 1, which provides as follows :

Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit.

Reading the rules as a whole, it is open to us in this court to say that we will treat the order, not as one made without jurisdiction, but as one with which we can deal under R.S.C., Ord. 27, r. 15, and R.S.C., Ord. 70, r. 1. The appeal must be dismissed with costs.

CLAUSON, L.J. : I agree. If the case had proceeded to trial, an order as to costs to the same effect could undoubtedly have been made.

GODDARD, L.J. : I agree. For my part, however, I see nothing in R.S.C., Ord. 27, r. 2, which can prevent the master from making the order which he did.

Appeal dismissed with costs.

Solicitors: *Wedlake, Letts & Birds* (for the appellants); *S. F. Miller, Mathews & Co.* (for the respondent).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

BOMFORD v. OSBORNE.

[KING'S BENCH DIVISION (Lawrence, J.), May 19, 22, 26, 1939.]

Income Tax—Schedule B—Nurseries and market gardens—Mixed farm—Apportionment of assessment—Income Tax Act, 1918 (c. 40), Sched. B, r. 8.

Where a farm is worked as a mixed farm, but as one unit, the commissioners can apportion the assessment, assessing one part of the land as a farm and the other part as nurseries or gardens for the sale of produce under the Income Tax Act, 1918, Sched. B, r. 8.

[EDITORIAL NOTE.] On the point here considered, there was a dictum by FINLAY, J. (as he then was), in *Dennis v. Hick* (1), and a decision of the Court of Session in Scotland in *Lowe v. Inland Revenue Comrs.* (2). LAWRENCE, J., while saying that he preferred the dictum of FINLAY, J., has felt bound to follow the decision of the Scottish court.

AS TO NURSERIES AND MARKET GARDENS, see HALSBURY, Hailsham Edn., Vol. 17, p. 72, para. 145; and FOR CASES, see DIGEST, Vol. 28, pp. 15, 16, Nos. 75-83.]

Cases referred to:

- (1) *Dennis v. Hick* (1935), 19 Tax Cas. 219; Digest Supp.
- (2) *David Lowe & Sons, Ltd. v. Inland Revenue Comrs.* (1938), 21 Tax Cas. 597.
- (3) *Monro & Cobley v. Bailey* (1933), 102 L.J.K.B. 471; Digest Supp.; 148 L.T. 505; 17 Tax Cas. 607.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of Income Tax acting for the division of Pershore West, Worcestershire, for the opinion of the King's Bench Division of the High Court of Justice.

This was an assessment under Sched. B of a mixed farm. Part of the farm was assessed as profits from lands occupied as nurseries or gardens for the sale of produce under Sched. B, r. 8. The remainder of the farm was assessed under the ordinary rules of Sched. B.

The following facts were admitted. For the year in question, the appellant was the occupier of 553 acres. Excluding the land utilised for the cultivation of hops, 16 acres were sown with wheat, 7 acres with potatoes, 3 acres with mangolds, and $\frac{1}{2}$ acre with lucerne, and 190 acres were used for growing various fruits and vegetables, while $11\frac{1}{2}$ acres were fallow. The land so utilised was assessed under Sched. B, r. 8. The remainder of the land consisted of 82 acres mowing grass, $178\frac{1}{2}$ acres grazing, 40 acres hops, and 7 acres osiers. The following livestock was kept by the appellant: 16 horses, 90 cattle, 232 sheep, 1,112 pigs, and 8,045 poultry. Para. 2 of the case stated states the facts to be as follow:

(b) The horses worked upon the farm. Cattle, sheep, pigs and poultry were produced and bred by the appellant upon the land. (c) The whole acreage occupied by the appellant was worked as a single mixed farm in one unit. The appellant employed ordinary farm-labourers, who were not highly skilled. (d) The appellant used very up-to-date appliances and practised mechanised farming over the whole farm. The minimum amount of hand-labour was used in producing crops upon the arable land, much of it being machine-planted and machine-hoed. (e) The appellant was a registered producer under the Pigs Marketing Scheme. (f) Wheat was grown upon 16 acres of the arable land, partly to obtain the subsidy payable under the Wheat Act and partly to provide straw litter for the pigs. The mangolds, parsnips and lucerne were grown to provide feed for the stock and horses. (g) The livestock, pigs and poultry were kept, not for the purpose of providing manure for the arable and pasture land, but for their fattening and sale. (h) During the winter, the poultry had access to the arable land. (i) The purchases and sales of livestock in 1936 were £5,386 1s. 6d. and £22,147 10s. 7d., respectively. (j) The wages for the year amounted to £9,684 17s. 10d. A big proportion of this expenditure was incurred in relation to the pigs and hops. The numbers of regular employees were 80 men and 29 women. These workers worked indiscriminately upon the whole farm, whether upon the sheep, pigs, cattle and poultry, or upon the pasture and/or the arable land, often being engaged upon different parts of the farm at different times in the same day. (k) The cost of labour over the whole farm was £12 per acre and for the land upon which fruit and vegetables were grown £18 per acre. (l) The purchases of artificial manures amounted to £1,471 8s. 6d. only, and had been progressively reduced year by year as the manure produced by the pigs increased. (m) The purchase of feeding stuffs amounts to £10,939 4s. 2d. (n) There are no glasshouses on the land occupied by the appellant, and no nursery work was done upon any part of the land. (o) The methods of cultivation were the ordinary accepted agricultural methods. (p) The appellant styles himself a farmer and fruit

and vegetable grower on his notepaper and billheads. (q) Some of the produce of the land used for growing fruit and vegetables was sold in various towns through an agent in the usual manner in the district. (r) In order to obtain continuity of supplies not always possible from the appellant's own land, produce is sometimes obtained from other growers and sold by the appellant under commission.

On behalf of the appellant, it was contended as follows :

- A (1) That the assessments were bad in law, as they did not identify, or enable the appellant to ascertain, to which part of the farmlands occupied by him each such assessment purported to refer. (2) That the assessment made under Sched. B, r. 8 (if in fact it related to the arable land other than that devoted to the growth of hops), was bad, in that no part of the farm lands occupied by the appellant was occupied as a garden for the sale of produce. (3) That the assessment made under the general rule of Sched. B. should be amended so as to embrace all the land occupied by the appellant, in that the appellant occupied the whole of such lands wholly for the purpose of husbandry.

On behalf of the respondent, it was contended as follows :

- C (1) That all the arable land (except that used for the growth of hops) was occupied as gardens for the sale of produce. (2) That the farming operations on the arable land (apart from the hops) were ancillary to the market-garden business. (3) That the profits from the arable land (apart from hops) are assessable under r. 8.

The commissioners came to the conclusion that the lands occupied by the appellant could be divided for purposes of assessment under Sched. B, and accordingly found as a fact :

- D (1) That the farming operations on the arable land (apart from that used for the growth of hops) are ancillary to the market-garden operations. (2) That the whole of the arable land (apart from that occupied for the growth of hops) is occupied as gardens for the sale of produce. (3) That the remainder of the land occupied by the appellant is devoted to farming operations and is assessable under the ordinary rules applicable to Sched. B. We also find that the assessments which form the subject of the appeal sufficiently describe the lands comprised in such assessments.
- E The appeals will therefore be dismissed so far as the principles at issue are concerned, but, in arriving at this decision, the commissioners are not confirming the amount of the assessments and, in the event of the actual liability of the year in question not being agreed between the inspector of taxes and the appellant, the appeals are to be regarded as being kept open for the question of the amounts of the liability to be agreed before the commissioners.

The taxpayer appealed from this finding.

- F *Rt. Hon. Sir William Jowitt, K.C.*, and *L. C. Graham-Dixon* for the appellant.

The Solicitor-General (Sir Terence O'Connor, K.C.) and *Reginald P. Hills* for the respondent.

- G LAWRENCE, J. : This is an appeal against assessment for the year ending Apr. 5, 1937, in respect of 553 acres said to have been occupied by the appellant, 238 acres of which have been found to be occupied as gardens. The acreages stated in para. 2 of the case, amounting to 229 arable and 307½ pasture, total 536½ acres, and it was,
- H I understood, common ground before me that the difference between 553 acres, the number of acres assessed, and 536½, the number of acres described in para. 2, was probably due to the omission of all farm and other buildings. The commissioners have upheld the assessment which assesses the appellant in respect of all land under the plough in 1936—namely, 229 acres—as being occupied as gardens within r. 8, and in respect of the

remainder of his lands (all of which they find were worked as a single mixed farm in one unit) under r. 1. The question which I have to decide is whether or not, in view of their findings of fact, this decision can stand.

It is common ground that the question whether or not the lands are occupied as gardens must be determined by the nature of the occupation in the year of assessment, but that the computation of tax must be made by reference to the profits of the year before. This consideration raises questions of importance where a mixed farm is being assessed, on which, in the course of rotation of crops, produce such as wheat may be followed by strawberries. Can it be said that a part of a mixed farm is occupied as gardens when, in the course of rotation, it is occupied in one year by what may be called a farm crop and in the other by what may be called a garden crop? Counsel for the appellant contends that it cannot. He argues that the case raises three points, (i) that it is not permissible to split up the assessment of a mixed farm worked as one unit, (ii) that the nature of the produce grown is not the sole consideration under r. 8, and (iii) that there is no proper identification of the lands said to be occupied as gardens in the present case. In my opinion, there is no substance in the third point, as, if the appellant had wanted to know which particular fields were being assessed under r. 8, he could have asked, but he does not appear to have done so.

Only two authorities have been cited upon the question of splitting up an assessment. The first is *Dennis v. Hick* (1), where FINLAY, J., said, at p. 228 :

It may be that in some cases the proper course is to split up the thing and to say: "Well, these are two quite distinct things, you occupy part of your land as a garden, and you occupy another part of your land as a farm, you have to be separately assessed in respect of these two things."

The second is *David Lowe & Sons, Ltd. v. Inland Revenue Comrs.* (2), where, although the question was not argued (see *per* LORD CARMONT, at p. 607), the Court of Session held that the commissioners can apportion the assessment, even where lands are held and worked as one unit. I think that I must follow this decision, although in my own view the *dictum* of FINLAY, J., is to be preferred to the view of the Court of Session.

In my own opinion, the finding in the present case that the whole acreage was worked as a single mixed farm is inconsistent with the decision to uphold an assessment upon one part as gardens and an assessment upon another part as farmlands. In my view, lands to be assessed as gardens must be distinct and separable from the farm, and it cannot be said on the present findings that they are. Any other view would, I think, lead to the conclusion that each field can be picked out and separately assessed, regardless of how it was occupied in the years preceding the year of assessment, and regardless of the occupation of lands held and worked with it. Such a method of assessment appears never to have been adopted before in England (see *Monro & Cobley v. Bailey* (3))

and *Dennis v. Hick* (1), where r. 8 was invoked, because it was held that gardening was the dominant purpose of the whole occupation), and that method of assessment may involve that every farmer who grows one field of potatoes for sale may be assessed thereon as a garden. As I say, however, I consider myself bound by the decision of the Court of
 A Session.

The next question is whether or not the commissioners were right in finding that the arable lands were occupied as gardens. The findings contained in para. 2 (b)-(o) all appear to me to be relevant, and to point to a conclusion that the land was not occupied as gardens, with the possible
 B exception of subpara. (k), and it is argued that the commissioners must, therefore, have decided solely upon the ground that vegetables were grown upon certain parts of the arable lands. However, I am not prepared to overrule the commissioners upon this point, because I think that the nature of the produce is one of the things which the commissioners
 C are entitled to consider in arriving at their decision as to whether or not the lands are gardens, and there was, therefore, evidence upon which they might come to their conclusion that some, at any rate, of the arable lands were gardens. There is one subsidiary point upon which I think that the commissioners' decision cannot be supported, and that is with
 D reference to that part of the arable land which they have held to be ancillary to the gardens. This appears to me to be inconsistent with their findings in para. 2 (f), (g). I cannot see how this land is ancillary to the gardens, any more than is the other land used for feeding stock. Subject to this point, I think that the appeal must be dismissed with costs, and the
 E case remitted to the commissioners.

Appeal dismissed with costs.

Solicitors: *Ellis & Fairbairn* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

F

NEWSTEAD v. LONDON EXPRESS NEWSPAPER, LTD.

[KING'S BENCH DIVISION (Hawke, J.), April 19, 20, 21, 1939.]

G *Libel*—True statement about existing person of same name as plaintiff—Whether referable also to plaintiff.

Practice—Trial by jury—Failure to answer one of five questions—Answers not read out in court.

H

The plaintiff, Harold Newstead, was a hairdresser at Camberwell. He was about 30 years of age and unmarried. The defendants published photographs of two women with a statement underneath that Harold Newstead, a 30-year-old Camberwell man, had been convicted of bigamy. The plaintiff contended that these statements were understood to refer to him, though in fact they referred to another man of the same name living in Camberwell. At the trial, the jury failed to agree on the first of 5 questions left to them, asking them whether reasonable persons would understand the words complained of to refer to the plaintiff. The jury returned written answers to the other 4 questions, but these

were not read out in court. It was contended that, despite the failure of the jury to answer the first question, there should be judgment for the defendants, because what had been written was written about an existing person and was true :—

HELD : (i) the failure to answer the first question did not in itself prevent the court from giving effect to the answers to the remaining questions.

(ii) as the judge was satisfied that the answers represented the view of the whole jury, it was immaterial that they were not read out in court. A

(iii) the fact that the person intended to be referred to in the libel was an existing, and not a fictitious, person, and the fact that the words complained of were true of the person intended to be referred to, did not prevent the words from being defamatory. Therefore, as the jury had not answered the first question left to them, no judgment could be entered. B

(iv) it is immaterial what the writer of the libel means or intends to mean. His meaning is to be discovered from the expressions which he uses and puts into permanent form.

[EDITORIAL NOTE.] Apart from the subsidiary questions arising here upon the practice of trials by jury, the main discussion is upon the principle established in *Hulton (E.) & Co. v. Jones* (1). The distinction between that case and the present is that there the person intended to be referred to was a fictitious person, while here the person intended to be referred to was an existing person, and the statements made, if they referred to him, were substantially true. It is found impossible to make any distinction on the facts, however, and the principle of the earlier cases is held to apply to the present. C

AS TO NECESSITY FOR STATEMENT TO REFER TO PLAINTIFF PERSONALLY, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 395, 396, paras. 483-485; and FOR CASES, see DIGEST, Vol. 32, pp. 15-17, Nos. 46-77.] D

Cases referred to :

- (1) *Hulton (E.) & Co. v. Jones*, [1910] A.C. 20; 32 Digest 17, 77; 79 L.J.K.B. 198; 101 L.T. 831; *affg.*, [1909] 2 K.B. 444. E
- (2) *Cassidy v. Daily Mirror Newspapers*, [1929] 2 K.B. 331; Digest Supp.; 98 L.J.K.B. 595; 141 L.T. 404.
- (3) *Yousoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T.L.R. 581; Digest Supp.

ACTION for damages for libel. The plaintiff, a hairdresser assisting his father in business at Camberwell, claimed damages for alleged libel from the defendants, the printers and publishers of the DAILY EXPRESS. The plaintiff, who was well-known in the hairdressing trade, both in Camberwell and elsewhere, as Harold Newstead, was about 30 years of age, a Camberwell man, and unmarried. On Mar. 30, 1938, on the back page of the DAILY EXPRESS under the title "Why do people commit bigamy?" the defendants published photographs of two women with the following words underneath : F G

Harold Newstead, 30-year-old Camberwell man, who was jailed for 9 months, liked having two wives at once. Married legally for a second time in 1932—his legal wife is pictured right, above—he unlawfully married 19-year-old Doris Skelly (left above). He said: "I kept them both till the police interfered." H

On behalf of the plaintiff, it was contended that those words were understood by a number of people to refer to the plaintiff and to mean that he had committed bigamy, and had been punished for it, and that he was

a person of no moral or social sense, unworthy of the confidence or trust of anyone, and especially of any woman, and that he was totally unfitted to be a ladies' hairdresser.

The defendants admitted publication of the words complained of, but denied that they were intended or understood to refer to the plaintiff, or that they bore, or were capable of bearing, the meanings alleged, or that they were defamatory of the plaintiff. They said that the words were published of an existing person of the name and description therein contained, and were intended and understood to refer to that person, who was not the plaintiff. In relation to that person, they said, the words were true, and they pleaded justification and fair comment.

In his reply, the plaintiff alleged that, if the words referred to some other existing person and were true of that person (which he did not admit), it was the absolute duty of the defendants, or at least their duty, to take reasonable care to give a precise and detailed description of such person denoting him exclusively, and to ensure that the words should not be capable of referring to any other person. Such a precise description of the other person, he alleged, would have been as follows: "Harold Newstead, a barman, of Crofton Road, Camberwell." The fact that such a description was available to the defendants was to be inferred from the fact that that was the description given by every other newspaper reporting the case. The defendants, recklessly, as the plaintiff alleged, struck out the words giving the occupation and address of the person, and published the words in a form capable of being understood to refer to the plaintiff. The defendants published a correction on Apr. 1, 1938.

The following questions were left to the jury:

1. Would reasonable persons understand the words complained of to refer to the plaintiff?
2. (a) Was it true to say that the convicted man was a "Camberwell man?"
- (b) Was it true to say that the convicted man "liked having two wives at once?"
3. Was the expression "liked having two wives at once" a fair comment on the conduct of the convicted man?
4. In omitting the occupation and address of the convicted man were the defendants (a) reckless, (b) negligent?
5. Damages (if any).

The jury failed to agree on the first question and their answers to the remaining questions were not announced in court. The jury were discharged.

A. T. Denning, K.C., and R. M. Wilson for the plaintiff.

G. O. Slade for the defendants.

Denning, K.C.: The failure of the jury to agree on the first question is fatal, and prevents the answers to the other questions from having any effect. The jury, in the events which have happened, have been discharged without giving any verdict, and the court ought not to decide a question of law unless all the material facts have been found.

Slade: The questions left to the jury are separate and distinct issues, and the answers to the questions other than the first are sufficient to decide this case in the defendants' favour. The words here complained

of were used of an existing person, and what was stated of that person was true. This case is, therefore, outside the decision in *Hulton (E.) & Co. v. Jones* (1), and reliance is placed upon the judgment of FARWELL, L.J., in that case in the Court of Appeal.

HAWKE, J. : In this case, the plaintiff sued the defendant newspaper company for libel. The case went to trial, and at the trial, by agreement between counsel, certain questions were put to the jury. There were 5 questions, and 4 of them were answered. As to the first question, after a very long consideration, the jury were unable to agree, and I discharged them. They handed in their answers on paper, and those answers caused the consideration of two points, (i) whether or not it is essential to the success of the plaintiff in this case to show that the words complained of referred to him, and (ii) if they did, whether or not the defendants have any defence based upon the suggestion that it is not a libel to publish something defamatory of a person unless the publisher is reckless in the way in which he publishes it, if he is in fact intending to refer to somebody else of whom it is true. I believe that that is a fair representation of those 4 questions. The jury could not answer the first question. They answered the 4 questions quite definitely and quite clearly. It is suggested, and the first point raised in this case is, that I am not entitled to look at these answers, or to give any effect to them. I wholly disagree with that proposition. The reasons suggested are that the authorities, beginning with COKE ON LITTLETON, followed by BACON'S ABRIDGMENT, and by COMYN'S DIGEST, all state that, if the jury do not agree on all the issues, a special verdict is useless. That is a proposition from which I do not differ or dissent, but, if I am satisfied that there is a series of answers which are conclusive of the matter, whatever the other answers may be, I think it is unnecessary to take further time in discussing other questions on which the jury do not agree. I think that the answers (2) to (5) of the jury in this case are quite conclusive upon the point which counsel for the defendants wants to have decided, and, if what he submits is the true view of the law, then I think that these answers will be conclusive of the matter and will determine this case. Then it is said, however : "That is only academic, because the answers determine this case only in one event." I cannot accept that proposition. If this case goes to the House of Lords and the House of Lords say it is not right, the point of law is anything but academic. It goes entirely to the root of the whole matter, so that I cannot accept that proposition. Then the third proposition is indeed a bold one. The jury, who had been in court for some days retired whilst they discussed these questions. They returned once and I gave them certain further directions. They retired again, and finally came and presented to me these answers written upon this piece of paper. It is said : "Those answers were not read out in court, and, therefore, we cannot be sure that the jury meant those answers." Cases were

cited before me to show, that when certain jurymen have hardly got into court at all when a jury returns their verdict, or are standing in a place where they cannot hear, it may be that the verdict returned by their foreman may not be a true one, and that, therefore, the matter cannot be allowed to rest there, and there must be a new trial. However, I think that, if the judge is satisfied that the answers do honestly and indubitably represent the view of the jury, and there is no reason for thinking that they do not—and I may say that there is no suggestion here that these answers do not represent the view of the whole jury, and were well understood by all of them to be the answers of all of them—

A the answers must be accepted. In this case, nobody suggested to me that these things ought to be read out, or anything of the kind. They were not read out in court, but I had made sure what the true position was and I am satisfied that I took every step to make sure that these answers were the true answers of the jury, and of every member of the

B jury, and that they were answers given to each question independently of any influence which their failure to answer the first question may have had upon the questions upon which they did agree. In other words, these answers to questions (2) to (5) are the independent view of the jury on the matters asked by those particular questions. I think,

C therefore, that I must accept these answers as being true answers of the jury.

However, the jury could not agree upon the answer to the first question—namely, whether reasonable persons understood the words complained of to refer to the plaintiff and it is there that the difficulty arises. Counsel

E for the defendants submitted that, apart from the question of reference to an existing alternative man of whom the alleged libel was published, these words could not in law, or could not in fact, refer to the plaintiff. I feel that there was enough to go to the jury upon this question. This first question is, therefore, one of the greatest importance, unless the law

F as suggested by counsel for the defendants renders it irrelevant, in the circumstances of this particular case. Therefore, I have to address my mind to the simple question whether or not the principles expressed in *Hulton (E.) & Co. v. Jones* (1) have any reference to a case where the writer of the alleged libel has in his mind a person other than the plaintiff,

G and where what he writes is true of that other person. That is a question on which once or twice in the course of this argument my mind has wavered. I get, on one side, decisions or expressions of opinion in the House of Lords, of Lords Justices and of judges of first instance, stating the principles with regard to libel in the broadest possible terms. On

H the other side, I have a judgment of FARWELL, L.J., which apparently supports the view which counsel for the defendants submits that I ought to take. There is also a decision of TALBOT, J., which is in part directly upon the point which counsel for the defendants desires to have substantiated. I think it is right to say that the Australian and American cases are directly against that view. I do not propose to say anything

about the textbook writers, and, of course, I am not bound by Australian or American cases, however much respect I may have for them, and however much I may be attracted by the arguments which they present.

I return to what I consider to be the only thing at which I can look, the decisions of the English Courts. In *Hulton (E.) & Co. v. Jones* (1), the point in this case was not mentioned by LORD ALVERSTONE. A
 FLETCHER MOULTON, L.J., gave a dissenting judgment, and then there came the much discussed decision of FARWELL, L.J. The case went to the House of Lords, where two Lords upheld the decision of the Court of Appeal, which was a decision in favour of the plaintiff, and two of them, while agreeing that the decision of the Court of Appeal ought to be upheld, also used expressions assenting to that part of the decision of the Court of Appeal which is connoted by the judgment of FARWELL, L.J. B
 When one looks at *Cassidy v. Daily Mirror Newspaper* (2) and *Yousoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* (3), one finds in those cases general expressions as to the law of England. I think that the expressions as they stand come to this, that it does not matter what the writer of a libel means, or intends to mean. His meaning is to be discovered from the expressions which he uses and which he puts into permanent form on paper or some such medium. If that is so, I feel a difficulty in understanding why it should be so. I am not saying that it ought to be so. I am saying that I accept it as being so, because it is said by the authorities to which I have referred. If that is so, the logical sequence is this: it does not matter if this statement, though defamatory of the plaintiff, is made of somebody else, and it is true of that other person. The result is that I have come to the conclusion, E
 though not without considerable doubt, that counsel for the defendants has not substantiated the proposition which he submitted to me, and I think, therefore, that I must leave this case as it is, and the parties will have to make up their minds as to what the future course of this litigation may be. Therefore, no judgment will be entered in this case. F
Jury discharged. No judgment entered.

Solicitors: *Manches & Co.* (for the plaintiff); *Shirley Woolmer & Co.* (for the defendants).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.] G

Re LEWIS, JENNINGS v. HEMSLEY.

[CHANCERY DIVISION (Simonds, J.), November 1, 1938.]

Executors and Administrators—Liability in respect of leaseholds—Lapse of time—Payment out of court of indemnity fund.

A Money was paid into court in 1891 under a consent order made in an administration action. This sum of money was paid in because the executor of a testatrix was entitled to be indemnified out of the estate against liability in respect of leasehold property. In 1938, an application was made that the money be paid out, on the ground that any claim against the executor was barred by lapse of time:—

B HELD: any claim against the executor was barred by lapse of time, and the money ought to be paid out to the beneficiaries.

[EDITORIAL NOTE. The original lessee and his estate are liable on the covenants in a lease during the whole term. An assignee and his estate are only liable on the covenants in the lease so long as he or his personal representatives are interested in the lease. Since the decision in *Re Blow, St. Bartholomew's Hospital (Governors) v. Camlden* (3), an executor can plead the Statute of Limitations, being within the Trustee Act, 1888, s. 8 (1) (b). In the circumstances, therefore, any claim against the fund was, at the time of the application, barred by lapse of time.

C AS TO LIABILITY OF PERSONAL REPRESENTATIVES IN RESPECT OF LEASEHOLDS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 408, 409, paras. 765-768; and FOR CASES, see DIGEST, Vol. 24, pp. 606-610, Nos. 6370-6411.]

D Cases referred to:

(1) *Re Nixon, Gray v. Bell*, [1904] 1 Ch. 638; 24 Digest 608, 6384; 73 L.J.Ch. 446.

(2) *Re King, Mellor v. South Australian Land Mortgage & Agency Co.*, [1907] 1 Ch. 72; 24 Digest 608, 6385; 76 L.J.Ch. 44; 95 L.T. 724.

(3) *Re Blow, St. Bartholomew's Hospital (Governors) v. Camlden*, [1914] 1 Ch. 233; 24 Digest 672, 6988; 83 L.J.Ch. 185; 109 L.T. 913.

E REFERENCE to the judge under R.S.C., Ord. 55, r. 69, upon a point arising in an inquiry upon a petition for payment of moneys out of court. The surviving executor of a will refused to distribute the estate among the beneficiaries under the will until an indemnity was given to him against any liability he might possibly incur under the provisions

F of two long leases created in 1847 and 1848 respectively for a term of 105 years. In an administration action, an order was made on Aug. 3, 1891, for the payment of £5,000 into court as a fund to provide such indemnity. The will was made in 1886, and the leasehold property above referred to was bequeathed to Miss Caroline Wilson, who died

G recently. The testatrix died in Mar., 1890, and her will was proved by the two executors appointed thereby, one of whom died very shortly after the grant. The surviving executor, Alexander Hemsley, died in 1906, and the trustees of his will were parties to the present reference. A petition was presented in 1937 for the payment out of court of the

H sum of £5,000, or so much thereof as was not required for the purposes of the indemnity. It was contended by those interested in the residuary estate of the testatrix that any liability on the part of the surviving executor was now barred by the operation of the Statute of Limitations, and that no part of the £5,000 need be retained in court.

J. Leonard Stone for the executors of Miss Caroline Wilson.

A. G. Coulson for those interested in the residuary estate apart from those claiming under Miss Caroline Wilson.

J. V. Nesbitt for the trustees of the will of the surviving executor.

SIMONDS, J. : This point is referred to me under R.S.C., Ord. 55, r. 69. In May, 1937, a petition was presented to this court asking for payment out to the petitioners of part of a sum of money in court, assenting to part of it remaining in court for an indemnity to an executor against certain liabilities. When the matter came before me, I ordered an inquiry as to what sum would be necessary to provide the required indemnity. When the matter went back to chambers, however, it was contended that, having regard to the lapse of time, no provision was now needed for any indemnity, and it is this question which has been argued before me.

The facts may be briefly summarised as follows. The sum of money was paid into court in 1891 in the administration of the estate of one Mrs. Jemima Lewis under an order whereby it was by consent ordered that the defendant, Alexander Hemsley, the executor of the testatrix, should be at liberty out of the assets of the testatrix remaining in his hands to raise the sum of £5,000 and the costs thereafter directed to be paid into court. By their solicitor, the plaintiffs admitted that the defendant was entitled to be indemnified out of the assets of the testatrix against liability in respect of leasehold property at Stratford and West Ham bequeathed by the testatrix to the plaintiff, Miss Caroline Wilson. Thereupon it was ordered that the executors should be at liberty to distribute the estate of the testatrix. It was also apparent from the order that all parties by their solicitors admitted that all the debts and legacies of the testatrix had been paid and that her estate had been fully and properly administered, with the exception of the payment of the further costs therein directed to be paid, and that the accounts delivered by the defendant, including his costs, charges and expenses down to May 25, 1891, were correct. Accordingly, the sum of £5,000 was paid into court, and the income thereof has since then been paid regularly to the beneficiaries entitled under the will.

It is contended that the representative of the testatrix's estate now no longer needs protection or indemnity. In my judgment, such a contention is correct. A line of authorities, of which I need cite only *Re Nixon, Gray v. Bell* (1) and *Re King, Mellor v. South Australian Land Mortgage & Agency Co.* (2), at p. 80, establishes that, if a fund be paid into court in circumstances such as those in the present case, that is done, not for the benefit of the lessor, but solely for the indemnity of the executors or trustees so paying it in. As a possible future creditor, the lessor is not entitled to require the provision of such a fund. Thus, the only question is whether or not in 1938 the legal personal representatives of Mrs. Jemima Lewis—the executors of her executor Alexander Hemsley, the original defendant—need any protection from any possible

- liability under the leases forming part of her estate. As was shown by *Re Blow, St. Bartholomew's Hospital (Governors) v. Camlden* (3), the legal personal representatives of a deceased person have a complete answer to any claim against them in this respect. In *Re King, Mellor v. South Australian Land Mortgage & Agency Co.* (2), reference was made to some
- A earlier authorities wherein a distinction was drawn between cases where there has been privity of estate between the executors and the lessor and cases where there has been no such privity. If there is such a distinction, I am unable to appreciate its importance, except for the fact that it may be that, where there is privity of estate, the executors may
- B have to rely on some Statute of Limitations other than that of 1623, and that a longer period may have to elapse before their liability is brought to an end. Whether that be so or not, however, it is now almost 50 years since the money was paid into court, and therefore the answer to the question whether or not any, and, if so, what, fund is now necessary
- C for the protection of the legal personal representatives is that no such fund is now necessary.

- In view of the importance of the matter, a *pro forma* summons raising the question now answered should be taken out, and on that summons I will make the declaration which I have indicated. The order for inquiry
- D must be discharged, and the petition must be amended and restored.

- Solicitors: *Walter O. Freeman* (for the executors of Miss Caroline Wilson); *Samuel Price & Sons* (for those interested in the residuary estate apart from those claiming under Miss Caroline Wilson); *Halsey, Lightly & Hemsley* (for the trustees of the will of the surviving executor).

- E [Reported by T. A. DILLON, Esq., Barrister-at-Law.]

SPENCE v. CRAWFORD.

- F [HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan and Lord Wright), **February 10, 13, 14, 16, 17, 20, 21, May 18, 1939.**]

- G *Misrepresentation—Rescission—Restitutio in integrum—One party released from obligations which cannot be restored—Sale of shares—Shares pledged to bank—Bank charge redeemed since sale.*

- H The respondent purchased from the appellant his holding of 2,925 shares in a private company at the price of £2,250, which sum was made up of the sum of £1,350, being the value of the shares, and the sum of £900, being the amount of a loan which had been granted by the appellant to the company. By the terms of the contract, the respondent also undertook to relieve the appellant of his obligations to a bank in respect of the company's overdraft and to have the securities, belonging to the appellant and pledged with the bank against the company's overdraft, transferred back to the appellant within 2 years. The appellant undertook to resign office as a director of the company and to cease to have any further interest in the profits or losses of the company, or in any dividends which might be declared on the shares. Both the appellant and the respondent duly fulfilled the terms of the contract. The appellant sought to have the contract set aside on the ground that he had been

induced to part with the shares by fraudulent misrepresentations on the part of the respondent as to the financial position and prospects of the company, and he also claimed *restitutio in integrum*. The respondent denied the appellant's allegations, and contended that *restitutio in integrum* was now impossible, on the ground, *inter alia*, that the appellant, by the release of his securities and by his own release from his obligations to the bank, had obtained a contractual benefit which could not now be restored :—

HELD : (i) on the facts, the appellant was induced to enter into the contract by fraudulent misrepresentations on the part of the respondent, who was therefore not entitled in bar of restitution to found on dealings with the subject purchased, which he had been enabled by his fraud to carry out.

(ii) the appellant was, therefore, entitled to the remedy of rescission, accompanied by *restitutio in integrum*, as the substantial identity of the subject-matter of the contract remained.

[EDITORIAL NOTE.] The doctrine of *restitutio in integrum* is the same in Scotland as in England. The usual case is where a purchaser is seeking to set aside a transfer of property and to be repaid the purchase price with all proper allowances and accounts. In the present case, the vendor is seeking rescission, and the subject-matter of the sale is the shareholding in a company, the latter having been developed considerably since the sale. Commercial development and expansion of the subject-matter are not, however, an absolute bar to the remedy by way of *restitutio in integrum*, although the replacing of the parties *in statu quo ante* is thereby rendered more difficult. The opinions to some extent explore the distinction where rescission is the result of an innocent misrepresentation and where there is proof of fraud, but upon this aspect of the matter no concluded opinion is stated.

AS TO *Restitutio in Integrum*, see HALSBURY, Hailsham Edn., Vol. 23, pp. 104-107, para. 145; and FOR CASES, see DIGEST, Vol. 35, pp. 66-72, Nos. 623-707.]

Cases referred to :

- (1) *Western Bank of Scotland v. Addie*, *Addie v. Western Bank of Scotland* (1867). L.R. 1 Sc. & Div. 145; 35 Digest 30, 214; 5 Macph. (H.L.) 80.
- (2) *Adam v. Newbigging* (1888), 13 App. Cas. 308; 35 Digest 77, 754; 57 L.J.Ch. 1066; 59 L.T. 267; *affg.* (1886), 34 Ch.D. 582.
- (3) *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; 35 Digest 77, 748; 48 L.J.Ch. 73; 39 L.T. 269; *affg.* (1877), 5 Ch.D. 73.
- (4) *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392; 35 Digest 77, 750; 68 L.J.Ch. 699; 81 L.T. 334.
- (5) *Hay v. Rafferty* (1899), 2 F. (Ct. of Sess.) 302.
- (6) *Boyd & Forrest v. Glasgow & South Western Ry. Co.*, [1915] S.C. (H.L.) 20; 35 Digest 53, case 473 *iii*.
- (7) *Hunt v. Silk* (1804), 5 East, 449; 12 Digest 553, 4597.

APPEAL against an interlocutor of the First Division of the Court of Session in Scotland, dated May 6, 1938, affirming an interlocutor of the Lord Ordinary, dated Dec. 16, 1937. The facts and the arguments are fully set out in the opinions of LORD THANKERTON and LORD WRIGHT.

J. L. Clyde, K.C., and *A. M. Prain* for the appellant.

L. Hill Watson, K.C., and *Ewan G. Macpherson-Grant* for the respondent.

LORD THANKERTON : My Lords, the appellant is the pursuer in this action, by which he seeks reduction of the contract constituted by the respondent's offer dated Aug. 18, 1931, and the appellant's acceptance

thereof, dated Aug. 27, 1931, on the ground that his acceptance was induced by false and fraudulent misrepresentations by the respondent. On this main issue of fact, the appellant has failed in both courts below, and the decree of *absolvitor* pronounced by the Lord Ordinary's interlocutor, dated Dec. 16, 1937, was adhered to in the First Division A by interlocutor dated May 6, 1938, against both of which interlocutors the present appeal is taken.

The offer and acceptance which constituted the contract under reduction are as follow. First, the offer is in the following terms :

Glencairn Works, Motherwell.

Aug. 18, 1931.

B

John Spence, Esq.,
Drumlea, Coatbridge.

Dear Sir,

I hereby offer you the sum of £2,250 in full satisfaction of your holding in the Glencairn Metals, Ltd., and of any claims or interest which you may have therein, and that on the following terms and conditions :—

C

1. That the purchase price shall include 2,925 shares valued at £1,350, in said company, and a loan of £900 granted by you to the company.

2. That said purchase price shall not bear interest.

3. The sum of £250 shall be paid within 30 days from the acceptance of this offer and a further sum of £650 shall be paid within 6 months thereafter. The balance of said purchase price shall thereafter be paid within 2 years from the date of acceptance hereof.

D

4. When payments amounting to £900 have been paid by me to you, you will assign to me or my nominee the said loan of £900 granted by you to the company.

5. That so soon as the overdraft due to the Bank of Scotland, Coatbridge, and for which you are joint obligant, is paid or you are relieved of your obligation granted to the bank, and the securities belonging to you and held by the bank in respect of said obligation are returned to you, that you will forthwith transfer the shares presently held by or belonging to you and amounting to 2,925 shares either to me or my nominee.

E

6. That I hereby bind myself to relieve you of your obligations to the Bank of Scotland in respect of the company's overdraft, and undertake that the securities belonging to you and pledged with the said bank shall be transferred or reconveyed to you within the said period of 2 years from the date of acceptance hereof.

7. That at the date of the acceptance of the offer you will resign your position as director of the company and at said date cease to have any further interest in the profits or losses of said company or of any dividends which may be declared on said shares.

F

8. Each party shall pay his own expenses.

I shall be glad to have your acceptance.

Yours truly,

Adopted as Holograph,

John L. Crawford.

The acceptance of that offer is as follows :

G

Drumlea, Coatbridge, Aug. 27, 1931.—I hereby accept the foregoing offer.

John Spence,

Aug. 27, 1931.

H

Glencairn Metals, Ltd., is a private company formed in 1919 with a capital of £6,000 in £1 shares, 5,850 of which shares were issued, and, at the date of the contract in Aug., 1931, the holdings were as follow: the appellant 2,825, the respondent 2,825, and William Thomas Richardson 200, of which 100 were held by him as nominee of the appellant and 100 as nominee of the respondent. The directors were the appellant, the respondent and Richardson.

The appellant's case is that he was induced to sell his shares and to

sever his connection with the company by the respondent's fraudulent misrepresentations. He does not challenge the adequacy of the consideration, but maintains that he would not have parted with his shares or his interest in the company but for these misrepresentations. The two particular misrepresentations on which the appellant bases his case are (i) that in Feb., 1931, he was shown in the office of the company by Richardson, in the presence of the respondent, a rough statement showing a loss of £900 for 1930, which was prepared by Richardson on the respondent's instruction on falsified figures for the purpose of inducing the appellant to part with his shares, and (ii) that in May, 1931, the appellant saw in the office of the auditors of the company the draft accounts and balance sheet of the company for 1930, which had been prepared by them from the information supplied to them on the respondent's instructions, and which included a deliberate undervaluation of stock, and which showed a profit of £134, that the undervaluation of stock, which was made by a falsification of the stock tonnage, amounted to £2,186, and that it was made on the respondent's instructions. The appellant also founds on certain gloomy statements and predictions about the prospects of the company made by the respondent to him and his wife in Dec., 1930, and Jan., 1931. It is true, as the Lord Ordinary and the Lord President state, that these incidents are of no moment by themselves, but they were clearly proved, and they have a bearing on the credibility of the respondent, who denies them, and they seem to destroy any significance in the fact that the proposal to sell his shares first came from the appellant.

The crucial facts which the appellant requires to establish are (a) that the valuation of stock in the 1930 balance sheet was understated by about £2,186, (b) that that undervaluation was arrived at by a deliberate falsification of the tonnage figures made by Richardson, and is not capable of an innocent explanation, (c) that the rough statement, showing a loss of £900, was made by Richardson on falsified figures, and (d) that these falsifications were made by Richardson on the instructions, or with the knowledge and consent, of the respondent. If the appellant had proved these facts, it seems clear to me that most, if not all, of the judges in the Inner House would have held that the evidence further established that the appellant was shown the rough statement, by Richardson in the presence of the respondent, that the respondent knew that the appellant was relying on them, and that the appellant was induced by them to enter into the contract with the respondent. In my opinion, that is clearly established, and, if so, there would remain only the question as to whether *restitutio in integrum* is possible in the circumstances. The appellant has no alternative conclusion for damages. I may at once deal with the opinion expressed by the Lord Ordinary when he said :

I think it proper to add that, even if I had reached an opposite conclusion on the question whether false representations were made by the defender, I should have entertained grave doubt whether the representations founded upon were material, so as to form an inducing cause of the contract and to involve a reduction of the contract.

For this opinion, the Lord Ordinary gives two reasons. First, if there was an understatement of stock as at Dec. 31, 1930, it did not follow that there was a corresponding understatement of profits for 1930, as that depended upon whether the statement of stock as at Dec. 31, 1929, was or was not accurate, as to which there was not reliable evidence. I find
A it difficult to reconcile this view with the judge's assumption that the false representations were proved, but, in any event, in my opinion, it is proved that the undervaluations of stock only began in 1930, and that, accordingly, the profits for 1930 were understated by a corresponding amount. The Lord Ordinary's second reason is his doubt as to the
B materiality of the alleged difference, and whether he was bound to accept the pursuer's evidence that, if he had known of the alleged difference, he would not have contracted. I regret to differ from the judge on both these points. In 1928 there was a trading profit of £1,663, in 1929 a trading loss of £1,011, and in the 1930 accounts shown to the
C appellant there appeared a trading profit of £133 14s. 4d., which was set against the debit of £2,270 15s. 3d. brought forward from 1929, whereas the appellant's case is that the 1930 trading profit was really £2,320 or thereabouts, which would have wiped out the debit and shown a very material increase in the profit-making capacity of this small company. Surely
D this would have been a most material fact for the appellant in deciding whether he should abandon any hope of getting salary, director's fees or dividends and take less than 50 per cent. of the face value of his shares. The fact that the business was highly speculative, as the Lord Ordinary puts it, seems to me to make this fact, if anything, the more material,
E and I see no good reason for rejecting the appellant's assertion that, if he had known it, he would not have entered into the contract. It is possible that the Lord Ordinary's view as to the draft letter of Apr., 1930, may have also affected his mind on this point, but I agree with the Lord President that the draft letter is not proved to have emanated from the
F appellant, and that it should be entirely disregarded. I do not propose to recapitulate the detailed history of the company, or the qualifications of, and the positions held in the company's work by, the appellant, the respondent and Richardson, or their respective holdings in the company down to the date of the action. It is sufficient to refer to the opinion of
G the Lord Ordinary, who has set out these matters at length.

I turn now to the evidence as to the four crucial matters which I have set out above. Admittedly, the decision of these matters depends on the consideration of the report by Messrs. French and Cowan, dated Mar. 16, 1936, so far as contained in the excerpts therefrom, which was proved
H by Mr. Cowan, and on the oral evidence of Mr. Cowan, the appellant, the respondent, Richardson and Miss Forsyth, who entered the service of the company as bookkeeper in the office, and became secretary of the company in Sept., 1931, which position she still holds.

In my opinion, the Lord Ordinary, the Lord President and LORD FLEMING have not sufficiently appreciated the weight of Messrs. French

and Cowan's report taken along with Mr. Cowan's evidence, and its effect in corroborating the evidence of Richardson and Miss Forsyth. I regret, in common with some of the judges, that the whole report was not admitted, for it seems to me that, if the report was relevant in the present issue at all, the whole of it was relevant, in view of the basis on which Messrs. French and Cowan's inquiry was conducted—namely, by working back from the tested figures at the close of 1935. I agree with the Lord President that the present issue is not concerned with proof of the admitted fraud against the Inland Revenue, but it is concerned with the identical figures in 1930 and 1931, which, in the report, are arrived at by such backward calculations. I may say at once, however, that I find in the excerpts, along with the evidence of Mr. Cowan, sufficient to establish (a) that the valuation of stock in the 1930 balance sheet was understated by a substantial amount of over £2,000, and (b) that such undervaluation is not capable of explanation as the result of an omission of stock in transit already paid for.

As the report states, the amended figures were agreed by the respondent and Richardson, though the figures for the intermediate years could only be regarded as approximate, and the inquiry did not go further back than 1930 because the directors stated that, to the best of their knowledge and belief, there were no irregularities prior to that time, and, further, the report states as follows :

We are advised by the directors that there are no other irregularities of any kind whatsoever affecting the company's accounts and that the extent of the irregularities detailed above has now been fully disclosed.

It was an essential condition of the indemnity which was being sought from the Inland Revenue that such a disclosure should be made. This, in my opinion, clearly establishes, in the appellant's favour, that there was an undervaluation of stock at the close of 1930 amounting approximately to £2,186, and that there was no similar irregularity in the commencing figure of stock value for that year. On that basis, the only explanation compatible with innocence which is put forward by the respondent is that the shortage may be accounted for by an omission to take into account stock in transit, already paid for, but not yet entered in the yard records, as it had not reached the yard. In my opinion, this explanation rests on a fallacy. If stock in transit had been so omitted, by a faulty system of bookkeeping, it would, on its arrival at the yard, have been entered in the stock books, and such entry would affect by that amount the figures for 1931 and for the ensuing years down to the end of 1935, when its effect would be reflected in the actual stock figures found by Messrs. French and Cowan, and it would not have affected the amount of the deficit then found by them. It would still have left the shortage of £2,186 in the stock valuation for 1930. This is clearly referred to by Mr. Cowan in the following question and answer :

But supposing there had been 600 odd tons in transit to the firm and supposing the stock abstract book did not show what was in transit, then that would account,

wouldn't it, for the different figure in the stock abstract book from what should have been shown ?—That is so, if it were suppressed.

Finally, it is not without significance that there was an undervaluation of stock by over £10,000 in the closing stock of 1931, after allowing over £8,000 as representing stock in transit, and that there were similar undervaluations of stock in the 3 following years to a total amount of about £4,500. It is impossible, in my opinion, to avoid the conclusion, that these undervaluations were deliberate, and, like LORD CARMONT, I find it difficult not to connect the suppression of sales in 1932 to an amount of nearly £3,000 with the accumulated undervaluations of the 2 preceding years amounting together to about £12,300, whereas the closing value shown in the 1931 balance sheet was £26,715, which means that nearly one-third of the stock was suppressed. It is to be remembered that the stock was being financed by bank overdraft. Though it relates more to the respondent's knowledge of, and participation in, the deliberate undervaluations of stock, it may be recalled here that the respondent admitted that the suppression of sales was mutually arranged and carried out by him and Richardson.

While the above evidence is sufficient, in my opinion, to establish a deliberate suppression of stock value at the close of 1930, which is incapable of innocent explanation, this conclusion is confirmed by the rest of the oral evidence, which I will next consider. I do not think that it can be doubted, on the evidence, that the falsification of the closing stock value of 1930 was made by Richardson, who was responsible for providing the stock abstract figures on which the accounts were made up by the auditors, and the crucial question is as to the respondent's association with the falsification. I agree with and accept the view of the Lord President that the respondent's evidence is not reliable, and his deprecation of the Lord Ordinary's palliation of the respondent's moral guilt in regard to his confessed fraud on the Revenue. I agree with the acceptance of the appellant as a reliable witness, and, although he might, if he had so chosen, have had access to information from which he could have ascertained the true state of matters, there is no suggestion that he did seek such information, and clearly, in my opinion, he was entitled to rely on the information given to him by the respondent or Richardson, and his evidence is that he did so rely. The progress of the negotiations after he saw the company's accounts for 1930 appears to me to confirm his evidence. Again, as regards Richardson, I agree that, unless corroborated, his evidence cannot be treated as reliable. In my opinion, however, sufficient weight was not given to the evidence of Miss Forsyth by the Lord Ordinary or by the two judges who agreed with him on this part of the case.

It is important to bear in mind the position of the parties in the early part of 1931. Richardson had no shares of his own at that time, and I cannot conceive what motive he could have for falsification of the stock values, which would not be likely to increase any chances

of a rise in salary, unless he had some understanding with the respondent, or acted, as he said he did, on the instructions of the respondent. As already stated, it is significant that in 1932 the suppression of sales was admittedly made by arrangement with the respondent, and it may also be noted that, subsequent to the transfer of the appellant's shares to the respondent, the latter made a present of 800 shares to Richardson. A Miss Forsyth, in whose demeanour, according to the Lord Ordinary, there was nothing to suggest that she was a dishonest witness, still remains as secretary of the company, and I find it difficult to conceive any reason why she should deliberately perjure herself in the interests of the appellant and against the interests of the respondent. There is B no suggestion, as in the case of Richardson, of any *animus* against the respondent. I confess that I am not impressed with the Lord Ordinary's grounds for rejection of her evidence. Inconsistencies in the details which he criticises appear to me to be such as might well be made after the lapse of several years by an honest witness, and, unlike the Lord C President, I see no valid reason for rejecting her evidence as to hearing the respondent instructing Richardson to falsify the stock valuation in order to deceive the appellant, especially as the Lord President refuses to accept the respondent's denial of Miss Forsyth's later protest to him. With all respect to the Lord Ordinary, I have difficulty in D agreeing with him in so far as he treats as a reason for not accepting her evidence that, if her whole evidence were to be accepted as true, it would convict her of at least passive participation in something which she clearly recognised as a fraud. For myself, I should regard this as an element in favour of the truth of her evidence. It is right to observe, E however, that the Lord Ordinary and the judges who agreed with him might well have taken a different view of the value of Miss Forsyth's evidence if they had been otherwise satisfied, as I am, that there was a deliberate suppression of stock value—incapable of innocent explanation—made by Richardson. I therefore regard the evidence of Miss F Forsyth as good proof of the way the falsification was achieved and of the respondent's instructions to Richardson, and also as corroborative of Richardson's evidence. Further, on the question of the respondent's participation in the fraud, one is bound to take into account the exhibition to the appellant by Richardson, in the presence of the G respondent, of the rough statement which brought out an estimated profit of £900. This is proved by the appellant, whose evidence is corroborative of Richardson on this matter.

In my opinion, the inevitable inference from the above facts and circumstances is that the fraud was carried out in the sole interest of H the respondent and at his instigation, as well as with his knowledge. I am therefore of opinion, in agreement with LORD MONCRIEFF and LORD CARMONT, that the appellant is entitled to have the contract reduced, provided he is able to effect *restitutio in integrum*, which will fall to be next considered.

On record, the appellant offered repayment of the price of £1,350 which the respondent paid for the shares, with interest at 4 per cent. from Aug. 27, 1933, and, if anything further were required to effect *restitutio in integrum*, he stated that he was prepared to do or pay what was necessary. I may repeat the well-known statement of LORD CRANWORTH in *Western Bank of Scotland v. Addie* (1), in which the respondent, under the first head, claimed the right of repudiating altogether the contract for the purchase of 135 shares from the bank, on the ground of fraudulent misrepresentations. LORD CRANWORTH said, at pp. 164, 165 :

Relief under the first head, which is what in Scotland is designated *restitutio in integrum*, can only be had where the party seeking it is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into. Indeed, this is necessarily to be inferred from the very expression, *restitutio in integrum* ; and the same doctrine is well understood and constantly acted on in England.

It is to be noted that the condition of the relief is the restoration of the defender to his pre-contract position, and that no stress is placed on whether the pursuer is so restored. The normal type of case in which the question has arisen is one where the pursuer is purchaser, and seeks to recover the price on restoration of the subject purchased, and the question in issue is whether the pursuer by his treatment of the subject purchased, while in his possession, has so treated it that it is no longer identifiable in any reasonable sense. I should add that the alteration of the subject purchased might also have been caused by circumstances outside the control of the pursuer, such as the conversion of shares into shares of an essentially different character. This type of case is well illustrated by *Adam v. Newbigging* (2), in which the plaintiff claimed rescission of a contract, under which he became a partner in the defendants' business, on the ground of misrepresentations without fraud. It was held that the deterioration of the business during the period of the plaintiff's partnership, which had resulted in its failure with large liabilities, was due to the inherent vice of the business itself, and did not depend to any degree on the bargain entered into between the plaintiff and the defendants, and that the plaintiff was entitled to rescission. In other words, the vice was already there when the contract was made.

It is well established that the doctrine is not to be applied too literally. This was pointed out in the opinion of LORD BLACKBURN in *Erlanger v. New Sombrero Phosphate Co.* (3), at p. 1278, which is quoted by RIGBY, L.J., in his opinion in *Lagunas Nitrate Co. v. Lagunas Syndicate* (4), at pp. 456, 457, where he sets out more fully the modifications of the doctrine as follows :

Now, no doubt it is a general rule that in order to entitle beneficiaries to rescind a voidable contract of purchase against the vendor, they must be in a position to offer back the subject-matter of the contract. But this rule has no application to the case of the subject-matter having been reduced by the mere fault of the vendors themselves ; and the rule itself is, in equity, modified by another rule, that where com-

pension can be made for any deterioration of the property, such deterioration shall be no bar to rescission, but only a ground for compensation. I adopt the reasoning in *Erlanger's* case (3) of LORD BLACKBURN, as to allowances for depreciation and permanent improvement. The noble Lord, after pointing out that a court of law had no machinery for taking accounts or estimating compensation, says [p. 1278]: "But a court of equity could not give damages, and, unless it can rescind the contract, can give no relief. And, on the other hand, it can take accounts of profits, and make allowance for deterioration. And I think the practice has always been for a court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract." This important passage is, in my opinion, fully supported by the allowance for deterioration and permanent improvements made by LORD ELDON and other great equity judges in similar cases. . . . The obligation of the vendors to take back the property in a deteriorated condition is not imposed by way of punishment for wrongdoing, whether fraudulent or not, but because on equitable principles it is thought more fair that they should be compelled to accept compensation than that they should go off with the full profit of their wrongdoing. Properly speaking, it is not now in the discretion of the court to say whether compensation ought to be taken or not. If substantially compensation can be made, rescission with compensation is *ex debito justitiæ*.

The fact that the Scottish court is a court of both law and equity does not affect the application of these modifications of the doctrine in Scotland.

Some discussion took place at the hearing of this appeal as to whether the application of the doctrine was to be measured by different standards according as the misrepresentations were fraudulent or not. LORD LINDLEY, then LINDLEY, M.R., undoubtedly took the view that there was a difference, as appears from his opinion in the *Lagunas Nitrate Co.* case (4), and, as I shall indicate later, I am of opinion that this must be so. LINDLEY, M.R., said, at pp. 433, 434:

These facts are very different from any with which the court had to deal with in *Erlanger's* case (3). Still, if this were a case of fraud, the court would be justified in making an order for repayment of the purchase-money (including the amount realised by the sale of the shares) on the plaintiffs accounting for all their profits. The defendants could not effectually set up their own wrong as a reason for not giving such relief against them. But, there being in this case no fraud, the reasoning which in a case of fraud would justify such an order is inapplicable.

The above cases were all examples in substance of a purchaser seeking relief against a vendor, but in the present case the position is reversed. Counsel were only able to refer to one case in which the position was similar—namely, *Hay v. Rafferty* (5), in which LORD KYLLACHY, Lord Ordinary, referred to this matter, and his decision was affirmed by the First Division. The pursuer sought reduction of an assignation by him of his share in a Crown fishery lease, which excluded assignees and subtenants without the consent of the Crown, on the ground of fraudulent misrepresentation. The assignee was accepted by the Crown as a tenant. The purchaser made no offer to repay the consideration which he had received, nor did he state that he was in a position to relieve the defender of his obligations to the Crown. The defender was assoilzied. The case was a clear one, and is of no assistance in the present case.

As I have already observed, the doctrine relates to the restoration of the defender to his pre-contract position, and the above statements as to the modifications of the doctrine relate to what the defender is

to get. None of these statements deals directly with the case of the vendor seeking relief against the purchaser in regard to the effect on the application of the doctrine of changes in the subject-matter while in the hands of the purchaser, and it is in regard to this question that, in my opinion, there may well be a different conclusion according as
A the misrepresentations are fraudulent or not. While the decision in any case must turn on the terms of the contract under reduction and the facts of the particular case, I may say broadly that, in my opinion, the defender who, as purchaser, has been guilty of fraudulent misrepresentation is not entitled in bar of restitution to found on dealings
B with the subject purchased, which he has been enabled by his fraud to carry out. I rather think that the Lord President had something of this sort in his mind when he said :

It was also urged with force that the increased prosperity of the company after the pursuer ceased to be a shareholder could not be attributed exclusively to its "inherent virtue." On the other hand there is also real difficulty in determining how far the defender in relying on considerations of this sort would be really relying on his own fraud and its effects on the finances of the company. That, in my opinion, would be inadmissible.
C

I may illustrate my view by an argument in the present case, which is stated in the respondent's case in this appeal as follows :

D The respondent further contends that one of the effects of *restitutio in integrum* would be to alter both the appellant's and respondent's share of the control of the company, and that from this point of view the appellant cannot restore the parties to their *statu quo ante*. Should the contract be rescinded, the appellant and Mr. Richardson will hold the controlling interest of the company, whereas in Aug., 1931, this was shared by the appellant and the respondent.

E This would in fact be true, but it is to be remembered that, after the acquisition of the appellant's shares, the respondent owned the whole issued capital of 5,850 shares, though 200 were in the name of Richardson as his nominee, that in 1934 he gave 800 shares to Richardson, and that, the capital having been increased in 1935 from £6,000 to £10,000,
F at the time of the proof the respondent held 5,000 shares, his wife 2,500 shares, and Richardson 2,500 shares. The Lord Ordinary says :

Furthermore, in view of the alteration which has occurred in the issued capital of the company and its individual holdings, the pursuer's demand is for a transfer of shares which, taken along with the shares of Mr. Richardson, who is, so to speak, in his camp, would give him control of the company. That would not be a reinstatement, but would be much more than a reinstatement.
G

My Lords, I regret to be unable to agree with this view of the Lord Ordinary, and I think that counsel for the respondent was well-advised in not pressing this contention before this House. To hold that the respondent's quarrel with his *particeps criminis* was to affect the question
H of restitution appears to me to be untenable, and exposes the possible consequences of holding that the respondent's dealings with the fruits of his fraud are to provide a bar to restitution. In a case of innocent misrepresentation, however, it may well be that an alteration of the holdings in the company, made on the footing that the contract was valid, might, in certain circumstances, prove a bar to restitution. If

the purchaser of the shares thereby gained ample control of the company, both parties being aware that that was the purpose of their acquisition, and thereafter disposed of so many shares as still left him in control if the contract stood, but would not do so if the contract were rescinded, it may be that, if the contract were reducible for fraudulent misrepresentation, there would be no bar to restitution, and that, if the misrepresentation were without fraud, it might be held to provide such a bar. I express no opinion upon the point. A

I now turn to the respondent's averments in bar of restitution in answer 9 of the condescendence, in which he states as follows :

The pursuer is not able to restore the parties to the position in which they were in Aug., 1931, when the company was in a position of financial difficulty and involved in a scheme which was at that date and still is a matter of speculation. The share capital of the company having been increased as set forth in answer 1 hereof, it is impossible to restore to the pursuer 2,925 fully paid shares of £1 each of the original capital of the company as concluded for. In implement of the said contract entered into between the pursuer and defender in the present action the defender made payment and undertook obligations to the bank as set forth in answer 6 hereof. If these payments had not been made and these obligations undertaken by the defender the pursuer's securities would not have been released. B C

As regards the first point, the appellant agreed that, while the original capital was referred to in the conclusion, it was only for identification, and was not a necessary or appropriate element in the decree. I have already dealt with the argument that the altered capital and the present holdings are a bar to restitution, which might affect the controlling interest in the company. Beyond that, the alteration of the capital does not appear to affect the question of the restoration of the respondent to his pre-contract position, and it is for the appellant to say whether he is content to take the number of shares sold by him, though they no longer amount to one-half of the issued capital. D E

There remain the payments made and obligations undertaken by the respondent in implement of the contract. Turning to the contract itself, it appears clear to me that the main purpose and effect of the contract were that the interest of the appellant in the company as a director, as works manager and as a shareholder should cease as at the date of the contract. Head 7 of the offer makes this clear, and, although the payment of the price and the transfer of the shares were postponed, any dividends were to go to the respondent. In that view, I agree with the view expressed by LORD MONCRIEFF, who alone has held that restitution is possible, that the postponement of the payment of the price was a benefit to the respondent, and that the obligations of the appellant to leave his securities meantime with the bank and the obligations of the respondent to secure the release of these securities within 2 years were natural conditions of the postponement of the payment of the price and of the release of the securities over a period during which the appellant was excluded from any part in the management or control of the business, and were a benefit to the respondent. In any event, I am clearly of opinion that they were ancillary to the F G H

main purpose of the contract, and on this point I am unable to agree with LORD CARMONT, who differed from LORD MONCRIEFF on the question of restitution.

The payments made and obligations undertaken by the respondent founded on by him in answer 6 of the condescendence are as follow :

- A (i) the repayment of the £900 loan to the company referred to in heads 1 and 4 of the offer, but this repayment was in fact made by the company, and not by the respondent ; (ii) the sale by the bank in 1932 of certain of the respondent's holdings of Bank of Scotland stock and Midland Bank stock, which the bank held as security for the company's overdraft ; I will deal with this matter later ; and (iii) a guarantee for £3,000 given by the respondent to the bank in Sept., 1933, a guarantee for the same amount given by the respondent's mother in Dec., 1931, and an assignation, dated Sept. 6, 1933, by the respondent in the bank's favour of the £5,638 loan due to him by the company and, in addition, of all claims competent to him against the company in respect of securities transferred to the bank in security of the company's obligations to the bank. The bank in fact never claimed payment under either of these guarantees, though doubtless they were useful in the financing of the business of the company, and, in my opinion, they cannot affect the question of restitution. The sale by the bank of the respondent's stock might raise a difficult question, but that question does not arise in view of the offer of the appellant, at the hearing of the appeal, to give credit to the respondent for an amount which would compensate him for the difference between the market value of the stocks when they were sold in 1932, when prices were low, and the present market value, if this House thought it just to do so. This also covers the assignation of Sept., 1933, as the £5,638 loan represented the amount realised by the sale of the stocks, which had been applied in reduction of the company's overdraft, and had been entered as a loan by the respondent in the company's books. In my opinion, to use the phrase of LORD BLACKBURN, the court will be doing what is practically just by making it a condition of restitution that the respondent should be compensated as above suggested, and such payment, along with repayment of the price of the shares with interest, will, in my opinion, satisfy the doctrine of *restitutio in integrum*.

- It is right that I should refer to two cases to which LORD CARMONT refers, but which, in my opinion, are of no assistance in the present case. The case of *Boyd & Forrest v. Glasgow & South Western Ry. Co.* (6) related to a contract for construction of a railway, which had been completed before the action was raised. The appellants had already failed in an earlier appeal to this House ([1912] S.C. (H.L.) 93) in their claim to have the contract reduced on the ground of fraudulent misrepresentation, and in this second appeal they sought to have the contract rescinded on the ground of innocent misrepresentation as to the nature of the strata in which the work was to be done, which they alleged

had made the work actually performed totally different from the work contracted for, and they claimed to be paid on the basis of a *quantum meruit*. The appeal was dismissed on a variety of grounds, among which was the impossibility of *restitutio in integrum*. It was obvious that the land could not be restored to its condition prior to the construction of the railway, and no offer was made to restore it. There is no analogy between the facts of that case and those of the present one, and the same remark applies to *Hunt v. Silk* (7), where there had been an intermediate occupation by the plaintiff, a part execution of the agreement, which was incapable of being rescinded. A

On the whole matter, I am of opinion that the appellant is entitled to reduction of the contract, on repayment of the price of the shares and making compensation as above stated, and to the execution of a transfer in his favour. The appellant stated that he did not press for decree in terms of the third conclusion of the summons. In this view, it seems clear that the appellant would be entitled to have an accounting from the respondent for all dividends, or other payments in respect of the shares by the company since the date of the contract. However, although this matter is referred to in condescendence 9, it is not covered by the conclusions of the summons, and would involve further proceedings, unless the parties could by agreement adjust the amount due, so as to set it against the sums due to the respondent as above set forth, including interest where properly payable, and thus strike an agreed balance, so that the whole question could be disposed of in this appeal. In order to save such further proceedings, in the event of your Lordships coming to the conclusions which I have expressed, counsel for the parties, on the suggestion of my noble and learned friend then on the Woolsack, have agreed on the form of order which should be pronounced by this House in that event, including an adjustment of the sum falling to be paid by the appellant to the respondent and of the sums falling to be paid by the respondent to the appellant, and the resulting balance in favour of the appellant, and have submitted it for your Lordships' acceptance. The balance thus brought out in favour of the appellant amounts to the sum of £1,936 6s. 10d., and a statement showing how that balance has been arrived at has been embodied in a joint minute which has been lodged by the parties. The statement thus agreed upon may be summarised as follows: B

1. Sums to be paid by the appellant to the respondent		
(1) Repayment of the price of 2,925 shares in Glencairn Metals, Ltd., and interest	£1,630 16s. 10d.	
(2) Loss on shares realised by the respondent in 1932, to the extent of one-half thereof	£500 11s. 4d.	
Total payable by appellant	£2,131 8s. 2d.	
2. Sums to be paid by the respondent to the appellant in respect of dividends on 2,925 shares	£4,067 15s. 0d.	
Balance in favour of the appellant	£1,936 6s. 10d.	

As the accounting by the respondent is not covered by the conclusions C

A

B

C

D

E

F

G

H

of the summons, it would in strict procedure be necessary that an appropriate amendment should be made by the appellant, but I suggest to your Lordships that, as the parties are really in accord in the matter, any further expense and delay may be avoided if the respondent is willing to agree that the order for payment by him of that balance should be made with his consent. If the respondent does so consent, I propose to your Lordships that the appeal should be allowed and that the interlocutor of the Lord Ordinary, dated Dec. 16, 1937, and the interlocutor of the First Division, dated May 6, 1938, should be recalled, and that, in accordance with the form of order agreed on by the parties, the case should be remitted to the Court of Session (a) to pronounce decree of reduction in terms of the first conclusion of the summons, and (b) to pronounce, in lieu of the decree asked for in the second conclusion of the summons, decree (i) ordaining the respondent, within 14 days from the date of decree, to execute and deliver to the appellant a transfer in his favour of 2,925 fully paid shares of £1 each in Glencairn Metals, Ltd., and authorising the clerk of court, in the event of the respondent's failing so to execute and deliver such transfer, to execute on behalf of the respondent and deliver to the appellant a transfer of the shares, and (ii) of consent ordaining the respondent to pay to the appellant the sum of £1,936 6s. 10d. sterling, and (iii) to find the appellant entitled to the costs of the action in the Court of Session other than those awarded to the respondent by the interlocutor of May 20, 1937. The respondent should pay to the appellant the costs of this appeal.

I am asked by my noble and learned friends, LORD ATKIN and LORD RUSSELL OF KILLOWEN to state that they concur in the opinion which I have just expressed.

LORD MACMILLAN: My Lords, I agree with the opinion which has just been delivered by my noble and learned friend LORD THANKERTON and that about to be delivered by my noble and learned friend LORD WRIGHT, which I have had an opportunity of considering.

LORD WRIGHT: My Lords, I have had the advantage of reading in print the opinion which has just been delivered by my noble and learned friend LORD THANKERTON, and I agree with it. I merely add a few observations out of respect to the judges from whom I have the misfortune to differ.

I shall deal first with the issue of fact. It is true that, in this as in any other action, a strong case is required to justify an appellate court in differing from the conclusion of fact reached by the trial judge, who has heard and seen the witnesses and has found that fraud was not proved, particularly when his decision has been supported by the two senior judges of the First Division of the Court of Session, though their two brethren were for holding that fraud was established. I feel constrained, after very carefully considering the whole evidence, to agree with LORD

MONCRIEFF and LORD CARMONT, and to hold that fraud has been made out. I do not think it necessary to repeat in detail the reasoning by which LORD MONCRIEFF and LORD CARMONT reached that conclusion, or to repeat the reasoning of LORD THANKERTON in the opinion which your Lordships have just heard. I shall, however, shortly indicate what appear to me to be the most crucial matters in the case. I may also add with respect that it seems to me that the Lord Ordinary, the Lord President and LORD FLEMING have, in dealing with the evidence, failed sufficiently to dovetail or correlate the various pieces, but have rather treated the pieces of evidence individually, instead of cumulatively. Proof of a complicated fraud generally depends on a process of correlation and corroboration. I regard as the most crucial pieces of evidence, first, the accountants' report of Mar. 16, 1936, explained and supplemented by the evidence of Mr. Cowan and by the balance sheets, and, secondly, the oral evidence of Miss Forsyth. The material issue in the case is whether the respondent fraudulently misrepresented to the appellant the company's profits for 1930, and did so by means of a false balance sheet and statement of account based on an understatement of stock at the end of 1930, and thereby induced the appellant to sell his shares. It is most unfortunate that the whole report was not available to the court, instead of merely the excerpts allowed under the Lord Ordinary's interlocutor, the reason for which I do not understand. The whole period covered by the report was, in my opinion, relevant, both as evidence of intention or system, and also because the estimate of the stock for 1930 was arrived at by the accountants by working backwards from the 1935 figures. However, I see no reason to doubt the substantial accuracy of the report which was prepared on the respondent's instructions and accepted by him as correct. I think also the report shows that the respondent agreed that there was for 1930 an understatement of stock of approximately £2,000, thus showing an understatement of profits for the year of about that sum. It seems an inevitable inference that the understatements of profits were not made for one year only, but were continued cumulatively until 1935, and were not made without the respondent's knowledge. The understatements were made in order to defraud the Inland Revenue. They involved the falsification of books, and constituted a fraud which I regard as peculiarly gross. They also enabled the fraudulent suppression of sales in 1932, to which undoubtedly the respondent was a party. In my judgment, the understatement was also used, so far as concerned 1930, in order to exhibit a false statement of profits to the appellant and so induce him to sell the shares. Quite apart from the admission by the respondent which I find in the report, I cannot accept the view that such a course of falsification could have been adopted except on the respondent's instigation and responsibility. Richardson had no interest in the company at the material time, and I find it incredible that he should have committed, or been a party to, the fraudulent

understatements of stock on his own initiative. That it was an intentional fraud I have no doubt, even though it is called an irregularity in the report.

- I think the attempted explanation that the discrepancy was due to stock in transit at the end of 1930 is unsubstantial. The accountants
- A** who made the report could not have failed to mention such an obvious matter of extenuation, if it existed. It is also clear that stock was systematically suppressed until it amounted to almost £17,000 by 1935. I cannot believe that the respondent would have agreed the irregularities, i.e., the understatements of the stock, as he did in the report, unless
- B** he was a party to them. In my opinion, however, that he was a party to the fraud is corroborated and confirmed by the evidence of Miss Forsyth, which, if believed, is conclusive that the respondent knew of the understatements of stock and instigated them, and intended to use them as regards the 1930 figures to induce the appellant to sell his
- C** shares. It is true that the Lord Ordinary has not accepted her evidence. If he had so acted because, on his impression of her personality, he regarded her as dishonest, and not worthy of credit, I should have felt the greatest hesitation in taking a different view. However, his reason for not accepting her evidence is not based on her demeanour, or his
- D** estimate of her as a woman, but on a course of reasoning. Thus, he said that she was in a sense implicated in the fraud if she was speaking the truth, and that there were some discrepancies in her evidence as compared with that of Richardson, and also some internal inconsistencies. I think an appellate judge is entitled to form his own opinion on the
- E** value of such considerations, once the Lord Ordinary has said there was nothing in her demeanour to indicate that she was a dishonest witness. If her evidence was not true, she must have been guilty of gross and inexplicable perjury. She said that there was an alteration of the quantities of stock, as at the end of 1930, involving an understatement
- F** of about 500 tons at £4 10s. per ton. She said that that was done after she heard the respondent telling Richardson that the figures shown must be reduced, and that he did not want to show a profit. She said that that practice went on afterwards for some years, and that some time after the first 2 years she protested to the respondent, because
- G** the practice was continuing. She is still in the company's employment and is a highly qualified secretary. Her evidence fits in precisely with the report. I see no reason why she should be disbelieved. If it is said that she was guilty of acquiescence in the fraud, it should be noted that she was then a girl of about 22 years of age, and acted under the orders of
- H** her employers and superiors. It is to be added that the respondent, when cross-examined as to whether Miss Forsyth may have protested about the falsification, said: "She may. I don't remember." While it is true that at a later stage he gave a categorical denial to the Lord Ordinary, I do not think that his earlier answer can be ignored. As to the evidence of Richardson for the appellant, I should not attach

importance to it without corroboration, but it does in substance agree, on the essential matters, with that of Miss Forsyth. As to the evidence of the respondent on his own behalf, he is clearly a discredited witness. If the fraudulent representations to the appellant by the respondent are made out, I think it must follow that they had their effect in inducing the appellant to decide that it was time to get out of the concern. It A would have been very different if he had known that the profits for 1930 were not about £133 but about £2,000.

I have briefly indicated the evidence which appears to me to be most crucial in supplement to the detailed examination of the evidence in the judgments of LORD MONCRIEFF and LORD CARMONT, and in the B opinion of LORD THANKERTON. On the basis that the fraud is established, I think that this is a case where the remedy of rescission, accompanied by *restitutio in integrum*, is proper to be given. The principles governing that form of relief are the same in Scotland as in England. The remedy is equitable. Its application is discretionary, and, where the remedy is C applied, it must be moulded in accordance with the exigencies of the particular case. The general principal is authoritatively stated in a few words by LORD BLACKBURN in *Erlanger v. New Sombrero Phosphate Co.* (3), where, after referring to the common law remedy of damages, he went on to say, at p. 1278 : D

But a court of equity could not give damages, and, unless it can rescind the contract, can give no relief. And on the other hand, it can take accounts of profits, and make allowance for deterioration. And I think the practice has always been for a court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract.

In that case, LORD BLACKBURN is careful not to seek to tie the hands of the court by attempting to form any rigid rules. The court must fix its eyes on the goal of doing "what is practically just." How that goal may be reached must depend on the circumstances of the case, but the court will be more drastic in exercising its discretionary powers F in a case of fraud than in a case of innocent misrepresentation. This is clearly recognised by LINDLEY, M.R., in the *Lagunas* case (4). There is no doubt good reason for the distinction. A case of innocent misrepresentation may be regarded rather as one of misfortune than as one of moral obliquity. There is no deceit or intention to defraud. G The court will be less ready to pull a transaction to pieces where the defendant is innocent, whereas in the case of fraud the court will exercise its jurisdiction to the full in order, if possible, to prevent the defendant from enjoying the benefit of his fraud at the expense of the innocent H plaintiff. Restoration, however, is essential to the idea of restitution. To take the simplest case, if a plaintiff who has been defrauded seeks to have the contract annulled and his money or property restored to him, it would be inequitable if he did not also restore what he had got under the contract from the defendant. Though the defendant has been fraudulent, he must not be robbed, nor must the plaintiff be unjustly

- enriched, as he would be if he both got back what he had parted with and kept what he had received in return. The purpose of the relief is not punishment, but compensation. The rule is stated as requiring the restoration of both parties to the *status quo ante*, but it is generally the defendant who complains that restitution is impossible. The plaintiff
- A** who seeks to set aside the contract will generally be reasonable in the standard of restitution which he requires. However, the court can go a long way in ordering restitution if the substantial identity of the subject-matter of the contract remains. Thus, in the *Lagunas* case (4), though the mine had been largely worked under the contract, the
- B** court held that, at least if the case had been one of fraud, it could have ordered an account of profits or compensation to make good the change in the position. In *Adam v. Newbigging* (2), where the transaction related to the sale of a share in a partnership, which had become insolvent since the contract, the court ordered the rescission and mutual restitution,
- C** though the misrepresentation was not fraudulent, and gave ancillary directions so as to work out the equities. These are merely instances. Certainly in a case of fraud the court will do its best to unravel the complexities of any particular case, which may in some cases involve adjustments on both sides.
- D** In the vast majority of cases of the transfer of property, it is a purchaser who is seeking to reduce the contract, on the terms, on the one hand, of restoring what he has purchased, and, on the other hand, of being repaid the purchase price with all proper allowances and accounts. The present case is peculiar in that it is a vendor who seeks rescission. Nevertheless,
- E** the principles must be the same. The appellant is content to take back 2,925 shares in the company, though the constitution of the company has been changed by a reconstruction and enlargement of the share capital. He is willing to pay back what he received with interest. He is also willing to pay any further compensation which the court thinks
- F** is due. So far the position might seem to be clear. The difficulties which have been raised have reference to the collateral terms of the contract. Of these I need only refer to cl. 5 and 6. These clauses were primarily due to the fact that completion of the transaction was deferred for the benefit of the respondent for 2 years, but they also involved
- G** relieving the appellant of the obligations which he had assumed while a shareholder and director. When he sold all his shares and interest in the company, it was natural that he should be relieved of these liabilities, in particular of his guarantee to the bank, and of the deposit
- H** of his shares with the bank. When, however, the *status quo ante* is restored and he again becomes holder of 2,925 shares, it might seem equitable that he should reassume the liabilities to which he was subject when he made the contract. However, during the years since the sale, during which the respondent has been conducting the affairs of the company on his own responsibility and in his own interest, the financial position of the company has been so changed that it is not clear to me

that anything further is necessary to restitution than the retransfer of 2,925 shares and repayment of the purchase price with interest. The appellant's claim for intermediate profits or dividends was not originally brought into the action. I cannot see how the fact that for the 2 years between the contract and its completion the respondent relieved, under cl. 6, the appellant of his liability can affect the position. If the respondent had been compelled to pay moneys, or was still under the liabilities under which the appellant had been, it would be different. However, the whole financial position of the company changed. It is not suggested that an indemnity for the past liabilities would be of any use. Though there is a further point on which I feel more difficulty, I am not satisfied that the sale which the bank required of the respondent's shares held by it as security would ever have been necessary, even to secure the release of the appellant's shares, except for the manner in which the respondent conducted the affairs of the company, in particular in regard to the understatement of stock and suppression of sales in the balance sheets. However, it is unnecessary to decide finally how these matters should be dealt with, because, as my noble and learned friend LORD THANKERTON stated, the parties have agreed upon a form of order which is to be made in the event of this House holding that the contract should be rescinded and that there should be restitution.

I should, however, refer shortly to *Hunt v. Silk* (7), which was quoted by LORD CARMONT. With all respect, I do not think that that decision affords any assistance here. That was an action at common law for money had and received. The plaintiff had paid £10 under an agreement for a lease of premises which contained certain conditions. The plaintiff entered into possession of the premises, and continued in possession after the conditions had to his knowledge been broken. It was held that he could not claim to rescind and recover the money he had paid, but that his action was in damages. It appears from the judgment of LAWRENCE, J., that he failed because there had been no total failure of consideration, so that the money could not be recovered in that form of action. Nor could he claim to rescind the contract, because he had held possession after he knew of the breach of condition, and had thereby waived any right to rescind. The contract could not be rescinded *in toto* and the parties replaced *in statu quo*, because there had been a part execution of the agreement. It is clear that the form of action at law in that case was different from the equitable jurisdiction which the appellant invokes in these proceedings.

Appeal allowed with costs.

Solicitors: *Lawrence Jones & Co.*, agents for *Macpherson & Mackay*, W.S., Edinburgh, and *Niven, Macniven & Co.*, Glasgow (for the appellant); *Botterell & Roche*, agents for *Martin, Milligan & MacDonald*, W.S., Edinburgh, and *Brownlie, Watson & Beckett*, Glasgow (for the respondent).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

**Re GUNTHER'S WILL TRUSTS, ALEXANDER AND
ANOTHER v. GUNTHER AND OTHERS.**

[CHANCERY DIVISION (Farwell, J.), **May 3, 4, 5, 25, June 14, 1939.**]

Executors and Administrators—Residuary estate—Determination of residue—Valuation—Date for valuing estate for purpose of final distribution.

By his will, dated July 29, 1919, the testator, who died on Aug. 30, 1931, after giving certain pecuniary legacies to his executors, and a specific devise of one estate and a life interest in another to his wife, gave the whole of the residue to trustees upon trust for sale and conversion with power to postpone, and declared that the whole of the net income of his estate as from his death should be treated as income, no part thereof being set aside as capital, and that no reversion or other property not actually producing income should be treated as producing income. He further directed that the trustees should stand possessed of the proceeds of the sale and conversion as a residuary trust fund to hold in two moieties on certain trusts as to the first moiety for the children of his first wife and in case of failure to be added to the second moiety, the income of the second moiety to be paid to his present wife during her life, and, subject thereto, in trust for her children surviving the testator and attaining the age of 21 in equal shares. Then followed provisions as to what should be brought into hotchpot in the division of the residuary trust fund as between the two moieties and charged against the same. There was also power to the trustees to advance and authority to appropriate all or any part of the real or personal estate in the actual condition or state of investment for the time being in or towards the satisfaction of any legacy bequeathed by the will, and incidental powers, *inter alia*, to settle all accounts and wind up the estate. There was a long interval between the date of the death of the testator, the date of retainer for legacy duty purposes and the date of distribution:—

HELD: (i) the question as to what date should be taken as the date on which the estate of the testator was to be valued for the purpose of adjusting the rights of the parties *inter se* in the final distribution was primarily one of the construction of the particular will in each case.

(ii) there was nothing in the will to show that the testator had some particular date in his mind, and, in the absence of such an indication, it was a matter of convenience. In all the circumstances, that date should be the date of the death of the testator.

[EDITORIAL NOTE.] The question asked in this case has not been made the subject of decision in the past. The answer given is of a two-fold nature. It may be that the will contains an indication of the date to be taken for this purpose, and then it is a matter of construction. Where the will contains no such reference, the matter is one for a rule of convenience, since there is no good reason for choosing any one of the possible dates rather than another.

AS TO RESIDUARY ESTATE, see HALSBURY, Hailsham Edn., Vol. 14, pp. 366-368, paras. 685-688; and FOR CASES, see DIGEST, Vol. 23, pp. 459-464, Nos. 5328-5357.]

Case referred to:

- (1) *Barnardo's Homes v. Income Tax Special Comrs.*, [1921] 2 A.C. 1; 28 Digest 84, 483; 90 L.J.K.B. 545; 125 L.T. 250; *sub nom.* *R. v. Income Tax Acts Special Purposes Comrs.*, *Ex p. Dr. Barnardo's Homes National Incorporated Assocn.*, 7 Tax Cas. 646.

ADJOURNED SUMMONS to determine, *inter alia*, what date should be taken as the date on which the estate of the testator should be valued for the purpose of adjusting the rights of the parties *inter se* in the final

distribution. The facts and arguments are fully set out in the judgment.

F. R. Evershed, K.C., and J. W. M. Holmes for the executors.

J. M. Gover, K.C., and R. H. Hodge for Mrs. Alexander and Mr. H. Gunther.

Lionel Cohen, K.C., and B. F. Mendel for the beneficiaries.

FARWELL, J. : In this case, the testator died on Aug. 30, 1931. He made his will on July 29, 1919, having made a codicil thereto on Oct. 12, 1927. By his will, he appointed his wife, Helen Gunther, Mr. John Bell and Mr. Carlisle to be his executors and trustees, and he gave them pecuniary legacies. He then gave to his wife a pecuniary legacy of £4,500 and certain chattels, to which I need not refer. He then made a specific devise of a certain estate to his wife, and also of his land and hereditaments at Romney Marsh and certain chattels to the use of his trustees, upon trust that his wife should pay all outgoings in respect of the premises, and keep the same in repair, and should have an interest for her life in that property. On her death, the premises were to fall into the residuary estate. The testator then, after another specific legacy, gave the whole of his residue to his trustees upon trust for sale and conversion in the usual way, with power to postpone, and declared as follows :

... that the whole of the net income of my estate as from death shall be treated as income no part thereof being set aside as capital and that no reversion or other property not actually producing income shall be treated as producing income provided that (a) my sons James Henry Gunther and William John Gunther shall (subject as hereinafter mentioned) have the option in succession according to seniority of purchasing my said estate . . .

I do not think that it is necessary to refer to that more in detail. In cl. 7, however, the testator provided as follows :

As to the moneys to arise from such sale and conversion I direct that my trustees (after paying thereout or retaining all the costs charges and expenses attendant or incident thereto and paying my debts funeral and testamentary expenses and the legacies given by me and the duties on any devises or bequests made free of duties) shall stand possessed of such moneys and the investments representing the same (hereinafter called my residuary trust fund) in trust (subject as hereinafter provided) to divide the same into two equal moiety of which one moiety is hereinafter called the first moiety and the other moiety is hereinafter called the second moiety.

Then cl. 8 provides as follows :

As to the first moiety (a) my trustees shall hold the same in trust for all or any of my children or child by my first wife who survive me and if more than one in equal shares . . . (c) in case the foregoing trusts concerning this moiety shall fail then subject to such trusts and to all powers vested in my trustees concerning the same such moiety shall be added to and form part of the second moiety.

Then cl. 9 provides as follows :

As to the second moiety : (a) The income thereof shall be paid to my said present wife during her life. (b) Subject as aforesaid my trustees shall hold such moiety in trust for all or any my children or child by my said present wife who survive me and attain the age of 21 years and if more than one in equal shares . . .

Then there comes a substitutionary gift, which I need not read. Then in cl. 10 the testator provides as follows :

In the division of my residuary trust fund the following shall be brought into hotchpot as between the said two moiety thereof and charged against the same

- respectively : (a) There shall be charged against the first moiety (1) the aggregate sum of £52,500 and (2) the aggregate amount or value of all gifts or settlements (other than allowances out of current income) exceeding in amount or value the sum of £5,000 made or agreed to be made by me after Sept. 2, 1918, to or for any child or remoter issue of mine by my former marriage. (b) There shall be charged against the second moiety (1) the aggregate amount or value of all gifts or settlements exceeding as aforesaid (other than as aforesaid) made or agreed to be made by me after the date aforesaid to or for any child or remoter issue of mine by my present marriage and (2) the aggregate amount or value of all gifts or settlements (other than those made out of current income) made or agreed to be made by me after the date aforesaid to or for my said present wife but so that in no event shall anything be charged in respect of the policies settled [by a certain settlement] and in the division of the first moiety as between the children of my first marriage or the persons taking in substitution for them respectively the following shall be brought into hotchpot and charged against the respective shares in such moiety : (c) There shall be charged against the share of my daughter Edith Julia Alexander or those taking in substitution for her (1) the sum of £52,500 and (2) the aggregate amount or value of such of the gifts and settlements covered by subclause (a) aforesaid as are made or agreed to be made to or for her or any of her issue. (d) There shall be charged against the share of my son Herbert Robert Paul Gunther or those taking in substitution for him the aggregate amount or value of such of the gifts and settlements covered by subclause (a) aforesaid as are made or agreed to be made to or for him or any of his issue and in the division of the second moiety as between the children of my present marriage or the persons taking in substitution for them respectively the following shall be brought into hotchpot and charged against the respective shares in such moiety : (e) There shall be charged against the share of each of such child or those taking in substitution for him or her the aggregate amount or value of such of the gifts and settlements covered by subclause (b) (1) aforesaid as are made or agreed to be made for such child or any of his or her issue and I declare that if any question or difficulty shall arise in construing or working out the provisions of this clause the same may be determined by my trustees and their determination (whether formally made or only implied in their acts or proceedings) shall bind all persons interested.

Then in cl. 11 the testator recites that " by a deed of covenant dated Sept. 2, 1918," he entered into certain covenants with

- ... the three then surviving children of my former marriage as to the devolution of my estate at my death of which three children two now survive namely Edith Julia Alexander and Herbert Robert Paul Gunther now I hereby declare that it is my wish that each of such two now surviving children or in case of decease his or her executors or administrators shall within 6 calendar months after my death or such extended time (if any) as my trustees shall in their discretion think fit to allow for the purpose execute at the expense of my estate a deed or deeds releasing my estate from all liability under such covenants and as to each such child who or whose executors or administrators omit to execute such a release the claims and demands of such child his or her executors or administrators under such covenants shall be satisfied out of the share or shares and interest under this my will and any codicil hereto of or for such child and of or for his or her spouse or issue if any and subject as aforesaid my will and codicils shall take effect in all respects as if such child had died before me without ever having been married and I declare that if such share or shares and interest as aforesaid are insufficient to satisfy such claims and demands then the balance of the same shall be satisfied out of the rest of the first moiety in the relief of the second moiety and the necessary marshalling shall be treated as having been made.

- Then there is a power to the trustees to advance, and authority to the trustees to appropriate, all or any part of the real or personal estate in the actual condition or state of investment for the time being in or towards the satisfaction of any legacy bequeathed by the will. Then there are other incidental powers given to the trustees, including the power to settle all accounts and wind up the affairs of the testator. There is nothing else in the will to which it is necessary, I think, to refer. The codicil is not important on any question which I have to consider. It merely substituted one trustee for another.

As I have said, the testator died on Aug. 30, 1931, he being twice married. He had children by his first marriage, two of those children surviving him, and children by his second marriage. After the death of the testator, and in course of administration, various questions arose which were the subject-matter of a summons, which was heard by BENNETT, J. The estate was a large one, and consisted of a considerable number of investments of various kinds in different countries. It was, necessarily, an estate which took a considerable time to administer, involving questions of some difficulty as to duties which had to be settled with the Inland Revenue authorities. While the administration was proceeding, the summons which I have already mentioned was taken out, dated Feb. 25, 1932. That summons came before BENNETT, J., and he made an order upon it. The questions which were raised by that summons were for the most part entirely, or very largely, questions of the amounts which had to be brought into hotchpot by the various beneficiaries. BENNETT, J., however, did also deal with the question of how the income should be adjusted after the date of the death of the testator and the date of distribution. He made a declaration, to which my attention has been called, which I am invited to say really is a decision, or in effect is a decision, on the point which I have to decide. The court declared that various large sums had to be brought into hotchpot, and then it dealt with the question of how the income should be treated in the meanwhile. The administration of the estate, as I have said, was complicated, and there has not yet been a final distribution of capital. It appears from the affidavit of Mr. Bagnall that he had been supplied by the defendant trustees :

. . . with full particulars of the estate of the testator as delivered to the Commissioners of Inland Revenue for the purpose of calculating the value of his residuary estate and payment of legacy duty thereon.

He also had given to him :

. . . particulars of the investments held by the executors (1) at the date of the testator's death ; (2) at the date of retainer for legacy duty purposes [which was taken as Dec. 31, 1936], and (3) at Aug. 23, 1938.

The first question on the summons which I am asked to determine is what date should be taken as the date on which the estate of the testator is to be valued for the purpose of adjusting the rights of the parties *inter se* in the final distribution. It seems odd that there does not appear to be any reported case in which this question has been decided. It therefore falls to me to consider the way in which the matter should be dealt with. A question of this sort must be primarily a question of the construction of the particular will in each case. That is to say, the court must look at the will and see whether there is anything in the will which indicates that the testator intended that the valuation should be made at any particular time. There may be provisions in the will which, although not expressly stating any particular date, may point to a conclusion as to what the testator did intend. In the present case, however, I am

unable to find anything in the will which is sufficient to say that the testator contemplated any particular date. There is nothing in the will which I can say indicates that he had some particular date in his mind. I have, therefore, to consider, as it were, at large, what is the appropriate date. The three dates which have been suggested to me in argument as

- A being the appropriate dates are (i) the date of the death of the testator, (ii) the date of retainer for legacy duty purposes [Dec. 31, 1936], and (iii) the date of distribution.

- It has been said on behalf of those who desire the later date to be taken that there is, and can be, no residue, properly speaking, until the liabilities of all kinds have been discharged. Reference has been made to *Barnardo's Homes v. Income Tax Special Comrs.* (1), an income tax case where it has been held that no one residuary legatee is entitled to any income for the purposes of tax on that income. That is to say, the income cannot be treated as the residuary legatee's income until after the date of retainer. It is said that that indicates that some date other than the date of the death is the date which should be taken. In my judgment, those considerations do not really assist me, because it is not a question of ascertaining what the residue is. It is a question of fixing the date at which the estate is to be valued, or has been valued, for the purpose, not of ascertaining what the residue is, but of adjusting the rights of the parties in a case of this sort, where there are hotchpot provisions in the ultimate distribution.

- The date of retainer is suggested, because it is said that after that date the residue has been ascertained, and the various persons will then—in equity, at any rate—be entitled to whatever their shares may be. Logically, however, if one is to take any date other than the date of the death, it would seem to me that, failing the retainer date, the date really would be the date of actual distribution.

- In this case, as it happens, there has been, as already appears, a long interval between the date of the death of the testator, the date of retainer and the date of actual distribution. As it happens, the various investments which form part of the testator's estate have very much altered in value, with the consequence that the persons interested under the estate in some cases would be well affected—that is to say, affected to their own advantage—by taking one date, whereas other classes of beneficiaries would be affected prejudicially by taking that date. There is nothing, I think, in the fact that the beneficiaries' rights or interests may vary according to the date which is taken which assists me in arriving at a conclusion, except for this consideration. The fact that the interests of the parties may vary according to the date which is taken is some indication that a date should be chosen which is a fixed date, and not one which is in any way dependent upon the energies of the executors and administrators.

I have been referred to a considerable number of authorities in which this sort of question has arisen with regard to the interim distribution

of income, and the amounts to be brought in for that purpose. As I have already said, that question did arise, and was determined by BENNETT, J. In my judgment, however, those cases really do not assist me in coming to a conclusion in this matter. This is a question of a date to be taken for the purpose of valuing the capital of the estate. Other considerations may well arise when the court is dealing with income, and not with capital. In these circumstances, it seems to me that I have to determine this point without the assistance of any decided cases at all. As I have said, it seems curious that there should not be any such case, but, so far as counsel has been able to discover, there is no case which really covers this point. It may be that in most cases the period between the death and the date of distribution is comparatively short, and, therefore, there is not much difference between the values at the death and at the date of distribution. The difference may be so small as not to make it necessary or desirable that any question should be raised.

Having regard to the fact that, if a date other than the date of the death is taken, the date must depend to some extent upon the individual executors, it seems to me desirable, if possible, to take a date which is not so dependent. I am not suggesting—I have no reason to suggest—in the particular case before me that there has been any undue delay in the administration of the estate. The estate was a large one, and a complicated one, and it may well be that the matter could not have been dealt with and disposed of more quickly. However, there will be cases in which the administration may be delayed because the executors do not exert themselves as they might have done, and are dilatory in their duties, with the result that the date for distribution may be postponed, and by such postponement some of the beneficiaries may suffer. That is a position which, in my view, is not a desirable one, if it can be avoided. I am unable to see that there is really any question of principle at stake in this case. It is really a matter of convenience. Some date must be taken at which the value of the estate can be ascertained for the purpose of making the proper adjustments in the interests of all parties. In my judgment, having regard to all the circumstances, I have come to the conclusion that the right date, in this case at any rate, is the date of the death of the testator, and I will make a declaration to that effect.

Solicitors: *Holmes, Son & Pott* (for the executors and for the beneficiaries); *G. & A. Cosens* (for Mrs. Alexander and Mr. H. Gunther).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

TUNNICLIFFE v. PICKUP.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Humphreys and Lewis, JJ.), **May 9, 1939.**]

Highways—Damage to highway—Inadvertently caused—Lorry catching fire—
A *Highway Act, 1835 (c. 50), s. 72.*

The appellant was driving a motor lorry laden with bales of cotton along the highway. Without any fault on the part of the appellant, the cotton became ignited and the lorry was set on fire. The appellant promptly did all he could to put the fire out and telephoned for the fire brigade. The heat of the fire, however, damaged the highway, and the appellant was summoned under the Highway Act, 1835, s. 72, for causing damage to the highway, and was convicted and fined:—

B **HELD:** as the appellant had not wilfully caused the damage, but, on the other hand, had done all he could to avert it, he was wrongly convicted, and the conviction ought to be quashed.

C **EDITORIAL NOTE.** The contention in this case was that the words in the Highway Act, 1835, s. 72—"shall cause any injury or damage to be done to the highway"—were in effect an absolute prohibition. The court, however, have held that, where the accused does all he can to prevent or mitigate the damage ensuing from a cause not due to his negligence, he is not guilty of any offence under the section. There is no offence within the meaning of the section unless the accused is guilty of some wilful act or omission.

D AS TO DAMAGE TO HIGHWAY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 375-377, para. 509; and FOR CASES, see DIGEST, Vol. 26, p. 436, Nos. 1537-1539.]

Cases referred to:

E (1) *Re Mahmoud & Ispahani*, [1921] 2 K.B. 716; 14 Digest 32, 37; 125 L.T. 161; sub nom. *Mahmoud v. Ispahani*, 90 L.J.K.B. 821.

(2) *Fearnley v. Ormsby* (1879), 4 C.P.D. 136; 26 Digest 416, 1345.

(3) *Moses v. Midland Ry.* (1915), 84 L.J.K.B. 2181; 25 Digest 48, 437; 113 L.T. 451.

(4) *Brackenborough v. Thorsby* (1869), 19 L.T. 692; 26 Digest 416, 1356.

F (5) *Dennis & Sons, Ltd. v. Good* (1918), 88 L.J.K.B. 388; 26 Digest 417, 1361; 120 L.T. 88.

(6) *Hawkins v. Robinson* (1872), 37 J.P. 662; 26 Digest 420, 1396.

(7) *R. v. Ewart* (1905), 25 N.Z.L.R. 709; 14 Digest 32, case 33 ii.

(8) *Harrison v. Leaper* (1862), 5 L.T. 640; 26 Digest 437, 1542.

(9) *Emary v. Nolloth*, [1903] 2 K.B. 264; 14 Digest 31, 31; 72 L.J.K.B. 620; 89 L.T. 100.

G (10) *R. v. Sleep* (1861), Le. & Ca. 44; 14 Digest 32, 33; 30 L.J.M.C. 170; 4 L.T. 525.

(11) *Strutt v. Clift*, [1911] 1 K.B. 1; 14 Digest 32, 36; 80 L.J.K.B. 114; 103 L.T. 722.

(12) *R. v. Bishop* (1880), 5 Q.B.D. 259; 14 Digest 37, 70; 49 L.J.M.C. 45; 42 L.T. 240.

H (13) *Cundy v. Le Cocq* (1884), 13 Q.B.D. 207; 30 Digest 86, 667; 53 L.J.M.C. 125; 51 L.T. 265.

(14) *Chisholm v. Doulton* (1889), 22 Q.B.D. 736; 14 Digest 32, 32; 58 L.J.M.C. 133; 60 L.T. 966.

(15) *Mousell Brothers v. London & North Western Ry.*, [1917] 2 K.B. 836; 14 Digest 44, 133; 87 L.J.K.B. 82; 118 L.T. 25.

(16) *Batting v. Bristol & Exeter Ry. Co.* (1860), 3 L.T. 665; 14 Digest 51, 176.

CASE STATED by justices for the petty sessional division of Warrington, Lancashire. An information was preferred by Roger Pickup, the respondent, a district highway surveyor, under the Highway Act, 1835, s. 72, against John William Tunncliffe, the appellant, for that he on Oct. 3, 1938, at Haydock in the county of Lancaster near the Old Boston Colliery bridge on the East Lancashire road A.580 did cause damage to be done to that highway by reason of a fire when the motor lorry which he was driving caught fire. A

The appellant was a motor driver employed by a firm of carriers, and on Oct. 3, 1938, in the course of his employment he was driving a motor lorry from Liverpool to Manchester along the East Lancashire road. The motor lorry was loaded with bales of cotton properly covered with tarpaulin sheeting. At or about the part of the highway near the Old Boston Colliery bridge, the cotton became ignited without any knowledge of the appellant, and the motor lorry was set on fire. The heat of the fire resulted in damage to the tarmacadam surface of the highway, to certain kerbstones along the highway, and to the grass verge at the side thereof, and the total cost to the Lancashire County Council, the highway authority for that highway, for the repair of the damage was the sum of £20 19s. 2d. The appellant properly attempted to extinguish the fire and telephoned for the fire brigade, and the damage was not caused by any wilful act or omission on his part. B C D

On behalf of the respondent, it was contended that the appellant was guilty of causing damage to be done to the highway within the meaning of the Highway Act, 1835, s. 72, and that, accordingly, the appellant had committed an offence thereunder. E

On behalf of the appellant, it was contended (i) that the appellant did not cause damage to the highway, (ii) that, since the damage was to the surface of the highway, in order to constitute an offence under the Highway Act, 1835, s. 72, the onus would be on the respondent to prove that the appellant wilfully caused the damage, and that the respondent had failed to discharge such onus, and had admitted that the damage was not wilfully caused, and (iii) that the respondent had failed to discharge the onus of showing the presence of *mens rea* on the part of the appellant. F

The following authorities were referred to : *Re Mahmoud & Ispahani* (1), *Fearnley v. Ormsby* (2), *Moses v. Midland Ry.* (3), *Brackenborough v. Thorsby* (4), *Dennis & Sons, Ltd. v. Good* (5), *Hawkins v. Robinson* (6), *R. v. Ewart* (7), *Harrison v. Leaper* (8), *Emary v. Nolloth* (9), *R. v. Sleep* (10), *Strutt v. Clift* (11), *R. v. Bishop* (12), *Cundy v. Le Cocq* (13), *Chisholm v. Doulton* (14), *Mousell Brothers v. London & North Western Ry.* (15) and *Batting v. Bristol & Exeter Ry. Co.* (16). G H

The justices were of opinion that, on the facts as stated, the contention of the respondent was right in law, and that it was not necessary, in order to constitute an offence, for the respondent to prove that the damage was wilfully caused by the appellant, nor for the respondent to prove

mens rea on the part of the appellant, and accordingly they held that the appellant had committed an offence, and convicted him.

The appellant appealed.

Robertson Crichton for the appellant.

J. Harcourt Barrington for the respondent.

A LORD HEWART, L.C.J.: It is quite obvious, and the efforts of counsel for the respondent have not in any way got rid of, or mitigated, the fact, that there were no materials to justify this conviction. The unfortunate appellant, who has been convicted and ordered to pay a sum of costs and a further sum for damages, was not only, so far as the facts found, perfectly innocent of what happened, but also, in the words of the case, he properly attempted to extinguish the fire and telephoned for the fire brigade. He was not guilty of any wilful act or omission, and apparently was not guilty of anything at all tending to form part of the causation of this fire. I think, therefore, that the appeal ought to be allowed.

HUMPHREYS, J.: I agree.

LEWIS, J.: I agree.

Appeal allowed with costs. Conviction quashed.

Solicitors: *Daphnes*, agents for *Bartley, Cocks & Bird*, Liverpool (for the appellant); *Norton, Rose, Greenwell & Co.*, agents for *Sir George Etherton*, Preston (for the respondent).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

BATTY v. SCHRODER (BARON).

[KING'S BENCH DIVISION (Lawtence, J.), April 19, 20, May 25, 1939.]

F *Income Tax—Succession to trade—New partnership—Exercise of option of treating old trade as discontinued—Limits of right of continuing partner to relief in respect of losses in old trade—Finance Act, 1926 (c. 22), ss. 32 (1), 33.*

G A partnership business was carried on by four partners until Feb., 1932. A fifth partner was then admitted and notice was given under the Income Tax Act, 1918, Sched. D, Cases I and II, r.11 (1) (inserted by the Finance Act, 1926, s. 32 (1)), that all members of the new partnership exercised the option of having the tax computed as if the old trade had been discontinued and a new trade set up at the time of the change in the partnership. There had been a loss in trading during the last year of the old partnership. The respondent claimed, under the Finance Act, 1926, s. 33, to set off the outstanding balance of this loss against his assessment in respect of the profits of the new partnership, contending that the relief granted by that section was a personal relief in favour of the individual partner:—

H HELD: the computation of tax made upon the exercise of the option included the final ascertainment of tax after giving all proper allowances, including allowances for losses, and losses of the old partnership cannot afterwards be set off against profits of the new partnership.

[EDITORIAL NOTE.] This case turns upon the construction of the Finance Act, 1926, s. 33, and the argument for the taxpayer is founded upon certain incidental remarks in the course of the judgment in the Court of Appeal in *United Steel Companies, Ltd. v. Cullington* (1). Where the old trade has sustained losses, any adjustment of the tax must be made, and finally made, at the time the option is exercised to treat the change of partnership as the cesser of an old trade and the commencement of a new.

AS TO CLAIMS FOR RELIEFS ON CHANGE OF PARTNERSHIP, see HALSBURY, *Hailsham Edn.*, Vol. 17, pp. 170, 171, paras. 348-350; and FOR CASES, see DIGEST, Vol. 28, pp. 40-42, Nos. 208-214. FOR THE FINANCE ACT, 1926, ss. 32, 33, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 9, pp. 671-673.]

Case referred to :

- (1) *United Steel Companies, Ltd. v. Cullington*, [1939] 1 All E.R. 454; Digest Supp.

CASE STATED under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on Feb. 2, 1938, Baron R. Bruno Schroder (hereinafter referred to as Baron Schroder) preferred a claim under the Finance Act, 1926, s. 33, by way of appeal against that portion of the assessment under Sched. D made upon the firm of J. H. Schroder & Co. for the year 1936/37 which, by virtue of sect. 33 (2), is taken as "the amount of profits or gains on which he is assessed" for that year. The ground of the appeal was that a certain sum should be deducted from, or set off against, that portion of the assessment in respect of a loss sustained by him as hereinafter appearing. A similar claim by way of appeal in respect of the year 1936/37 was preferred at the same time by F. C. Tiarks.

The present partners in the firm (hereinafter referred to as the new partnership) are Baron Schroder, F. C. Tiarks, Helmut Schroder, H. F. Tiarks, and Veritas Trust, Ltd. Up to the end of Feb., 1932, the business was carried on in partnership by the four first-named (hereinafter called the old partnership), sharing profits in definite proportions, but in the case of a loss in any year Baron Schroder bore two-thirds and F. C. Tiarks one-third, the remaining partners not bearing any part of the loss.

On Mar. 1, 1932, a new partnership agreement was entered into, under which Veritas Trust, Ltd., was admitted a partner. Veritas Trust, Ltd., was registered on Feb. 26, 1932, with a capital of £50,000, of which £49,998 was held by Baroness Schroder (the wife of Baron Schroder) and Baron Johann Rudolph von Schroder of Hamburg jointly, and £1 each by two clerks of Slaughter & May, the company's solicitors. There was no change in the character of the trade or business carried on. In the year to Dec., 1931, the old partnership sustained a loss in its trade.

Following the change of partnership, formal notice was given on Apr. 14, 1932, by all the partners both before and after the change under

the proviso to the Finance Act, 1926, s. 32 (1), r. 11 (1), requiring that the tax payable should be computed as if the trade had been discontinued on Feb. 29, 1932, and a new trade had been set up on Mar. 1, 1932. The assessments were adjusted accordingly.

A For the year 1931/32, Baron Schroder and F. C. Tiarks made claims under the Income Tax Act, 1918, s. 34, in respect of their shares of the loss of the year to Dec. 31, 1931, and relief was thus given in respect of a small proportion of the loss. No relief under the Finance Act, 1926, s. 33, has been given for any of the years 1932/33 to 1935/36 in respect of the balance of the loss sustained by Baron Schroder or F. C. Tiarks in B the year to Dec., 1931. The amount of the loss was sufficient, in the case of each, to swallow up the aggregate amount of his share of the assessed profits of the new partnership for the years 1932/33 to 1935/36 inclusive, and to leave a balance in excess of his share of the assessed profits of the new partnership for the year 1936/37 to which this appeal C relates.

There was also before the special commissioners an appeal by the new partnership against the assessment made upon it in the firm name for the year 1936/37. In arriving at that amount, no allowance had been made in respect of the losses sustained by Baron Schroder and F. C. D Tiarks in the year to Dec., 1931, and the ground of the appeal was that those losses should be deducted from, or set off against, that assessment.

The contentions on each side are set out in the judgment. The commissioners allowed the claims, and confirmed the assessment on the new partnership for the year 1936/37 in the sum of £53,556, subject E to a set-off against the appropriate portions thereof of £20,721 and £7,540 in respect of losses sustained by Baron Schroder and F. C. Tiarks respectively.

The Crown appealed.

F *The Solicitor-General* (Sir Terence O'Connor, K.C.), and *Reginald P. Hills* for the appellant.

A. M. Latter, K.C., and *F. Heyworth Talbot* for the respondent.

G LAWRENCE, J. : The question in this appeal is whether continuing partners who have exercised the option contained in the proviso to r. 11 (1) of Sched. D, Cases I and II, inserted by the Finance Act, 1926, s. 32, can claim that losses sustained in the partnership shall be carried forward and deducted from profits accruing after the exercise of the option.

H Counsel for the respondent contends that the right conferred by the Finance Act, 1926, s. 33, is a purely personal right, that the function of the proviso to sect. 32, r. 11 (1), of that Act is merely to secure that the computation and charge of tax as between the outgoing continuing and incoming partners shall be ascertained as if the trade had been discontinued and a new trade set up at the date when the option is exercised, and that that does not affect the personal rights conferred upon continuing

partners by sect. 33, which may continue so long as the trade of the partnership is the same trade. He says, moreover, that that was implicit in the judgment of the Court of Appeal in *United Steel Companies, Ltd. v. Cullington* (1), at p. 461 :

If the matter is to be treated as if a new trade had been set up at the crucial date, then it is clear that the old partners, and they alone, obtain the benefit of any allowances or deductions available at that date. A

He also drew my attention to the Finance Act, 1927, s. 29.

The Solicitor-General, on the other hand, contends that the right conferred by sect. 33 is only to set off losses against profits in respect of that trade—namely, the trade in which the loss was sustained—and that, as, by sect. 32, tax is to be computed and charged as if the trade of the old partnership had been discontinued and the trade of the new partnership had been set up on the exercise of the option, it cannot be that the right can be claimed as against the profits of the new trade. The Solicitor-General relies upon the observation of the Court of Appeal in *United Steel Companies, Ltd. v. Cullington* (1), at p. 461 : B

The direction to compute the tax payable can only mean that the tax payable has to be ascertained after making all proper allowances on the basis that the trade was set up or commenced on the last-mentioned date. This must of necessity exclude any allowances to which the predecessor might be entitled in respect of the period antecedent to the acquisition of the trade by the successor. C

Moreover, he says that this passage means that computation of tax in the proviso to r. 11 (1) includes the final ascertainment of tax, which involves the giving of all proper allowances, including allowance for losses, and that, as this computation and charge are to be made as if a new trade had been set up, losses cannot be set against the profits of the new trade, having regard to the words of sect. 33. I have come to the conclusion that the Crown's contention as to the meaning of the reasoning of the Court of Appeal is correct, and I think, therefore, that the appeal must be allowed with costs. D

Appeal allowed with costs. Respondent's claim disallowed. E

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *Slaughter & May* (for the respondent). F

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

BUSH, BEACH & GENT, LTD. G

[KING'S BENCH DIVISION (Lawrence, J.), May 9, 1939.] H

Income Tax—Profits from trade and trade receipts—Lump sum paid for cancellation of contract—Contract in ordinary course of trade—Cancellation not excluding company from part of business. H

From 1920 to 1933, the appellant company carried on business as chemical merchants, confining their business to industrial chemicals. In 1933, they entered into a contract for the purchase of agricultural chemicals, in the selling of which they were to have exclusive rights in certain parts of the country. This contract was terminated on May 1, 1935, upon a payment to the appellant company of £4,750. The question

v. Dictum of LAWRENCE, J., at p. 304, applied. HOUSEHOLD v. GRIMSHAW (INSP. OF TAXES). [1953] 2 All E.R. 12.

was whether such payment must be treated as income or as a capital payment :—

HELD : the sum paid represented profits which the appellant company would or might have made under the contract, and, although a payment for the cancellation of the contract, was an income payment.

[EDITORIAL NOTE.

The point of this case is whether the payment was one

- A** for the cancellation of a contract, where such cancellation would result in the closing down of a self-contained part of the company's business, or was made in the ordinary course of the business of the company, and in lieu of, or as a prepayment of, future profits. The judge, in considering this matter, has come to the conclusion that this sum represents the profits which might have been made under the contract, and that it was, therefore, not to be treated as the purchase price of the cancellation
- B** of the contract, but rather as the prepayment of profits. It must be noted that the cancellation of the contract did not in any way exclude the company from dealing in any particular kind of chemicals.

AS TO PAYMENTS FOR CANCELLATION OF CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 126, 127, para. 237 ; and FOR CASES, see DIGEST, Vol. 28, pp. 47-49, Nos. 242-252.]

C Cases referred to :

- (1) *Short Bros., Ltd. v. Inland Revenue Comrs.* (1926), 12 Tax Cas. 955.
- (2) *Inland Revenue Comrs. v. Northfleet Coal & Ballast Co., Ltd.* (1927), 12 Tax Cas. 1102.

- (3) *Van den Berghs, Ltd. v. Clark*, [1935] A.C. 431 ; Digest Supp. ; 104 L.J.K.B. 345 ; 153 L.T. 171 ; 19 Tax Cas. 390.
- D** (4) *Chibbett v. Robinson (J.) & Sons* (1924), 132 L.T. 26 ; 28 Digest 19, 98 ; 9 Tax Cas. 48.

- (5) *Henry v. Foster (A.)*, *Henry v. Foster (J.)*; *Hunter v. Dewhurst* (1932), 16 Tax Cas. 605 ; Digest Supp. ; *sub nom. Dewhurst v. Hunter*, 146 L.T. 510.
- (6) *Henderson v. Meade King*, Unreported.

- E** (7) *Inland Revenue Comrs. v. Gliksten (J.) & Son, Ltd.* (1929), 14 Tax Cas. 364 ; Digest Supp.

- (8) *Glenboig Union Fireclay Co., Ltd. v. Inland Revenue Comrs.* (1922), 12 Tax Cas. 427.

- (9) *Anglo-Persian Oil Co., Ltd. v. Dale*, [1932] 1 K.B. 124 ; Digest Supp. ; 100 L.J.K.B. 504 ; 145 L.T. 529 ; 16 Tax Cas. 253.

- F** (10) *Greyhound Racing Assocn. (Liverpool), Ltd. v. Cooper*, [1936] 2 All E.R. 742 ; Digest Supp. ; 20 Tax Cas. 373.

- (11) *Kelsall Parsons & Co. v. Inland Revenue*, [1938] S.C. 238 ; Digest Supp.

- (12) *British Insulated & Helsby Cables v. Atherton*, [1926] A.C. 205 ; 28 Digest 52, 264 ; 95 L.J.K.B. 336 ; 134 L.T. 289 ; *affg. S. C. sub nom. Atherton v. British Insulated & Helsby Cables, Ltd.*, [1925] 1 K.B. 421.

- G** CASE STATED by the Commissioners for the General Purposes of the Income Tax for the City of London pursuant to the provisions of the Income Tax Act, 1918, s. 149, for the opinion of the High Court of Justice. The facts are fully set out in the judgment.

- It was contended for the company that the selling of industrial and
- H** of agricultural chemicals were two separate and distinct branches of its business, and that the cancellation of the contract in question destroyed the whole of its business in agricultural chemicals. The sum of £4,500 was, therefore, an agreed compensation for the loss of that business and the sterilisation of a capital asset.

It was contended on behalf of the Crown that the contract was made

in the ordinary course of the business of the company, and that the use for which the chemicals were sold was immaterial. The cancellation of the contract did not affect the structure of the company's business as a whole, and the sum of £4,500 was paid in lieu of future profits, and was itself a profit of the company's business.

The following authorities were referred to: *Short Bros., Ltd. v. Inland Revenue Comrs.* (1), *Inland Revenue Comrs. v. Gliksten (J.) & Son, Ltd.* (7), *Chibbett v. Robinson (J.) & Sons* (4), *Glenboig Union Fireclay Co., Ltd. v. Inland Revenue Comrs.* (8), *Van den Berghs, Ltd. v. Clark* (3), *Anglo-Persian Oil Co., Ltd. v. Dale* (9), *Greyhound Racing Assn. (Liverpool), Ltd. v. Cooper* (10), *Kelsall Parsons & Co. v. Inland Revenue* (11), *British Insulated & Helsby Cables v. Atherton* (12) and *Inland Revenue Comrs. v. Northfleet Coal & Ballast Co., Ltd.* (2).

The commissioners held that the sum of £4,500, of which sum £3,000 falls to be included in the year 1937/38, was chargeable as a profit liable to income tax, and the appeal failed.

The appellant company appealed.

F. Heyworth Talbot for the appellants.

The Attorney-General (Rt. Hon. Sir Donald Somervell, K.C.) and *Reginald P. Hills* for the respondent.

LAWRENCE, J.: The appellant company have carried on business since 1920 as chemical merchants. Up to 1933 their business had been confined to industrial chemicals. In 1933 they entered into a contract for the purchase of agricultural chemicals, which, by the contract, were to be sold only in certain parts of the country, the sellers undertaking to debar all their other buyers from selling the same chemicals in those parts of the country. For the purposes of this contract, the appellants set up a new sales organisation. This contract was terminated by agreement as from May 1, 1935, on payment to the appellant company of £4,500, and the question is whether the proportion of that payment attributable to the year in question is to be treated as income or capital. The commissioners have held that it is income.

The appellants contended before the commissioners, and now contend, (i) that the selling of industrial and agricultural chemicals were two separate and distinct branches of the appellant company's business, (ii) that the cancellation of the contract destroyed the whole of their business in agricultural chemicals, and that the sum of £4,500 was paid by way of agreed compensation for the loss of that business, and (iii) that the sum of £4,500 was paid by way of compensation for sterilisation of a capital asset. It was further argued that the appellants had, by the contract, established for themselves, not only a source of supply, but also a market, that the sale of agricultural chemicals was a new and profitable field, and that, in view of the agreement not to supply competitors, the contract was a capital asset, and the payment for its cancellation was, therefore, capital.

In my opinion, the present case is more closely analogous to cases such as *Short Bros., Ltd. v. Inland Revenue Comrs.* (1) and *Inland Revenue Comrs. v. Northfleet Coal & Ballast Co., Ltd.* (2) than to cases such as *Van den Berghs, Ltd. v. Clark* (3).

A The sum paid, in my view, represented profits which the appellants would or might have made under the contract, and not the purchase price of the contract itself : *Inland Revenue Comrs. v. Northfleet Coal & Ballast Co., Ltd.* (2), per ROWLATT, J., at p. 1108. Nor do I accept the argument that the structure of the appellant company was affected by the contract or its cancellation, as in *Van den Berghs, Ltd. v. Clark* (3).

B The appellant company could always have sold agricultural chemicals, and it can still do so. The contract was made in the ordinary course of the company's business, although in a new field, and the exclusion of competition is an ordinary incident of such contracts, and not, as it seems to me, analogous to a pooling agreement. It is clear that the

C *dictum* of ROWLATT, J., in *Chibbett v. J. Robinson & Sons* (4), at p. 61, is too widely expressed : *Hunter v. Dewhurst* (5), at p. 653. *Henderson v. Meade King* (6) is distinguishable. There money had been lent to secure a certain sole agency, and the loss on that loan was held to be of a capital nature. Here no money was paid to secure the contract in question, and the money paid for its cancellation was not a repayment of any such money, but must have been a payment in respect of the profits to have been earned under the contract. I am therefore of opinion that the commissioners' decision was right, and the appeal is dismissed with costs.

E *Appeal dismissed with costs.*

Solicitors: *Blundell, Baker & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

F

WELCH v. ROYAL EXCHANGE ASSURANCE.

[KING'S BENCH DIVISION (BRANSON, J.), June 6, 1939.]

G *Practice—Costs—Set-off—Proceedings commenced in arbitration and proceeding to Court of Appeal—Set-off notwithstanding solicitor's lien—R.S.C., Ord. 65, r. 14.*

H In an arbitration, the arbitrator allowed an amendment of the defence, and ultimately gave his award in favour of the respondents. He then ordered that the claimant should receive his taxed costs down to the time of the amendment and that he should pay to the respondents one-half of their taxed costs of the arbitration. The matter then came before the court and later before the Court of Appeal. In both instances the respondents were successful, and were awarded their costs. It was contended that the respondents were entitled to set off the costs in the appeals against the costs ordered to be paid by them in the arbitration, since the solicitor for the claimant had a lien for his costs only as against his own client :—

HELD : (i) the application was properly made to the judge who heard the case stated by the arbitrator.

(ii) the costs, being due to the party in the same capacity, ought to be set off, providing the fact that the solicitor had a lien for them.

[EDITORIAL NOTE.] The first point here is a point of practice. It has been held that for the purposes of a set-off of costs, county court proceedings are not the same proceedings as proceedings in the Court of Appeal on appeal from the county court. The judge has, however, held that proceedings on a special case stated by an arbitrator are the same proceedings as the arbitration. The solicitor's lien referred to in the latter part of the case is not the common law lien, but the right of a solicitor to ask for the intervention of the court for his protection so that a successful client shall not receive the fruits of a judgment obtained for him without providing for the solicitor's costs.

AS TO SET-OFF OF COSTS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 93-98, paras. 179-185; and FOR CASES, see DIGEST, Practice, pp. 902, 903, Nos. 4423-4427. See also YEARLY PRACTICE OF THE SUPREME COURT, 1939, p. 1484.]

Cases referred to :

- (1) *David v. Rees*, [1904] 2 K.B. 435; 13 Digest 524, 745; 73 L.J.K.B. 729; 91 L.T. 244.
- (2) *Re Bassett, Ex p. Lewis*, [1896] 1 Q.B. 219; 4 Digest 524, 4790; 65 L.J.Q.B. 144; 73 L.T. 736.
- (3) *Hassell v. Stanley*, [1896] 1 Ch. 607; 13 Digest 524, 744; 65 L.J.Ch. 494; 74 L.T. 375.
- (4) *Puddephatt v. Leith* (No. 2), [1916] 2 Ch. 168; 42 Digest 284, 3195; 85 L.J.Ch. 543; 114 L.T. 1159.
- (5) *Mercer v. Graves* (1872), L.R. 7 Q.B. 499; 42 Digest 286, 3213; 41 L.J.Q.B. 212; 26 L.T. 551.

APPLICATION for an order that the respondents in the arbitration, the applicants here, shall be entitled to set off against the claimant the costs which they were awarded when the decision of the arbitrator was appealed to the King's Bench Division of the High Court and the Court of Appeal under an award in the form of a case stated. The facts are fully set out in the judgment.

Philip Vos, K.C., and *A. S. Wilson* for the applicants.

R. E. Borneman for the respondent.

BRANSON, J. : In this case, the position in fact appears to be as follows. The arbitrator, having allowed an amendment in the defence of the respondents in the proceeding before him, awarded against the claimant, but gave the claimant his taxed costs of the arbitration down to the date of the order permitting the amendment of the points of defence. After that, the claimant was to pay to the respondents one-half of their taxed costs of the arbitration. The matter came before me, and I upheld the award and ordered that the respondents should receive the costs of the hearing before me. The claimant appealed to the Court of Appeal, who affirmed my decision and made an order that the respondents should be paid the costs of the hearing before them. It now appears that the taxing master is in doubt as to whether the argument of the respondents—that they are entitled to set-off the costs in this court and the Court of Appeal against the costs which the arbitrator ordered that they should pay to the claimant—is right, or whether he

should refrain from doing so by reason of the fact that the solicitor of the claimant has a lien for his costs as against his own client.

A The first question which arises is whether or not I have any jurisdiction to intervene at all in this matter. On that, it seems to me to be a case in which, the question having arisen, application has to be made to the court for a decision upon it, and, as I was the judge who was seised of the matter when it came to this court, it is right that application should be made to me. The same thing seems to have been done in *David v. Rees* (1).

B The question then arises, assuming that I have jurisdiction in the matter, whether or not this is a case in which a set-off is allowable at all. It is said, on the one hand, that, in order to allow a set-off, the proceedings in which the two sets of costs have been incurred must be the same, and the parties to those proceedings must be the same. It is said here that this is not the same proceeding. That is to say, the C proceeding in this court and the Court of Appeal was not the same proceeding as that before the arbitrator. In support of that submission numerous cases have been quoted by counsel for the respondent. First of all he quoted *Re Bassett, Ex p. Lewis* (2). In my view, that case has really no resemblance to the present case at all. Lewis, in his capacity as D liquidator of the company, sued Bassett for the payment of a sum of money. He obtained an order against Bassett for the payment of a sum of money with costs. Bassett appealed against that order, and his appeal was dismissed by the Divisional Court. Lewis's costs came to £14 19s. 4d. Then, in Sept., 1934, Lewis, not as liquidator of the E company at all, but in his private capacity, presented a bankruptcy petition against Bassett, and that petition was dismissed with costs. He appealed, and that appeal was dismissed with costs. He then sought to set off the costs he was ordered to pay in those proceedings against the costs which Bassett owed him in respect of the other proceedings, and VAUGHAN F WILLIAMS, J., as he then was, refused to allow it, because the proceedings were different. The parties were suing in different capacities, and no set-off was possible at all. I do not think that that case touches this case in the slightest.

G Then the next case was *Hassell v. Stanley* (3). That is nearer this case, because what happened there was this. There was an action commenced by Hassell in the Liverpool County Court against the defendants as trustees for the Royal Liver Friendly Society. Then the defendants moved in the High Court for a *certiorari* to remove the action into the Chancery Division, and that application was dismissed with costs. The H action was tried in the county court, and was dismissed with costs. Then the defendants moved that execution for the costs ordered to be paid by them might be stayed until the plaintiff had paid the county court costs in that action. CHITTY, J., refused the application, because he said that R.S.C., Ord. 65, r. 14, which says that a set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's

lien for costs in the particular cause or matter in which the set-off is sought, did not apply to enable a set-off to be made of the costs of the *certiorari* in the High Court against the costs of the action in the county court. That case does not apply to the present one unless it appears that an arbitration before an arbitrator stands in the same relation to an appeal by way of case stated to this court as the county court proceedings did to High Court proceedings in *Hassell v. Stanley* (3). In my view, they do not. When there is an arbitration, and the arbitrator is asked to state a case, and does so, his award in the form of a special case to this court is not a new proceeding. It is a continuation of the proceeding before the arbitrator. The arbitrator finds the facts, states the facts, and asks the court to apply the law to those facts. The two matters are intimately connected, but, until the court has decided upon the law, and until the matter has come to this court, there is no decision by the arbitrator at all. Of course, the party who has asked for the special case may change his opinion and come to the conclusion that, after all, the arbitrator's view of the law is a correct view, and that it is no good proceeding any further with the matter. Then, when the time for setting down the case has gone by, he has a final decision. In the ordinary course, when an arbitrator states his award in the form of a special case, and that special case is brought to this court, it seems to me that it would be a misuse of language to speak of it as a different proceeding. It is the working out of the same proceeding which was initiated before the arbitrator. Therefore, in my view, the rule is applicable.

The question then arises whether or not, in the exercise of the discretion which I have in the matter, I should order that a set-off may take place between these two sets of costs. The position is this. The claimant in the arbitration, having failed in his claim, and having been awarded costs down to a particular date, when it comes to taxation is shown to be entitled to a certain sum for costs, but it is said that, between the time when the award was made and the time when the appeal from the award was heard, the claimant had assigned away any rights which he might have had as against the respondents in the matter, and, consequently, when the costs were ordered against him in the court here and in the Court of Appeal, they were ordered against him in a different capacity. I think that it is plain enough that, in order to get a set-off, one must have claims and cross-claims between the parties in the same rights. For example, if A is sued in his private capacity and A sues the same person but sues as trustee for X, then no doubt there could be no set-off, but, although no doubt in fact Welch had executed a deed of assignment for the benefit of his creditors he was still appearing in this court in his capacity as Welch, the assured under the policy of insurance under which he was making a claim. His capacity as party to the action was the same throughout. He was the assured claiming against his underwriters for a loss under the policy. The underwriters, having been ordered to pay to their assured certain costs by the arbitrator, seem to me to be entitled

in reason and fairness to set off the costs which, on appeal from that arbitrator, they were awarded by this court and by the Court of Appeal.

With regard to the question of the solicitor's lien, I think that that matter really falls under the principle of the decision of YOUNGER, J., in *Puddephatt v. Leith* (No. 2) (4). As was said by SIR ALEXANDER A COCKBURN, L.C.J., in *Mercer v. Graves* (5) in the passage cited by YOUNGER, J., one has to remember that a solicitor's lien is a lien against his client, really, and not against the other party. As SIR ALEXANDER COCKBURN, L.C.J., said, at p. 503 :

B The question is simply whether the defendant has or has not a right to set off his judgment against that of the plaintiff, the reason alleged in the replication that he cannot is, that the attorney for the plaintiff has a lien for his costs on the order or judgment obtained by the plaintiff, and the plaintiff is suing as trustee for his attorney. But the attorney has no such lien for costs as to be able to compel the plaintiff to bring the action on his behalf as trustee for him. In truth, as Mr. Brown pointed out, there is no such thing as a lien except upon something of which you have possession. The matter is thoroughly well explained in CHITTY'S C ARCHBOLD'S PRACTICE, 12th Edn., pp. 139, 140, that although we talk of an attorney having a lien upon a judgment, it is in fact only a claim or right to ask for the intervention of the court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs.

D That is not the position here. The position before me is that it is not the client who is trying to deprive his attorney of his costs. The only question is whether the attorney is to be entitled to a prior claim on the costs, and so defeat a set-off which the opposite party is seeking to obtain in order to recover the costs for which they have received an order from this court against the solicitor's client. I think that the respondents E are entitled to the order for which they ask, which is that, notwithstanding the solicitor's lien, the taxing master should set off the costs of the respondents in this court and the Court of Appeal against the costs which the respondents were ordered to pay the claimant by the award.

Solicitors : William Charles Crocker (for the applicants) ; Philip F Conway, Thomas & Co. (for the respondent).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

G INLAND REVENUE COMMISSIONERS v. MARBOB, LTD.

[KING'S BENCH DIVISION (Lawrence, J.), May 12, 15, 1939.]

Income Tax—Undistributed income—Dividend paid by cheque on condition that sum paid be lent to payer—No genuine distribution of income.

H The respondent company was incorporated on Jan. 22, 1936, with a capital of £100 in £1 shares, each carrying one vote. Of these shares, 98 were held by a company called M., Ltd., and two by L. M., Ltd., was registered on the same day, and, although L. originally held certain shares in it, at all material times he had transferred them and was no longer a shareholder. On Mar. 27, 1936, L. entered into a deed of covenant to pay to M., Ltd., £12,000 per annum for 7 years from Apr. 4, 1935, or for the rest of his life, whichever period should be the shorter. The consideration for this payment was the issue to L. of non-interest-bearing

debentures amounting to £57,300, redeemable at 3 months' notice at a premium of 10 per cent. These arrangements were admittedly made in order to reduce the liability of L. to sur-tax. The annuity was paid by L., and the company redeemed debentures to an amount equivalent to the amount of the annuity, so that there were no funds available to M., Ltd. On Apr. 3, 1937, the second instalment of the annuity was paid. On Apr. 5, 1937, the respondent company declared a dividend of £166 per share, and drew a cheque in favour of M., Ltd., for £16,268 in respect of the dividend on the 98 shares held by that company. That cheque was indorsed back by M., Ltd., to the respondent company, and the sum of £16,268 was treated as a loan to the respondent company. No part of this loan was repaid, and no interest was paid in respect of it. On Dec. 1, 1937, the respondent company went into liquidation. A direction and an apportionment were made under the Finance Act, 1922, s. 21, as amended by the Finance Act, 1937, s. 14, in respect of the income of the company, and it was then contended that the transaction was a sham, and that, if that were not so, the payment by cheque on condition that the money should be immediately lent to the payer was not a distribution of income :—

HELD : (i) as the commissioners had not found as a fact that the transaction was a sham, it was not open to the court to treat it as such.

(ii) the cheque for £16,268 was handed over on condition that it should be immediately indorsed back to the drawer and such conditional handing over was not a distribution of income by the company to one of its members. Such a condition negated the idea of a genuine distribution of income.

[EDITORIAL NOTE.] It was here sought to be said that the arrangement under which the cheque was paid was in fact a payment of the sum for which the cheque was drawn. This argument seems an impossible one in the present case, since the company drawing the cheque had not sufficient funds to meet it. In such circumstances, it could not amount to a payment, and there was, therefore, no distribution of income.

AS TO DISTRIBUTION OF INCOME, see HALSBURY, Hailsham Edn., Vol. 17, pp. 291, 292, para. 577; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 674a-674z.]

Cases referred to :

- (1) *Inland Revenue Comrs. v. Morgan-Grenville-Gavin*, [1936] 1 All E.R. 895; Digest Supp.; 20 Tax Cas. 529.
- (2) *Bouch v. Sproule* (1887), 12 App. Cas. 385; 9 Digest 176, 1124; 56 L.J.Ch. 1037; 57 L.T. 345; *revsg. S.C. sub nom. Re Bouch, Sproule v. Bouch* (1885), 29 Ch.D. 635.
- (3) *Parker v. Chapman* (1928), 138 L.T. 729; Digest Supp.; 13 Tax Cas. 677.

CASE STATED under the Finance Act, 1922, Sched. I, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. The facts are fully set out in the judgment.

The Attorney-General (Rt. Hon. Sir Donald Somervell, K.C.), J. H. Stamp and Reginald P. Hills for the appellants.

F. Grant for the respondents.

LAWRENCE, J. : This case raises the question whether the special commissioners on appeal were right in discharging a direction which had been made by the special commissioners of first instance under the Finance Act, 1922, s. 21 (1), the basis of that direction being that it

appeared to the special commissioners that the company had not distributed to its members, in such manner as to render the amounts distributed liable to be included in statements to be made by the members of the company of their total income for the purposes of sur-tax, a reasonable part of its actual income from all sources.

- A The company was incorporated on Jan. 22, 1936. Its capital was £100 in £1 shares, each carrying one vote, and 98 shares in the company were held by a company called Marjon, Ltd., and 2 shares by a Mr. Oliver Lucas. Marjon, Ltd., was registered on the same day, with a share capital into which I need not go. Some of that was originally held
- B by Mr. Oliver Lucas, but at a subsequent date Mr. Oliver Lucas transferred his shares, and was no longer a shareholder in Marjon, Ltd., on Apr. 5, 1937. Mr. Lucas entered into a deed of covenant to pay an annuity of £12,000 per annum for 7 years or for the rest of his life to Marbob, Ltd. That was the only asset of that company. It was admitted
- C that the two companies concerned were formed, and the deed of covenant was entered into, for the sole purpose of reducing the liability to sur-tax of Mr. Oliver Lucas. The annuity was paid by Mr. Lucas in due course, and the company redeemed debentures which were held by Mr. Lucas to an amount equivalent to the amount of the annuity—that is to
- D say, to the amount of £9,130, the net amount of the annuity being £9,300—so that then there were no funds available to Marbob, Ltd. On Apr. 3, 1937, the second instalment of the annuity was paid. On Apr. 5, 1937, Marbob, Ltd., declared a dividend which amounted to £16,268, or rather a dividend of £166 per share, free of tax, and on the same day
- E they drew a cheque in favour of Marjon, Ltd. (which, as I have already said, held 98 shares in Marbob, Ltd.), for £16,268, and another cheque for £332 in favour of Mr. Lucas. On the same day, it was resolved at a meeting of the directors of Marjon, Ltd., that Marjon, Ltd., should lend to Marbob, Ltd., the same amount of money as was received in dividend
- F—namely, £16,268—with interest at 5 per cent. per annum, the loan to be repayable on a month's notice. The cheque drawn by Marbob, Ltd., was indorsed by Marjon, Ltd., back to Marbob, Ltd. No part of the sum of £16,268 was ever repaid to Marjon, Ltd., and no interest was paid in respect of it. Marbob, Ltd., went into liquidation on Dec. 1, 1937.
- G In these circumstances, the special commissioners of first instance directed that the sum in question should be apportioned to Mr. Oliver Lucas for the purposes of sur-tax. On appeal to the special commissioners, it was held by the special commissioners that Marbob, Ltd., had distributed to its members—namely, to Marjon, Ltd., and to Mr. Lucas—
- H a reasonable part of its actual income from all sources. The special commissioners on appeal decided the question without giving any reasons for their decision, and without making any specific finding of fact. They said simply that they discharged the direction and apportionment for the year 1936/37, and the sur-tax assessment for that year made on Mr. Oliver Lucas in the name of the company.

In these circumstances, it is contended by the Attorney-General, in the first place, that the documents and the whole transaction were a sham, that there was no evidence upon which the commissioners could reasonably have found otherwise, and that, apart from that, the matter was not solely a question of fact, but was really a question of principle. In the second place, he contended that the cheque for £16,000 odd was handed to Marjon, Ltd., upon the condition that an equivalent amount should be lent back by Marjon, Ltd., to Marbob, Ltd., and that that was not a distribution to its members of any part of the actual income of the company. Thirdly, he contended that, on the facts of this case, what had really taken place was, not a distribution of actual income, but an increase of the loan capital of Marbob, Ltd. A B

Counsel for the respondents in an able and ingenious argument has contended, in the first place, that the question whether or not the transaction was a sham, or whether or not the documents were shams, is a question of fact which the commissioners have impliedly found in his favour, and that it is impossible to say that there was no evidence upon which they could come to that finding. He cited to me, among other cases, a decision of my own which was not appealed against, *Inland Revenue Comrs. v. Morgan-Grenville-Gavin* (1), in which, on facts which are not unlike the present, I came to the conclusion that the finding of the commissioners ought not to be interfered with upon that question as to whether the document and the transaction in substance were a sham. In view of that decision, I am not prepared to decide this case upon that ground. I am, however, clearly of opinion, that no tribunal of fact could come to any conclusion other than that the cheque for £16,000 odd was given upon the condition that the equivalent loan should be made by Marjon, Ltd., at the same time. C D E

I have to consider, therefore, whether or not such a conditional handing over of a cheque by one company to one of its shareholders is a distribution to its members in such manner as to render the amount distributed liable to be included in the statements to be made for the purposes of sur-tax. In my judgment, such a condition negatives the idea of a genuine distribution of its income. The very condition itself necessitates that the person to whom the cheque is given should at once repay the amount of the cheque, and in such circumstances, in my judgment, there is no distribution of income within the meaning of sect. 21. The condition may equally be regarded, in my view, from the other point of view which has been put in the argument of counsel for the Crown—namely, that, if that condition attached to the drawing and handing over of this cheque, it was not distribution in such manner as to render the amount distributed liable to be included for the purposes of sur-tax of the members, but was in reality a capitalisation of the sum alleged to have been distributed. F G H

On this part of the argument, *Bouch v. Sproule* (2) was relied upon. There it was held that, even though the shareholder to whom the dividend

was paid had an option to take either shares or cash, as the intention of the company was that the dividend should be taken in shares, because that was the intention to be inferred from the facts, that was really capital in the hands of the shareholder, and, if capital, would not have to be returned for the purposes of sur-tax. The present is, in my view,

- A a stronger case than that upon the question as to whether the declared dividend was capital or income, because here, if I am right in finding, as I do, that the condition attached to the receipt of this dividend, the shareholder, Marjon, Ltd., had no option whatever, and never would have received the cheque for £16,000 odd, had it not been arranged that
- B the equivalent sum would be immediately repaid by way of loan by Marjon, Ltd., to Marbob, Ltd.

- Parker v. Chapman* (3) is quite different in its facts from the present case. That was dealing with the case of a shareholder who had a debt against the company. He could have discharged that debt, if he wished,
- C by taking shares (as he did) in order to support the credit of the company, or he could have insisted upon payment of the debt in cash. The matter was entirely in his dominion and in his option, and it is entirely different from the facts in this case, in which, as I have said, in my opinion, Marjon, Ltd., never would have got the cheque for £16,000 odd unless their
- D directors had agreed that an equivalent sum should be repaid to Marbob, Ltd., at the same time. I am not satisfied that these considerations were present to the minds of the commissioners on appeal, but I see no reason for sending the case back to them, because I am satisfied that they could not properly find that the condition which I have found did not attach
- E to the cheque for £16,000 odd. I therefore find that that condition did attach, and the appeal will be allowed with costs.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Ashurst, Morris, Crisp & Co.* (for the respondents).

F [Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

COURT LINE, LTD. v. DANT & RUSSELL INC.

[KING'S BENCH DIVISION (Branson, J.), June 13, 14, 15, 16, 1939.]

Contract—Impossibility of performance—Frustration—Duration of impossibility—Estimate of parties at happening of event and not as subsequently ascertained—Charterparty—War—Boom placed across river—Ship in fact released in time to fulfil charter.

A
A ship was chartered on a time charter to trade within certain limits, hire to be paid monthly in advance and the voyages to be prosecuted with the utmost despatch. During the term of the charter, the ship was carrying a cargo of lumber and scrap iron to Wu-hu, a town about 750 miles up the Yangtse River. She was discharging there in Aug., 1937, when hostilities broke out between the Chinese and the Japanese. B
As a part of such hostilities, a boom was placed across the river, and it was impossible for the ship to go down the river. In the normal course, she would have reached Shanghai, at the mouth of the river, on Aug. 19, 1937, but in fact she did not reach that port until Dec 17, 1937. The Japanese made a passage through the boom on Dec. 9, 1937, and this would have permitted the ship to get to Australia before the date fixed for redelivery of the ship:— C

HELD: the fair inference from the facts was that the delay due to the presence of the boom would be indefinite, and therefore the contract was frustrated. The fact that, in the events which happened, the Japanese were able to break a passage through the boom, which would have allowed the re-delivery of the ship at the stipulated time, was immaterial. D

[EDITORIAL NOTE. In considering frustration, where the question whether or not a certain event amounts to frustration depends upon the duration of that event, that duration must be fixed by the estimate of the parties at the time of the first happening of that event, and not by the duration as afterwards ascertained, when all the facts are known. Thus, in the present case, it was not known in Aug., 1937, how long the ship would have to stay in the Yangtse River. The period to be taken for the purposes of the doctrine of frustration is not the period until Dec., 1937, when in fact the ship was able to proceed out of the river, but such a period as the parties, taking into consideration all the facts of the case in Aug., 1937, would have estimated as the probable duration of the ship's stay in the river. E

AS TO FRUSTRATION OF CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 212-220, paras. 296-298; and FOR CASES, see DIGEST, Vol. 12, pp. 386-392, Nos. 3172-3200.] F

Cases referred to:

- (1) *Re Comptoir Commercial Anversoise & Power, Son & Co.*, [1920] 1 K.B. 868; 12 Digest 396, 3218; 89 L.J.K.B. 849; 122 L.T. 567. G
- (2) *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; 12 Digest 390, 3194; 85 L.J.K.B. 1389; *sub nom. Re F. A. Tamplin S.S. Co., Ltd., and Anglo-Mexican Petroleum Products Co., Ltd.*, 115 L.T. 315; *affg.*, [1916] 1 K.B. 485; [1915] 3 K.B. 668.
- (3) *Bank Line, Ltd. v. Capel (A.) & Co.*, [1919] A.C. 435; 12 Digest 391, 3198; 88 L.J.K.B. 211; 120 L.T. 129. H
- (4) *Turner v. Goldsmith*, [1891] 1 Q.B. 544; 12 Digest 382, 3157; 60 L.J.Q.B. 247; 64 L.T. 301.
- (5) *Tatem (W. J.), Ltd. v. Gamboa*, [1939] 1 K.B. 132; [1938] 3 All E.R. 135; Digest Supp.; 108 L.J.K.B. 34; 160 L.T. 159.

(6) *Hogarth v. Miller, Brother & Co.*, [1891] A.C. 48; 41 Digest 360, 2091; 60 L.J.P.C. 1; 64 L.T. 205.

APPEAL by way of case stated in an arbitration between the owners of the Errington Court and the charterers of that ship. The facts are fully set out in the judgment.

A *Sir Robert Aske, K.C.*, and *A. A. Mocatta* for the shipowners.
H. U. Willink, K.C., and *C. A. Roberts* for the charterers.

BRANSON, J.: In this case, a ship, the Errington Court, was chartered on a time charter which contemplated a trading for 9 months
B to 10 months between the limits defined by the institute warranties and delivery, unless lost, at a safe port in Australia between Newcastle, New South Wales, and Port Pirie. Payment of hire was to be monthly in advance, and the captain was to prosecute his voyages with the utmost despatch and to be under the orders and directions of the charterers as
C regards employment and agency. There was an "off hire" clause (cl. 15) and an "exceptions" clause (cl. 16) excepting, amongst other things, restraint of princes.

The vessel entered upon her service on Mar. 18, 1937, and was variously employed until, in July, 1937, she loaded a cargo of lumber and scrap
D iron at Port Origen for Wu-hu and Shanghai. She arrived at Wu-hu on Aug. 7, 1937. Wu-hu is 750 miles up the Yangtse River, and Shanghai is at the mouth of it. Whilst the ship was discharging at Wu-hu on Aug. 13, 1937, hostilities between Chinese and Japanese armed forces broke out in the neighbourhood of Shanghai, and, on Aug. 14, 1937,
E the Chinese government placed a boom across the river near Chin-Kiang about 100 miles below Wu-hu. This boom, while it existed, rendered it impossible for the Errington Court to go down the river to Shanghai. She completed the discharge of her Wu-hu cargo on Aug. 17, and, in the normal course, would have reached Shanghai on Aug. 19. On Aug. 21,
F the master was ordered by the charterers' agents to discharge the Shanghai cargo at Wu-hu. This was completed by Sept. 3. On Dec. 9, a Japanese flotilla made a passage through the boom, and the ship was able to proceed down river on Dec. 17. The owners claimed that the ship was still on hire but the charterers asserted that the contract had
G been frustrated on Sept. 3, and declined to issue further orders to the master. The matter went to arbitration, and now comes before me upon an award stated by the umpire, Mr. Develin, in the form of a special case.

The umpire found that the adventure provided for by the charterparty
H was frustrated on Sept. 3, 1937, and the charterparty thereby dissolved, and that neither party had any further claim against the other thereunder, except as to some bunker coals with regard to which no question arises before me. He sets out in para. 19 of his award certain findings as to the opinions expressed by various persons as to the probable

duration of the delay to which the vessel would be subjected, the net result of which is that it was likely to be indefinite. As the object of the Chinese in building the boom was to prevent the Japanese from getting up the river to such places as Hankow, it is obvious that they would maintain the boom for as long as they could, or until the Japanese gave up the attempt to ascend the river. A

Upon this set of facts, the first question which is raised for my decision is whether—the umpire having found that the contract was frustrated—the court is bound by his decision if there is any evidence upon which it was possible for him so to find, or whether the question whether or not there was frustration is one for the court. This question is decided for me by the Court of Appeal in *Re Comptoir Commercial Anversois & Power, Son & Co.* (1), where BANKES, L.J., says, at p. 890 : B

The question whether the doctrine of frustrated adventure applies to any particular state of facts must, I consider, always be a question of law to be decided by the court upon the facts. C

Later, SCRUTTON, L.J., at p. 898, states the same conclusion more at length.

The next matter in controversy is as to the true basis upon which the doctrine of frustration of contract rests. Does it depend upon a term to be implied into the contract, or does it arise by operation of law as soon as it appears that the “basis of the contract has gone,” whatever that expression may mean? I am not sure myself that the distinction is more than academic. In *F. A. Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* (2), EARL LOREBURN, at p. 403, and LORD PARKER, at p. 422, expressly based the principle upon a term to be implied in the contract itself, and not on something *dehors* the contract, whilst VISCOUNT HALDANE, at p. 406, used language open to the construction that no implied term was involved. In *Bank Line, Ltd. v. Capel (A.) & Co.* (3), LORD FINLAY, L.C., referring to *Tamplin's* case (2), said, at p. 442 : D
E
F

... it will be found that the principles of law enunciated by LORD LOREBURN and by the two dissentients are identical; the difference between them being as to the application of these principles to the particular circumstances of the case.

Thus it is plain that LORD FINLAY, L.C., considered that there is no real distinction to be drawn. The court will not regard the basis of a contract as gone unless circumstances have altered to such an extent that the court will conclude that no reasonable men who contemplated such an alteration would be content to remain bound by the contract if it came about. If there be any material difference between the two views, however, the question is settled for me as a judge of first instance by the express decision of the Court of Appeal in the *Comptoir* case (1), to which I have already referred. BANKES, L.J., says, at p. 886 : G
H

Having regard to the facts of the present case I do not think that the question of the frustration of the adventure, and the question whether the contract contained an implied condition that they should in certain events be dissolved, need be con-

sidered separately. The present is a case in which it seems to me clear that the view taken by LINDLEY, L.J., in *Turner v. Goldsmith* (4) and by LORD SUMNER in *Bank Line, Ltd. v. Capel (A.) & Co.* (3) applies, namely, that the so-called doctrine of the frustration of an adventure rests on an implied condition in the contract between the parties.

This judgment does not appear to have been brought to the notice of
A GODDARD, J., in *W. J. Tatem, Ltd. v. Gamboa* (5). I cannot think that he would not have held himself bound by it if it had been.

Next comes the question, what is the term to be implied? It is suggested on behalf of the charterers that it should be a term in general language, such as that, "if the adventure is frustrated, the charterparty
B shall come to an end." I do not think that this suggestion is compatible with the language used in the decided cases. The condition suggested by EARL LOREBURN in *Tamplin's* case (2) was, at p. 406 :

... that they should be excused if substantially the whole contract became impos-
C sible of performance, or in other words impracticable, by some cause for which neither was responsible.

The difficulty created by the use of a diversity of terms to define the circumstances which lead to a dissolution of the contract has been pointed out by LORD SUMNER in the *Bank Line* case (3), at p. 457. I do not propose to add another to the various attempts which have been made, but
D intend to apply to the case before me the condition suggested by EARL LOREBURN. Here was a time charter for some 9 months to 10 months, contemplating that for that period the owners should keep the ship at the disposal of the charterers to carry goods for them to any port within the prescribed limits, as and when ordered by the charterers, with the
E utmost despatch. For this service, the charterers were to pay the prescribed hire. That is, in my opinion, a commercial adventure in the performance of which both parties were interested, and in respect of which both parties had continuing duties to perform: *per* LORD SUMNER in the *Bank Line* case (3), at p. 453. What was the effect upon this
F adventure of the closing of the Yangtse by the boom on Aug. 15? It is true that the charterers could go on paying hire and giving orders, if so minded, but the owners could not obey the orders nor move the ship out of the river. It was urged, on behalf of the owners, that the doctrine of frustration cannot apply to a time charter unless the ship is physically
G removed from the control of both parties. I cannot see why the adventure in question before me was any the less frustrated than was the adventure in the *Bank Line* case (3). All power in the ship's officers to continue the adventure was taken away, in the one case, by requisition, and, in the other, by the construction of the boom.

H The only question left on this part of the case is whether the delay imposed was long enough to effect frustration. The authorities upon this point are again by no means unanimous. They agree, I think, in holding that the time as at which the question must be decided is the time when the parties came to know of the cause, and the probabilities

of the delay, and had to decide what to do. In the *Bank Line* case (3), LORD SUMNER said, at p. 454 :

... the main thing to be considered is the probable length of the total deprivation of the use of the chartered ship compared with the unexpired duration of the charterparty ...

Indeed, this was the only distinction on the facts between *Tamplin's* A case (2), where the charterparty was for 60 months, of which nearly 3 years remained to run when the ship was requisitioned, and was held not frustrated, and the *Bank Line* case (3), where the charterparty was for 12 months, all yet to run, and frustration was held to have taken place. The court must, as the parties have to when the event arises B which is alleged to cause frustration, estimate as best it can the probable duration of that event. The probabilities as to the length of the deprivation, and not the certainty arrived at after the event, are material : per LORD SUMNER in the *Bank Line* case (3), at p. 454.

According to LORD SHAW of DUNFERMLINE in the *Bank Line* case (3), C at p. 449, if stoppage and loss arise from a declaration of war, they must be considered to have been caused for a period of indefinite duration, and so to have effected an immediate solution of the contract arrangements for and dependent upon the completion or further continuance of the adventure. His Lordship thought that the rule so stated would apply D equally to a requisition, and I think that it must also apply to hostilities which are being carried on without a formal declaration of war. Other authorities—for example, LORD SUMNER in the *Bank Line* case (3), at p. 455—indicate that the causes of frustration may have to be in operation E for long enough to raise a presumption of inordinate delay before frustration takes place. The fair inference from the findings of the umpire as to what persons interested thought of the prospects of the ship getting down the river is that he concluded that the probabilities were that the ship would be kept up the river by the boom for an indefinite period. Once that conclusion is reached, the contract is frustrated. F The fact that the Japanese were able to break a passage through the boom in time to permit the ship reaching Australia before the date fixed for redelivery is immaterial.

For these reasons, I have come to the conclusion that the award is correct, and ought to be affirmed. I need not, therefore, deal in any G detail with the other points which would have arisen if I had come to the opposite conclusion. If there was no frustration, the contract stands, and hire is payable, unless there is anything in the contract to prevent its becoming payable. The charterers rely on cl. 15 for this. The argument depends upon whether or not the delay caused by the H boom comes within the words : “any other cause preventing the full working of the vessel.” In my opinion, it does not. I do not rely on *Hogarth v. Miller, Brother & Co.* (6) for this conclusion, but upon the words of this charterparty, which are materially different from those

which the court had to construe in that case. The words are not apt to cover a case where the ship is in every way sound and well found, but is prevented from continuing her voyage by such a cause as this. If there were no "off hire" period, the charterers could recover nothing in respect of coal consumed or hire paid, but they would, on the other

A hand, be liable for hire and damages, as suggested in cl. 25 of the award.
Award upheld.

Solicitors : *Holman, Fenwick & Willan* (for the shipowners) ; *Thomas Cooper & Co.* (for the charterers).

B [Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

BARROWFORD HOLDINGS, LTD. v. INLAND REVENUE COMMISSIONERS.

C [KING'S BENCH DIVISION (Lawrence, J.), **May 11, 25, 1939.**]

Income Tax—Undistributed income—Subsidiary company—Subsidiary of foreign company—Finance Act, 1922 (c. 17), s. 21 (6)—Finance Act, 1927 (c. 10), s. 31 (3).

D An English company which is the subsidiary of a company incorporated outside England is not a subsidiary company within the meaning of the Finance Act, 1922, s. 21 (6), as amended by the Finance Act, 1927, s. 31 (3), and a direction as to undistributed profits can be made in respect of such a company.

[EDITORIAL NOTE. The Finance Act, 1922, s. 21, making provision as to the undistributed income of companies, does not apply to a subsidiary company. The word "company" in the section is also defined as meaning an English company. It is therefore held that the subsidiary of a company which is not itself an English company is not a subsidiary company within the meaning of the section.

E AS TO UNDISTRIBUTED INCOME, see HALSBURY, Hailsham Edn., Vol. 17, pp. 290, 291, para. 576 ; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 674r-674x.]

F CASE STATED under the Finance Act, 1922, Sched. I, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

G At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on July 5, 1938, the appellant company appealed against a direction made by the special commissioners under the Finance Act, 1922, s. 21 (1), as amended by the Finance Act, 1927, s. 31, in respect of the period from Dec. 2, 1936, to Apr. 5, 1937.

H The appellant company is a private company incorporated on Dec. 2, 1936, its business being to hold stocks and shares. It has a nominal and issued capital of £100, divided into 100 shares of £1 each, all of which are beneficially owned by C. D. Holding, Ltd., St. Johns, Newfoundland, a company registered under the Companies Acts of Newfoundland. The

appellant company made up its first accounts to Apr. 5, 1937, and a profit of £344 was shown, none of which was distributed.

At the hearing of the appeal before the special commissioners, the company did not attempt to justify the retention of its profits by reference to the current requirements of its business, or to such other requirements as might be necessary or advisable for the maintenance and development of that business. A

On behalf of the company, it was contended that it was a subsidiary company within the meaning of the Finance Act, 1922, s. 21 (6), as amended by the Finance Act, 1927, s. 31 (3), and was, therefore, outside the terms of the section. B

On behalf of the Crown, it was contended that the company was not a subsidiary company within the meaning of that expression in the Finance Act, 1922, s. 21 (6), as amended.

The commissioners who heard the appeal were of opinion that the company was not a subsidiary company within the meaning of the Finance Act, 1922, s. 21 (6), as amended, and they accordingly confirmed the direction. C

The company appealed.

The Finance Act, 1922, s. 21 (6), as amended by the Finance Act, 1927, s. 31 (3), provides as follows : D

This section shall apply to any company which is under the control of not more than 5 persons and which is not a subsidiary company or a company in which the public are substantially interested. For the purpose of this subsection, a company shall be deemed to be a subsidiary company if, by reason of the beneficial ownership of shares therein, the control of the company is in the hands of a company not being a company to which the provisions of this section apply, or of two or more companies none of which is a company to which those provisions apply. . . . The expression "company" means a company within the meaning of the Companies (Consolidation) Act, 1908. E

H. Heathcote-Williams for the appellants.

The Attorney-General (Rt. Hon. Sir Donald Somervell, K.C.) and Reginald P. Hills for the respondents. F

LAWRENCE, J. : The question in this case arises upon the construction of the Finance Act, 1922, s. 21 (6). Is the appellant company, the shares in which are held by a foreign company, a subsidiary company within the meaning of sect. 21 (6) or not ? If it is not, it is within the section, and the direction of the commissioners under the Finance Act, 1922, s. 21, cannot be challenged. G

It is contended for the appellant company that C. D. Holding, Ltd., which controls the appellant company, is "a company not being a company to which the provisions of this section apply" within the meaning of the second paragraph of subsect. (6), because it is not a company within the meaning of the Companies (Consolidation) Act, 1908, and that, therefore, the appellant company shall be deemed to be a subsidiary company. H

In my opinion, this contention is unsound. The section does not say : "The provisions of this section do not apply to companies which are not companies within the meaning of the Companies (Consolidation) Act, 1908." The word "company" means a company within the meaning of the Companies (Consolidation) Act, 1908. It follows that the words "a company," where they first occur in the fourth line of the second paragraph of subsect. (6), mean, and mean only, an English company. This reading does no violation to the qualifying words which follow, for these are English companies which are not companies to which the provisions of the section apply.

The fact that this construction prevents the subsidiary of a foreign company from obtaining exemption from the provisions of the section cannot, in my judgment, alter the clear meaning of the words used. I am therefore of opinion that the commissioners were right, and the appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Francis White & Needham*, agents for *Frank Roberts, Sons & Baldwin*, Nelson (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

Re DE CHASSIRON, LLOYDS BANK, LTD. v. SHARPE AND OTHERS.

[CHANCERY DIVISION (Morton, J.), May 16, 17, 1939.]

Wills—Gifts of annuities—Annuities payable out of residue—Power to resort to capital—Abatement—Rights of annuitants and residuary legatees.

The testatrix by her will gave certain legacies which had priority to a number of annuities payable out of her residuary estate. There were six annuities payable to annuitants of ages ranging from 41 years to 80 years, and upon the death of any annuitant, his or her annuity was to be paid equally between the survivors. Upon the death of the last survivor, the residuary estate was to be divided between certain named charities. The trustee was given power to resort to capital in so far as the income of the residuary estate was insufficient to provide the annuities. The income of the residuary estate proved insufficient to provide the annuities and the trustee asked for the direction of the court as to how the residuary estate ought to be dealt with :—

HELD : (i) it was a question of construction of the will whether the rule in *Re Cottrell* (2) ought to be applied.

(ii) upon the proper construction of the will in this case, that rule ought not to be applied, and there was no necessity to value the annuities.

(iii) the testatrix had contemplated and provided for the deficiency of income, and the annuities must be paid in full, the trustee having recourse to capital. Capital must be resorted to for payment of the annuities, if necessary, until the whole residuary estate was exhausted. If after payment of all the annuities in full, there was any surplus, that would be paid to the charities as directed by the will.

[EDITORIAL NOTE. Under the rule in *Re Cottrell* (2), where the estate is insufficient to provide for the payment of annuities in full, the annuities have to be valued and abate with the other pecuniary gifts not having priority to them. Whether this rule has to be applied, however, is a question of the construction of the will, and if the testator has foreseen the possibility of a deficiency of income and provided for that contingency, then the provisions of the will must be carried out and not the procedure under the rule.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 28, pp. 188-191, paras. 346-349; and FOR CASES, see DIGEST, Vol. 39, pp. 124-129, Nos. 182-217.]

Cases referred to :

- (1) *Re Cox, Public Trustee v. Eve*, [1938] Ch. 556; [1938] 1 All E.R. 661; Digest Supp.; 159 L.T. 13. B
- (2) *Re Cottrell, Buckland v. Bedingfield*, [1910] 1 Ch. 402; 39 Digest 126, 195; 79 L.J.Ch. 189; 102 L.T. 157.
- (3) *Todd v. Bielby* (1859), 27 Beav. 353; 23 Digest 421, 4925.
- (4) *Heath v. Nugent* (1860), 29 Beav. 226; 39 Digest 161, 528.
- (5) *Re Wilkins, Wilkins v. Rotherham* (1884), 27 Ch.D. 703; 39 Digest 161, 527; 54 L.J.Ch. 188. C
- (6) *Re Farmer, Nightingale v. Whybrow*, [1939] 1 All E.R. 319; Digest Supp.; 160 L.T. 59.

ADJOURNED SUMMONS taken out by the trustee of the will asking whether the trustee ought to have the annuities valued, and, if so, directions as to how the valuation should be made, and, if no valuation was necessary, directions how the residuary estate ought to be distributed as between the annuitants and the residuary legatees. The terms of the will and the facts are fully set out in the judgment. D

Gerald R. Upjohn for the trustee. E

Wilfrid M. Hunt for the younger annuitants.

C. R. D. Richmond for the other annuitants.

A. L. Ungood-Thomas for the charities.

MORTON, J. : The testatrix made her will on Sept. 5, 1938, and died on Sept. 27, 1938. The will was proved on Dec. 8, 1938, by the plaintiff bank and the other persons therein named. By the will, after appointing the bank and the other persons therein named to be executors and trustees, and making dispositions which I need not read, she gave certain pecuniary legacies free of duty. No question arises with regard to them. They all have been or will be paid, and they have priority to certain annuities which are payable out of residue. F
G

The gift of residue is to the trustees on trust for sale, conversion and investment. The testatrix refers to the residue and the investments as "my trust fund" and proceeds : H

I direct that my trustees shall out of the income of my trust fund and the investments for the time being representing the same pay the annuities which I give as follows, all free of duty : To my niece the said Rose Alice Guinness Sharpe the sum of £500 per annum for her life and an extra sum of £100 per annum for so long as she shall own and occupy the house No. 19, Brunswick Terrace, Hove, which I have hereinbefore devised to her.

I am told that the house referred to has since been sold so that the annuity of £100 has ceased to be payable to Miss Sharpe. The next annuities are :

A to my brother Gordon Vincent the sum of £50 per annum for his life ; to my sister Ada Vincent the sum of £300 per annum for her life. To my sister Maud Vincent the sum of £200 per annum for her life : to my brother Henry Vincent the sum of £300 per annum for his life : to my nephew John Sharpe the sum of £50 per annum for his life.

The facts giving rise to the present summons are as follows. The testatrix directed that on the death of each and every one of the annuitants her trustees should pay the annuity of the annuitant so dying equally B between the surviving annuitants in addition to the annuity given by her to the surviving annuitants. She directed also that if at any time the income of the trust fund should be insufficient to answer the annuities recourse might be had to the capital thereof. She declared that any surplus income of the trust fund not required to pay the annuities should C be paid equally to the charities thereafter mentioned, and directed that, on the death of the last of the annuitants to die, the trustees should hold the capital and future income of the trust fund, and of the investments representing it, on trust to be equally divided absolutely between the D Lady Chichester Hospital (Incorporated) ; the Royal Hospital and Home for Incurables, Putney ; the Royal London Ophthalmic (Moorfields Eye) Hospital, and the Brighton Institution for Deaf and Dumb Children. The estate amounted to about £23,000, which, when invested in authorised securities, would provide an annual income of about £750. The aggregate amount of the annuities payable at the date of this summons was E £1,650 per annum, and it was impossible to provide for payment of the annuities out of the residuary trust estate. The bank has been advised that the proper course is to value the annuities and to pay the respective annuitants the respective amount, or, if necessary, the abated amount, of the valuations. But it has been also further advised that, on the true F construction of the will, difficult questions arise as to how the valuations are to be made. The bank has had all the annuities valued except the additional annuity of £100 given to Rose Alice Guinness Sharpe, but there has been excluded from the valuation the share of any accruing annuity to which each annuitant may be entitled in the will. At the G date of the testatrix's death the value of Rose Alice Guinness Sharpe's annuity was £8,729 ; that of Stanley Gordon Vincent's, £3,115 ; that of Ada Vincent's, £2,591 5s. ; that of Maud Vincent's, £2,121 13s. 4d. ; that of Henry Vincent's, £1,591 5s. ; and that of John Charles Gillies Sharpe's annuity, £913 10s. 10d. It has been ascertained from a firm of H actuaries that, although it would be difficult, if not impossible, to value the accruing annuities correctly—especially if they were not bequeathed free of duties—according to the government tables, it would not be impossible to propound a scheme which would be a reasonable approximation.

The ages of the annuitants vary substantially. Rose Alice Guinness Sharpe is 49 years old, Gordon Vincent 64, Ada Vincent 73, Maud Vincent 68, Henry Vincent 80, and John Sharpe 41. It has been contended by counsel for the youngest annuitants, that the proper way of dealing with the matter is for all the annuities to be valued and for each annuitant to be paid, with abatement where necessary, when the value has been ascertained. In *Re Cox, Public Trustee v. Eve* (1), SIMONDS, J., followed *Re Cottrell, Buckland v. Bedingfield* (2), and carried out the method which was employed in that case of administering the estate. The rule in question is that, as between pecuniary legatees and annuitants, where the estate is inadequate to provide for the payment of both in full, it is necessary to have a valuation of the annuities, and the pecuniary legatees and the annuitants are entitled to have paid to them their legacies and the amount of the valuation of the annuities *pari passu*. That is a rule of administration adopted by the court to produce justice between parties ranking *pari passu*.

In the present case I must ascertain from the will, first, the testatrix's intention, and, secondly, whether she made provision for the event which has arisen. If I find that her intention was that other steps should be taken, I ought to give effect to that intention. There are two clauses in the will which throw strong light on her intention. The first is :

And I also direct that if at any time the income of my trust fund shall be insufficient to answer the said annuities recourse may be had to the capital thereof :

and the second is :

And I declare that any surplus income of my trust fund not required to pay the said annuities shall be paid equally to the charities hereinafter mentioned.

In those clauses the testatrix has contemplated two events : (i) that when the residuary trust fund has been constituted the income from it may be insufficient to provide for the annuities which are for the time being payable, and, in that event, recourse may be had year by year to the capital of the fund as far as necessary ; (ii) that the income may be more than sufficient to pay the annuities. It is true that she has not said "recourse shall be had," but she does begin the first of the two clauses with the words : "And I also direct." She has foreseen the event and has indicated what is to be done.

There is a very clear distinction between the present case and *Re Cox, Public Trustee v. Eve* (1), where there was no such direction as the one I have just read. In *Re Cox, Public Trustee v. Eve* (1), the trustees were given power to provide a fund, but it was impossible to set aside a fund, as the estate was insufficient. SIMONDS, J., applied the rule of administration as laid down in *Re Cottrell, Buckland v. Bedingfield* (2), and said, at pp. 562, 563 ([1938] 1 All E.R., at pp. 665, 666) :

The question here is whether, in order to do justice between annuitants *inter se*, it is necessary that their annuities should be valued and the amount of the valuation

paid out to them. It is I think quite clear that where the estate is inadequate to provide the actuarial amount of the annuities according to a proper valuation, then they are entitled to have their annuities valued and the available estate distributed among them rateably according to that value: see *Todd v. Bielby* (3), *Heath v. Nugent* (4), and *Re Wilkins, Wilkins v. Rotherham* (5). The reason is clear from a hypothetical example. Suppose an annuity of £100 is bequeathed to one annuitant, A, who is 90 years of age, and a similar annuity to another, B, who is 19 years of age, and suppose that the whole estate available for satisfaction of the annuities is only £1,000. If both the income and the capital of that sum are applied year by year until it is exhausted in payment of the two annuities, A will probably get his annuity paid in full for the whole of his life, but B will not do so. There is thus an inequality in this treatment, which the testator is presumed not to have intended. The only fair way of dealing with annuities as between annuitants of different ages is to make an actuarial valuation of the annuities, and to pay the value of each so ascertained to the annuitants, as was done in the cases last cited.

I entirely agree with what SIMONDS, J., has there said. A testator is not, in the absence of very clear words, to be presumed to have intended a fund to be applied in the manner described in the hypothetical example given by the judge. But in the present case I think that the testatrix did intend the fund so to be applied. She may be taken to have known the approximate ages of her sisters, brother, nephew and niece, and, to my mind, must be taken to have made the provision deliberately.

In *Re Cox, Public Trustee v. Eve* (1), a testatrix, by her will, after giving certain pecuniary legacies, bequeathed to her husband an annuity of £1 per week during his life, and directed her trustees to appropriate and set apart and invest such sum of money as would when invested produce by the income thereof an annual sum equal to the amount of the annuity and to apply the income or (if necessary) the corpus of the fund so appropriated in payment of the annuity, which sum should on the dropping of the annuity fall into and form part of her residuary trust estate. And she devised and bequeathed the residue of her real and personal estate to her trustees on trust for sale and conversion and payment of her debts, funeral and testamentary expenses and legacies, and to invest the moneys which should remain in certain investments, and to hold such investments on certain trusts for the benefit of her son. The estate of the testatrix was insufficient to pay the pecuniary legacies and to set apart a sum sufficient to answer the annuity to her husband in full. It was, however, sufficient to pay the pecuniary legacies and the value of the annuity as at the date of her death, and the court held that the proper course for the trustees to adopt was to value the annuity as at the date of the death of the testatrix according to the government scale and to pay the amount of such valuation to the annuitant or invest it in the purchase of an annuity, as he should choose, and to pay the pecuniary legacies in full. SIMONDS, J., in *Re Cox, Public Trustee v. Eve* (1), referring to *Re Cottrell, Buckland v. Bedingfield* (2), said at pp. 563, 564 ([1938] 1 All E.R., pp. 666, 667):

The estate was realised and the trustees had in their hands the sum of £1,250. Now comes the fact which was of vital importance. That sum was insufficient to pay the pecuniary legacies in full and to enable a sufficient sum to be set aside and invested in trust securities to produce the annuity. It was, however, sufficient to

pay the pecuniary legacies in full and the value of the annuity as at the date of the death of the testatrix. WARRINGTON, J., held that the proper course was to value the annuity as at the death of the testatrix according to the government scale, to pay the amount of such valuation to the annuitant, and to pay the pecuniary legacies in full. The learned judge thought that thus only could justice be done to all three classes of beneficiaries: the legatees would be paid in full, the annuitant would get the value of his annuity and there would remain a residue to which the residuary legatee would be entitled. Logically I can see no reason why, if that is the rule to be followed where there is competition between legatees and an annuitant and the residuary legatees, as in *Re Cottrell, Buckland v. Bedingfield* (2), it should not also be the rule where the competition is between annuitants *inter se* and residuary legatees. To introduce a different rule in the latter case is a refinement which is calculated to cause confusion. Therefore I propose to follow, not to distinguish. *Re Cottrell, Buckland v. Bedingfield* (2). A

With those observations of SIMONDS, J., I entirely agree. The cases of *Re Cox, Public Trustee v. Eve* (1), and *Re Cottrell, Buckland v. Bedingfield* (2) are, however, distinguishable from the present case, because, in each of those cases, a direction was given to set aside a fund, but the direction could not be carried out and the court applied the principle of administration to which I have referred. In the present case the testatrix's intention can be carried out exactly and fully, though it is true that in the process the fund may be exhausted and the older annuitants may be paid in full and the younger may not. That, however, is what the testatrix intended. B C

I have been referred also to *Re Farmer, Nightingale v. Whybrow* (6). In that case there was, again, a direction which could not be carried out, so that there is nothing in it to lead me to a conclusion other than that at which I have arrived. I therefore hold that there should be no valuation of the annuities, but that the directions given in the will should be carried out. D

Solicitors: *Quicke & Card*, agents for *Cockburn, Gostling & Co.*, Hove (for the trustee); *Simon, Haynes, Barlas & Ireland* (for the younger annuitants); *Wilfred Light & Co.* (for the remaining annuitants); *Farrer & Co.* (for the charities). E

[Reported by T. A. DILLON, Esq., Barrister-at-Law.] F

COLES v. ENOCH.

[COURT OF APPEAL (Scott, Finlay and Luxmoore, L.JJ.), June 7, 12, 1939.]

Agency—Remuneration of agent—Commission—Contract to let premises—Prospective tenant—Communication by him to second prospective tenant—Causa causans—Chain of causation—Novus actus interveniens.

The defendant, who was the owner of empty shop premises, authorised the plaintiff to attempt to let them on the terms that the plaintiff was to be paid a commission if he succeeded in doing so. The plaintiff spoke on the telephone to A., whom he considered to be a possible tenant, but A. gave no definite answer, as he desired to consult his partner. W. overheard this telephone conversation and asked A. for information. A. merely mentioned that they were in the neighbourhood of Victoria, and added that, if his partner and himself did not want the premises, he would put W. in touch with them. W. thereupon, without communicating further with A., went to Victoria, and, finding the defendant's empty shop with a notice in the front window that it was to let, took it at a rent of £1,100 per annum :—

HELD : it was not the plaintiff's action which was the *causa causans* of W. becoming the tenant of the shop. The deliberate withholding of the address of the premises by A. must be construed as a deliberate withholding by the plaintiff, and he was not entitled to commission :—

Decision of OLIVER, J. ([1939] 1 All E.R. 614) reversed.

[EDITORIAL NOTE. It is well settled that, in order to earn his commission, the agent must be the *causa causans* of the transaction going through, but probably there is no more difficult problem in practice than to determine the application of this principle to the facts of particular transactions. The present case considers the application of the doctrine in difficult, though not unusual circumstances, and for that reason will be found of importance in considering this question that so often arises in practice.

AS TO EFFECTIVE CAUSE IN COMMISSION CASES, see HALSBURY, Hailsham Edn., Vol. 1, pp. 259-261, para. 434; and FOR CASES, see DIGEST, Vol. 1, pp. 488-493, Nos. 1664-1692.]

APPEAL by the defendant from a decision of OLIVER, J., dated Jan. 23, 1939, and reported [1939] 1 All E.R. 614. The facts are set out in the judgment of SCOTT, L.J., and more fully in that of OLIVER, J., in the report of the hearing in the court of first instance.

S. Cope Morgan for the appellant.

Rodger Winn and *G. K. McCulloch* for the respondents.

SCOTT, L.J. : In this case, the judge held, though not without difficulty, that the plaintiff had earned his commission. The defendant appeals. He was the owner of a shop in Victoria Street, London. The shop was one which, if its front was removed, was of suitable dimensions to make a pin-table arcade. The position of the shop, being one where people congregate and are at leisure, was suitable for such a business. In Dec. 1937, Coles, who had pin-table arcades of his own in the north of England, and who was trying to find in London a suitable site for himself, called on the defendant and had a conversation with him. Coles indicated that he thought that he would be able to find the necessary finance to enable

him to take the place for himself, but added : " If I cannot take the place myself, I suppose I had better turn agent and try to find a tenant for you upon the usual agency terms." The defendant promised to pay commission if Coles found a tenant. Coles applied to Scott & Adickes, business friends of his, who were manufacturers and distributors of pin-tables. He spoke about the premises on the telephone to Adickes. A During that conversation, one Wilkie was seated in Adickes' room, and he ultimately took the shop for a pin-table arcade. Adickes in his evidence said : " I deliberately did not tell him the exact location of the premises, because I thought, if Scott came into the deal, we might run them ourselves." B

I agree with the judge that this case is near the line, and it is easy for two judges to take different views. The passages which I have quoted from the evidence seem to me quite definitely to show that, in this particular case, and on these rather peculiar facts, the evidence falls short of an introduction of the particular property to the person who in fact became tenant of it. I think that here the plaintiff did not achieve the result which the commission contract contemplates as the result which must be achieved by him as agent in order to earn commission. He must accept what his sub-agent, Adickes, did just as if he did it himself, and if, instead of Adickes talking to Wilkie, he had said to Wilkie what Adickes said, and deliberately kept back the actual address of the premises and all specific means of identification, because he wanted to keep open for himself the opportunity of taking the shop, the proper inference must necessarily be that he deliberately stopped short of doing that which would entitle him to his commission. He stopped short of being the direct or efficient cause of Wilkie taking that shop. The fact that he did not give the address must be interpreted as a deliberate act falling short of what was essential to bring him within the terms under which he would be entitled to commission under the oral contract. C D E

In these circumstances, I feel compelled to arrive at the conclusion that the plaintiff fell short of finding a tenant for the defendant's shop, and that the letting was due to the act of the tenant himself. In fact, the tenant found this shop for himself. For these reasons, the appeal must be allowed. F

FINLAY and LUXMOORE, L.JJ. agreed. G

Appeal allowed with costs.

Solicitors : *Norman Hart & Mitchell* (for the appellant) ; *F. Blacket Gill* (for the respondent).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

TAYLOR AND ANOTHER v. LIVERPOOL CORPORATION.

[LIVERPOOL SUMMER ASSIZES (Stable, J.), June 20, 21, 1939.]

Landlord and Tenant—Liability of landlord for injuries due to want of repair—Liability to tenant and his family—Injury suffered outside demised premises—Yard attached to premises over which tenants have a right to pass—Fall of brick from defective chimneystack.

The male plaintiff was the tenant of 3 rooms in a house which had been acquired by the defendant corporation for demolition. The house had not been vacated, because no alternative accommodation was available for the tenants. The female plaintiff was the daughter of the male plaintiff and acted as his housekeeper. The daughter was in a yard adjoining the house when she was hit by a brick which fell from the chimneystack, and was severely injured. The chimneystack was in a bad state of repair when the house was acquired by the defendant corporation, and its want of repair had been brought to their notice. The yard was within the curtilage of the house, and was used in common by all the occupants of the house, mostly as the only access to the water-closet. It was contended on behalf of the defendant corporation that the corporation were not liable for damage sustained by a tenant of the corporation, or by the tenant's guest, servant or relation :—

HELD : (i) the yard was no part of the demised premises and the principle of *Cavalier v. Pope* (2) did not apply, and the plaintiffs were entitled to recover.

(ii) if the yard was part of the demised premises, the plaintiffs were entitled to recover under the authority of *Cunard v. Antifyre, Ltd.* (6).

[EDITORIAL NOTE.] The authority of *Cavalier v. Pope* (2) is quite definite so far as the rights of a tenant or his guests are concerned, and there is no liability to such persons for injuries sustained by reason of want of repair of the demised premises. It is equally clear that the landlord is liable to anyone on the highway or on other premises adjoining the demised premises. The judge here has, however, not found it necessary finally to decide whether or not the yard was part of the demised premises ; for he has held that, even if it was, the plaintiffs could recover under the authority of *Cunard v. Antifyre, Ltd.* (6). The corporation were in exclusive occupation of the defective chimneystack and the ordinary principles of the law of tort applied. Having negligently allowed the chimneystack to remain in disrepair, the corporation was equally liable to any person, whether tenant or mere passer-by, suffering injury by reason of such want of repair.

AS TO LIABILITY OF LANDLORD FOR INJURY TO TENANT AND HIS GUESTS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 596-600, paras. 846-850 ; and FOR CASES, see DIGEST, Vol. 31, pp. 347, 348, Nos. 4892-4905.]

Cases referred to :

- (1) *Robbins v. Jones* (1863), 15 C.B.N.S. 221 ; 31 Digest 347, 4895 ; 33 L.J.C.P. 1 ; 9 L.T. 523.
- (2) *Cavalier v. Pope*, [1906] A.C. 428 ; 31 Digest 348, 4900 ; 75 L.J.K.B. 609 ; 95 L.T. 65.
- (3) *Cheater v. Cuter*, [1918] 1 K.B. 247 ; 2 Digest 65, 413 ; 87 L.J.K.B. 449 ; 118 L.T. 203.
- (4) *Erskine v. Adeane, Bennett's Claim* (1873), 8 Ch. App. 756 ; 2 Digest 66, 416 ; 42 L.J.Ch. 835 ; 29 L.T. 234.
- (5) *Shirvell v. Hackwood Estates Co., Ltd.*, [1938] 2 K.B. 577 ; [1938] 2 All E.R. 1 ; Digest Supp. ; 107 L.J.K.B. 713 ; 159 L.T. 49.
- (6) *Cunard v. Antifyre, Ltd.*, [1933] 1 K.B. 551 ; Digest Supp. ; 103 L.J.K.B. 321 ; 148 L.T. 287.
- (7) *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74 ; 31 Digest 99, 2381 ; 92 L.J.K.B. 50 ; 128 L.T. 386.

ACTION for damages (i) for injuries suffered by the second plaintiff, the daughter of the first plaintiff, when a brick fell out of the chimneystack of a house rented from the defendants in which both plaintiffs lived, and (ii) for loss of the services of the second plaintiff, who admittedly acted as housekeeper for the first plaintiff, her father, with the result that the first plaintiff was put to expense and suffered damage.

William Gorman, K.C., and *B. R. Rice-Jones* for the plaintiffs.

F. E. Pritchard, K.C., and *H. I. Nelson* for the defendants.

Pritchard, K.C.: The defendants are not liable, because the injured person was the daughter of a tenant. [Counsel referred to *Robbins v. Jones* (1), *Cavalier v. Pope* (2), *Cheater v. Cater* (3), *Erskine v. Adeane*, *Bennett's Claim* (4), *Shirvell v. Hackwood Estates Co., Ltd.* (5) and *Cunard v. Antifyre, Ltd.* (6).] The yard was part of the premises let.

STABLE, J.: This case is one of some difficulty and considerable importance. It is important, not only because the amount of money involved in this particular claim is considerable, but also because it raises a question of principle which, in view of the activities of local authorities in improving the housing conditions of their respective areas, may be one of some general application. The case was tried before me and a jury, but, for reasons which will hereafter appear, on my direction, the function of the jury was confined to assessing the amount of damages to be recovered in the event of my holding as a matter of law on the undisputed facts, that the defendant corporation were liable to pay damages to one or other or both of the plaintiffs.

There are two plaintiffs before the court: *Ellen Taylor*, a young woman who at the material time was aged 26 years, and her father, *Edward Taylor*, the latter being at all material times a tenant of 3 rooms in a dwelling-house, No. 42, Portland Street, in the city of Liverpool, owned by the Liverpool Corporation. The claim arises in this way. On Oct. 14, 1938, a brick which formed part of the chimneystack of the house fell from the stack and hit *Miss Taylor* on the head, as a result of which she sustained very terrible injuries, and her claim is for compensation for those injuries. *Mr. Taylor* claims on the footing that he has lost the services of his daughter, who admittedly acted as his housekeeper, with the result that he has been put to expense and has suffered damage.

I ought to say at the very outset, to remove any possibility of misapprehension, that this is not a case in which the corporation, the defendants, are slum landlords, who have been deriving rents from tenants whom they have housed in dilapidated houses for the purpose of financial advantage to the corporation. The facts are precisely the opposite. The property in question originally belonged to a *Mr. Roberts*. It was condemned as a slum and was acquired by the corporation, under the powers which they possess, for the purpose of having the slum demolished and the occupants housed in more suitable conditions. Of

course, these things cannot be done in a moment. One cannot turn people out of their dwellings into the street, no matter how unsuitable the dwellings may be for human habitation. Alternative accommodation has to be built, and the process of transferring the population from the condemned slum to one of the very admirable development sites which

A one sees on almost every side in Liverpool must of necessity be a gradual one. The motive of the corporation in acquiring this property was wholly admirable, and the purpose for which they acquired it was beneficent. I do not think, however, that the propriety of their motives can or does affect their legal liability.

B As this case may well go further, I think it desirable to state the facts, and the course which the trial of the action took. Evidence was called on behalf of the plaintiffs, but no evidence was called by the defendant corporation, and at the close of the evidence it appeared to me that there was no question of fact whatever for the jury to determine. That is to

C say, there was no question of pure fact on which more than one answer was open to the tribunal appointed to decide the question of fact, because the evidence was all one way, and was not contradicted, for the simple reason that it could not be contradicted. There was one possible exception—namely, the question as to whether or not Mr. Taylor was the

D tenant of the yard adjoining this house, where Miss Taylor was standing or walking at the moment when she was hit by the brick. In my judgment, that was not a question of fact for the jury at all. The actual facts of the matter were undisputed, and whether or not those facts created a relationship of landlord and tenant in respect of this particular

E yard as between the corporation and Mr. Taylor is, in my judgment, an inference of law, and not a question of fact at all.

As so often happens in cases of this kind, the actual legal relationship, and the area over which that relationship operated, as between Mr. Taylor and the corporation remains somewhat obscure and in the realm

F of conjecture. When Mr. Roberts owned the property, it appears that a certain Mrs. Kays, who was the married daughter of the plaintiff, Mr. Taylor, held the whole of the house under some agreement or another between her and Mr. Roberts. Precisely what the terms of that agreement were I do not know. All I know about it is that there was no

G written agreement, and that the arrangement between Mrs. Kays and Mr. Roberts was oral, or perhaps a matter of inference from the fact that she was responsible to Mr. Roberts for the whole of the rent, while she, on her part, sublet some of the rooms to two other tenants, of whom Mr. Taylor was one. Whatever that arrangement was, it is perfectly plain

H that, when the corporation acquired the property, an entirely new state of affairs came into being, for thereafter, instead of the corporation collecting rent from Mrs. Kays in respect of the whole of the premises, or so much of the premises as theretofore had been occupied by Mrs. Kays, the corporation collected from Mrs. Kays rent for those rooms of which she was in actual physical possession, and they collected the rents

from Mr. Taylor and the other tenant in respect of the rooms which they respectively occupied.

There was no written agreement between the corporation and Mr. Taylor, and Mr. Taylor told me (and I accept his evidence) that there was no oral arrangement made. There was no interview at which either the terms or the particular scope of his tenancy were discussed or agreed. A All that happened was that the officer of the corporation, having informed Mr. Taylor that the corporation had acquired the property, informed him that thereafter the rent for the premises which Mr. Taylor occupied was to be paid to the corporation direct. This was done, with the result that the terms of the tenancy thus created, and the area of the building B over which the tenancy operated, are a matter of inference.

Mr. Taylor occupied 3 rooms. He occupied a room on the ground floor in front, and two rooms in the middle, one on the first floor and one on the second floor. He apparently had the right to use—or in fact he did use—a room or an area inside the house which was described as the “slop,” but whether or not that user arose as a result of an understanding C between him and his daughter, Mrs. Kays—whether or not in relation to the “slop” he was a mere licensee—seems to me to be entirely immaterial to anything which I have to decide.

Adjoining the house, No. 42, Portland Street, there was an enclosed D yard, and there is no doubt whatever that this yard was part of the premises. It was all part of the curtilage. It was used by the occupants of the house for the purpose, partly of getting access to the only water-closet which the premises possessed, which was situate in the yard, and also for the purpose of getting access from the back of the premises to the E street. When the corporation acquired the property, there is no doubt whatever that it was in a dirty and a dilapidated condition. A schedule of dilapidations which had been prepared by the corporation as far back as Nov. 9, 1933, proved quite clearly that the brickwork of the chimney-stack was decayed, and that the state of decay was known to the corporation. F No repairs to the decayed brickwork were executed at all between 1933, when the schedule of dilapidations was prepared, and Oct., 1938, when the mischief happened, and there is no reason to suppose that its state had got any better. In fact, I think that one can arrive without much difficulty at the opposite conclusion—namely, that the decayed G brickwork certainly had not got any better in the interval, even if it had not got considerably worse.

On Oct. 14, 1938, Miss Taylor, who, as I have said, was living in the house, she being under no contractual relationship in relation to the house or any part of it with the corporation, was leaving the premises H for some purpose or another, and she was passing across the yard to which I have already referred when she was undoubtedly and admittedly struck on the head by a large brick, which formed a part of the upper course of brickwork of the chimneystack, and which had become dislodged and fell a very considerable distance, striking her on the head.

An architect was called. His evidence was not contradicted. It merely confirmed what the schedule of dilapidations had disclosed—namely, that the brickwork of this chimneystack was in a decayed condition, and the mortar perished. The top course of bricks, of which the brick in question was one, were detached from the rest of the brickwork, and
A maintained their position in the chimneystack simply as a result of the ordinary law of gravity and their own weight.

It was conceded, and very properly conceded, by counsel for the defendants that the corporation, having known of the decayed state of this chimneystack for a matter of 5 years, and having done nothing to
B put the matter right, would have been unquestionably liable in damages if the brick had fallen off and hit on the head somebody who was passing in the highway, or had hit somebody present on adjoining premises which were not the property of the corporation, or which were not held under any lease or tenancy agreement from them. Counsel for the
C defendants contended, however, in the course of a very forcible argument (which lost nothing in clarity or force by reason of the brevity and conciseness with which it was presented to me), that, because Mr. Taylor happened to be the tenant of the corporation, and because Miss Taylor, although not a tenant of the corporation, was living in rooms with her
D father, the corporation were absolved in law from any legal liability for the damage which the tenant or the tenant's guest, servant or relation might sustain. The proposition is a little startling. It involves the proposition that, if I am the owner and in occupation and possession of, shall we say, a chimneystack, which I am warned is in a highly dangerous
E condition, and likely at any moment to collapse, and if it appears that, when it does collapse, it is going to collapse on an adjoining yard, which also happens to belong to me, and which I may have let for the purpose of being used as a children's playground, and if what everybody expects to happen does happen, and the chimneystack collapses, and it collapses
F on to the playground when the playground is full of children, and kills, injures and maims a large number of them, I escape from liability for what appears to be the most tortious act, simply and solely because the chimneystack happens to have fallen on a yard which is held under some form of tenancy agreement from me. That, at first sight, strikes one
G as a somewhat startling proposition of law. Counsel for the defendants supported the proposition, first of all, by reference to the well-known case of *Robbins v. Jones* (1). The case is familiar. The proposition of law which it establishes is quite incontrovertible, and may be summarised by a short quotation from the judgment of ERLE, C.J., at p. 240 :

H A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumbledown house; and the tenant's remedy is upon his contract, if any.

The distinction between this case and *Robbins v. Jones* (1) lies in the fact that the defective structure which caused the damage in *Robbins*

v. Jones (1) was part of the demised premises. It was actually a physical part of the demised premises, and the proposition of law which that case establishes beyond controversy is that, in those circumstances, apart from any contractual obligation which there may be, the landlord, the owner, who has parted with the possession, and who is not in occupation of the property at all, is not liable to anybody for any ill consequences A which may ensue from the dilapidated state in which the property may be. It seems to me that that case is a very long way from the present one.

The next case which was cited was the equally familiar case of *Cavalier v. Pope* (2). That case carried the principle of *Robbins v. Jones* (1) a B step further, because there the owner of the dilapidated house had contracted with the tenant to do the requisite repairs, but had failed to do them. The result was that the tenant's wife, who lived in the house, and who, incidentally, was well aware of the danger, was injured by an accident which was caused by the want of repair, and it was held by the C House of Lords, affirming the judgment of a majority of the Court of Appeal, that, in those circumstances, the wife having no contractual rights against the landlord, and, in the absence of a contract, there being no obligation to repair on an owner who has parted with the legal possession of real property, her action failed. There again, however, D it is to be observed that the defective structure which caused the accident was a part of the demised premises.

The next case, I think, which is important is *Cheater v. Cater* (3). That is a rather interesting case. It was a case in which a yew tree which grew on the landlord's land had a branch which overhung a field which was E let by the landlord to a tenant, and during the course of the tenancy the branch was eaten by a mare belonging to the tenant, with the result that the animal died. The tenant brought an action against the landlord, and the action failed. It was held by the Court of Appeal that, although, if the animal which ate the yew tree had belonged to an adjoining owner, F and not to a tenant of the gentleman on whose land the offending tree was growing, the action would have succeeded, yet a distinction was drawn between the rights of an adjoining owner and the rights of an adjoining tenant, and it was held by the Court of Appeal that the action failed because the yew tree was, when the tenancy began, in substantially the G same position as it was when the branch was eaten by the mare. BANKES, L.J., cites a passage from a judgment of MELLISH, L.J., in *Erskine v. Adeane, Bennett's Claim* (4), at p. 761, which he accepts in full as being a statement of the law in accordance with a long line of cases, as follows, at p. 255 : H

The law of this country is that a tenant, when he takes a farm, must look and judge for himself what the state of the farm is. Just as in the case of a purchaser of a business the rule is *caveat emptor*, so in the case of taking the lease of property the rule is *caveat lessee* ; he must take the property as he finds it.

The Court of Appeal were careful to point out in that case that they did not

decide what the position would have been if, when the tenancy had commenced, the yew tree had not been overhanging the demised land, but had grown and expanded so as to overhang the land during the course of the tenancy. That case decides that the lessee must take the subject-matter of his lease as he finds it when the lease comes into existence.

- A The next authority to which counsel for the defendants referred is *Shirvell v. Hackwood Estates Co., Ltd.* (5). That was a case between a landlord and a tenant. There was a tree which was partly dead growing on the landlord's adjoining land, with a branch overhanging the tenant's land. The servant of the tenant was killed by the fall of the branch.
- B His master paid compensation to the widow under the Workmen's Compensation Act, and then proceeded to bring an action against the landlord under the provisions of sect. 30 (2) of that Act, and, although in that action the nominal plaintiff was the tenant, it is perfectly plain from the argument and the judgments that the right of action which he
- C was seeking to enforce was an action founded in tort, and a right of action which accrued to the nominal plaintiff by reason of the statutory provision in the Workmen's Compensation Act, which in substance transferred to the nominal plaintiff the claim which the workman would have had if the master had not paid workmen's compensation and an
- D action had been brought against the landlord for damages for tort. It is important to see in that case that the Court of Appeal dismissed the action on the ground that no negligence had been proved, and that what the landlord had done or had omitted to do did not constitute negligence—not actionable negligence—and was not even carelessness. There was
- E no act or omission proved which the court held to constitute carelessness, but two members of the court held that, even if there had been, the action could not have been maintained, because the relationship between the plaintiff and the defendant was the relationship arising as between the servant of a tenant and the landlord of an adjoining piece of property.
- F In my view, the latter part of that decision can only be regarded as *obiter*, because what the Court of Appeal decided was that, on the evidence in fact, there had been no carelessness, but the case is unquestionably important in this relation, partly from the weight of the *dicta* of GREER, L.J., and BENNETT, J., and partly from the fact that GREER, L.J.,
- G said that the decision in *Cunard v. Antifyre, Ltd.* (6) was a wrong decision if it was inconsistent with the decisions in *Robbins v. Jones* (1) and *Cavalier v. Pope* (2). GREER, L.J., says, at p. 594 ([1938] 2 All E.R. at p. 8):

- H I do not think the case [the *Antifyre* case (6)] can be relied upon as in any way inconsistent with *Robbins v. Jones* (1) and *Cavalier v. Pope* (2) referred to above. If it is so inconsistent, the decision was wrong and is not binding on this court.

He does not say, however, that the decision was wrong. He says that it was only wrong if it was inconsistent with the other two decisions, and he says that in his view that case was not inconsistent with either *Robbins v. Jones* (1) or *Cavalier v. Pope* (2).

In that state of the authorities, it was argued by counsel for the defendants that the yard where Miss Taylor was standing when she was hit by the brick was either a part of the premises which Mr. Taylor occupied under the terms of his tenancy agreement or was so closely connected with the rooms of which he was in exclusive occupation that the yard must be regarded in precisely the same way, so far as legal consequences are concerned, as it would be if it had formed part of the property comprised in the tenancy agreement. In my judgment, that argument breaks down at the very threshold. I do not think that Mr. Taylor was the tenant of this yard. He certainly had no exclusive occupation of the yard. There is no evidence before me that he had any right to use the yard at all, except for the purpose of passing to and from the rooms in which he lived, either to the street or to the water-closet. I think that the true position as between Mr. Taylor and this yard was that of which *Fairman v. Perpetual Investment Building Society* (7) is an example. In that case, there was a house let in separate tenements, the landlord retaining possession and control of the common staircase, and the House of Lords held that a lodger with one of the tenants who was using the staircase was at most an invitee as between himself and the landlord, and more probably a licensee. The House of Lords held that there the lodger who had sustained the injuries—as a result of a defect, be it noticed, in the staircase itself—was unable to recover unless he could prove that the defect in the stair was something in the nature of a trap, or a concealed danger, or something which the landlord knew, or ought to have known, and which was not apparent to the person who was using the staircase. On the facts of that case, it was held that the defect was perfectly apparent to the lodger, and that there was no concealed danger at all.

If the case which I have to decide really comes within that principle at all, I am quite satisfied here that the chimneystack was in the nature of a trap. That is to say, it was a concealed danger of which the landlord knew, and of which neither Miss Taylor nor Mr. Taylor had knowledge at all. It is true that Mr. Taylor had written to the corporation and complained about the house in which he was living. He said that it was a disgrace. He said that it was nothing less than a rat trap, and that the rats had actually been getting into his bed. I have no doubt Mr. Taylor knew that he was not living in Buckingham Palace. That probably was apparent, but there is no reason to suppose, and there is no evidence before me, that he knew that this particular brickwork was decayed, and it is common ground that the landlord did. Thus, if the question depends on whether or not the injury was caused by a concealed danger in the nature of a trap, on the facts of this case, it seems to me that there is no possible conclusion at which one can arrive other than that it was a trap, and, if that be the right principle to apply, I apply it.

I ought to add that I do not really think that that case has any application at all, because in that case the defect which caused the injury

was a defect present in the structure which the tenants had something in the nature of a licence to use. That case would have been of direct application if the defect which had caused Miss Taylor's injury had been a loose stone or a hole, a trap present in the yard which she was using.

A In my judgment, where the cause of the trouble was this defective brick in the chimneystack, of which the landlord was in exclusive occupation and possession, the ordinary principles of tort apply, and I think that the landlord—I call him the landlord, it is a mere accident that he was the owner of the chimneystack—who negligently allowed the brickwork to remain for a matter of 5 years in this dangerous state was equally

B liable at law whether the brick fell on his tenant, on his tenant's daughter, or on a casual passer-by, and whether the tenant or the daughter or the passer-by was in the yard or on the highway or on the property of an adjoining owner.

C In my judgment, *Cheater v. Cater* (3) has no application, because the basis of that decision was that the tenant had to take the demised property as he found it, and he found the demised property with the branch of the yew actually overhanging the property. This brick did not fall on the demised property at all, but, even if it had, the whole trouble was not that

D the brick at the time of the accident was where it was at the commencement of the tenancy. The whole trouble was caused by reason of the fact that it was not. It had moved. It had become dislodged. It had fallen off the chimneystack and hit Miss Taylor on the head.

So far as authorities are concerned, my attention was called to *Cunard*

E *v. Antifyre, Ltd.* (6). That case is directly in point. If I may respectfully say so, that case seems to me to be rightly decided, but, whether or not I thought that it was, it would be my duty to follow that case, and I do follow it. It seems to me to establish here that all this discussion as to the liability of the landlord towards his tenant or the tenant's friends,

F guests, servants, lodgers and the like, where injury has been caused either by some defect in the demised premises or by the situation of something overhanging the demised premises which, at the time the damage is done, remains substantially where it was at the time of the creation of the tenancy, is entirely irrelevant to the principles which I have to consider

G and apply.

In my judgment, this case is concluded by the decision in *Cunard v. Antifyre, Ltd.* (6), and, if that case is decided wrongly, it is for the Court of Appeal, and not for me, to say so. The only doubt which I have in my mind as to whether I am bound to follow that case is caused by the report

H of *Shirvell v. Hackwood Estates Co., Ltd.* (5), and, as I have already said, that case does not seek to overrule *Cunard v. Antifyre, Ltd.* (6). All that is said is that the *Cunard* case (6) is not inconsistent with *Robbins v. Jones* (1) and *Cavalier v. Pope* (2), but that, if it was, of course, it does not express the law. In those circumstances, it seems to me that it is my duty to follow the decision of the Divisional Court, which is directly in

point, rather than to follow the *dicta* in *Shirvell v. Hackwood Estates Co., Ltd.* (5).

I ought perhaps to add that, unless the yard must be regarded as though it were part of the property held under the tenancy agreement, *Shirvell v. Hackwood Estates Co., Ltd.* (5) and the cases which preceded it have no application at all. As I have already said, in my judgment A this yard never was in the legal occupation of Mr. Taylor. It never formed part of the property which he held under his tenancy agreement, and consequently *Cavalier v. Pope* (2), *Cheater v. Cater* (3), *Shirvell v. Hackwood Estates Co., Ltd.* (5) and that line of cases have no application at all. If I am wrong in that, and if the yard must be regarded as being a B part of the property which Mr. Taylor held under his tenancy agreement, then I think that the matter is determined by *Cunard v. Antifyre, Ltd.* (6), and I follow that decision in preference to the *dicta* in *Shirvell's* case (5). I do that with all the more readiness because in *Cunard v. Antifyre, Ltd.* (6) the court arrived at the conclusion at which I should have arrived C if I had not been assisted by the authorities to which my attention has been directed.

It only remains to add that, in either view of the precise legal relationship between Mr. Taylor and the corporation in connection with this yard—whether he must be regarded as holding the yard as a part of his D tenancy, or whether, as I think, the relationship is really that of licensee—I see no distinction whatever between his rights as against the corporation and those of his daughter, Miss Taylor. If the fact was that he was precluded from recovering because he happened to be a tenant, it is quite plain from *Cavalier v. Pope* (2) that his daughter can have no higher E rights than he has.

The jury, to whom the question of damages was left, have awarded £100 to Mr. Taylor, and the sum of £4,000 to Miss Taylor in respect of her injuries. It is not necessary in this judgment to make any reference to the very terrible injuries which Miss Taylor sustained. The result is F that there will be judgment for Mr. Taylor for the sum of £100. As regards Miss Taylor, I am quite satisfied on the evidence—and I think that the verdict of the jury confirms it—that Miss Taylor is not in a condition in which she can give a valid receipt for the money. In those G circumstances, I am going to direct the sum of £4,000 to be brought into court, and steps will have to be taken to see that this young woman is protected, because she is in no mental condition to protect herself.

Solicitors: *Silverman & Livermore* (for the plaintiffs); *W. H. Baines*, Town Clerk, Liverpool (for the defendants).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

BURKE AND UNSWORTH v. ELDER DEMPSTER LINES, LTD.

[LIVERPOOL SPRING ASSIZES (Croom-Johnson, J.), May 1, 2, 1939.]

Workmen's Compensation—Alternative remedies—Election between two remedies—Receipt of compensation—Knowledge of workman—Receipt signed “without prejudice”—Onus of proof where unequivocal act proved—Workmen's Compensation Act, 1925 (c. 84), s. 29 (1).

On Mar. 8, 1938, the two plaintiffs were injured in the course of their employment, and such injury was admittedly due to a breach of statutory duty by the defendants. From Mar. 18, 1938, until Aug. 12, 1938, in the case of the first plaintiff, and until Aug. 19, 1938, in the case of the second plaintiff, workmen's compensation at the appropriate rate was paid to both the plaintiffs without any reservation by them, and from those dates down to the date of trial they had continued to receive the same amounts of compensation but in their receipts for such compensation they added the words “without prejudice.” At no time did they make any other reservation of their rights, either to the clerk paying them the compensation or to anyone else acting on behalf of the defendant company. It was proved that the first plaintiff by the end of July became aware that he had to elect between receiving workmen's compensation and suing in an action for damages, and that the second plaintiff had no such knowledge at the time he first signed the receipt “without prejudice” :—

HELD : (i) in the case of the first plaintiff, the receipt of compensation without any reservation and with knowledge of his right to elect was an election to accept workmen's compensation, and he could not succeed in an action for damages.

(ii) the mere addition of the words “without prejudice” to the receipt was not a sufficient reservation of the rights of the plaintiffs to prevent such receipt being an election to receive workmen's compensation, and for that reason the second plaintiff could not recover.

(iii) the mere receipt of workmen's compensation does not amount to an election. It must also be shown that the person accepting such compensation is aware of his right to claim damages.

(iv) (following *Selwood v. Towneley Coal & Fireclay Co., Ltd.* (1)) the provision in the Workmen's Compensation Act, 1925, s. 29 (1), that the employers shall not be liable to pay compensation both under and independently of the Act does not provide a separate obstacle against recovery by the workman. The whole of the section must be read together, and it all relates to the one question of election.

(v) when what appears to be an unequivocal act on the part of the workman is proved, then the onus is upon the workman to satisfy the court that the circumstances in which this seemingly unequivocal act took place were such as to render it not a binding election on his part.

[EDITORIAL NOTE.] The question whether or not there has been a binding election is largely one of fact, and, indeed, one of those questions of mixed fact and law upon which every case must more or less be an authority only on its own facts. At the same time, there has been a widely held opinion that a receipt for compensation which includes the words “without prejudice” was a sufficient protection for the workman. The present case considers this matter very fully, and shows that that is not so in all cases. The essential matter underlying such a case as this is the knowledge of the workman of his choice between two remedies, and, if the receipt of compensation is relied upon as an election, the receipt of such compensation must be at a time when he had such knowledge. The matter, however, is certainly carried a step further. If the employers, by their own evidence or by cross-examination of the workman, can prove an unequivocal act on the part of the workman—such as the receipt of compensation without any reservation of his

rights—then the onus is upon the workman to show that that act did not amount to a definite election on his part.

AS TO ALTERNATIVE REMEDIES, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 195, 196, paras. 430, 431; and FOR CASES, see DIGEST, Vol. 34, pp. 490-492, Nos. 4063-4071. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 478-483.]

Cases referred to :

- (1) *Selwood v. Towneley Coal & Fireclay Co., Ltd.*, [1939] 2 All E.R. 132; Digest Supp.
- (2) *Codling v. Mowlem (J.) & Co., Ltd.*, [1914] 3 K.B. 1055; 34 Digest 491, 4067; 83 L.J.K.B. 1727; 111 L.T. 1086; 7 B.W.C.C. 786; *affg.*, [1914] 2 K.B. 61.
- (3) *Bennett v. Whitehead (L. & W.), Ltd.*, [1926] 2 K.B. 380; 34 Digest 492, 4068; 135 L.T. 329; 19 B.W.C.C. 133.
- (4) *Scarfe v. Jardine* (1882), 7 App. Cas. 345; 36 Digest 382, 581; 51 L.J.Q.B. 612; 47 L.T. 258.
- (5) *Kendall v. Hamilton* (1879), 4 App. Cas. 504; 21 Digest 218, 540; 48 L.J.Q.B. 705; 41 L.T. 418.
- (6) *Davenport v. R.* (1877), 3 App. Cas. 115; 31 Digest 472, 6195; 47 L.J.P.C. 8; 37 L.T. 727.
- (7) *Craft v. Lumley* (1858), 6 H.L. Cas. 672; 31 Digest 376, 5229; 27 L.J.Q.B. 321; 31 L.T.O.S. 382; *affg.* (1856), 5 E. & B. 682.
- (8) *Re Daintrey, Ex p. Holt*, [1893] 2 Q.B. 116; 4 Digest 105, 946; 62 L.J.Q.B. 511; 69 L.T. 257.
- (9) *Oliver v. Nautilus Steam Shipping Co.*, [1903] 2 K.B. 639; 34 Digest 495, 4087; 72 L.J.K.B. 857; 89 L.T. 318; 5 W.C.C. 65.
- (10) *Huckle v. London County Council* (1910), 27 T.L.R. 112; 34 Digest 495, 4090; 4 B.W.C.C. 113; *affg.*, 26 T.L.R. 580.
- (11) *Kinneil Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell)*, [1931] A.C. 575; Digest Supp.; 100 L.J.P.C. 113; 145 L.T. 289; 24 B.W.C.C. 181; *affg. S.C. sub nom. Waddell v. Kinneil Cannel & Coking Coal Co., Ltd.* (1930), 23 B.W.C.C. 567.
- (12) *Kelly v. North British Ry. Co.*, [1916] S.C. 19; 34 Digest 496, case *m*.

ACTION for damages for negligence and for breach of statutory duty. The facts are fully set out in the judgment. The plaintiffs alleged that at the material times (i) they were ignorant of their right to damages, (ii) they were ignorant of their right to elect as between damages and workmen's compensation, and that, therefore, in law, there was no valid or binding election, and (iii) when they eventually received compensation, this was not in any binding form. For the defendants, it was alleged (i) that the two plaintiffs had accepted workmen's compensation under the Workmen's Compensation Act, 1925, s. 29 (1), (ii) that the admitted receipt of compensation was evidence of this in the absence of other explanation, and (iii) that in any event the defendants were not liable under sect. 29 (1).

William Gorman, K.C., and *B. R. Rice-Jones* for the plaintiffs.

G. J. Lynskey, K.C., *Hartley Shawcross, K.C.*, and *J. R. D. Crichton* for the defendants.

CROOM-JOHNSON, J. : The two plaintiffs are dock labourers, working at the Liverpool Docks on half-daily engagements, and their remuneration

was paid to them through a clearing-house each Saturday on behalf of all their employers. On Mar. 8, 1938, they were working at the West Brunswick Dock on a motor ship known as the Accra, owned by the defendants, Elder Dempster Lines, Ltd. They were working in No. 2 hold. They had just gone down to the lower hold. Three sections of
 A the hatches were off, and one beam had been left on.

During the unloading, a hook descending into the hold caught and dislodged the beam and the beam fell upon each of the plaintiffs, severely injuring the plaintiff Burke on the head and left hand (so far as it is material for me to consider the injuries) and the plaintiff Unsworth
 B on the left hand. It was a heavy beam, some 15 cwts. in weight, and it fell because it had not been adequately secured to prevent its displacement. It should have been so secured, having regard to the Docks Regulations, 1934.

In those circumstances, the plaintiffs, by writ issued on Nov. 21,
 C 1938, claimed against the defendants as their employers damages for negligence, or, alternatively, damages for the alleged breach of the statutory duty. By letter dated Jan. 26, 1939, the solicitors for the defendants informed the solicitors for the plaintiffs that the defendants admitted that the accident to which I have referred was brought about
 D by a breach of statutory duty for which they must accept responsibility, and they went on to inform the plaintiffs' solicitors that it would be unnecessary for the plaintiffs to call evidence on the question of negligence or breach of duty. Accordingly, the action has proceeded before me on the basis that, but for certain matters which I will indicate in a moment
 E or two, the plaintiffs would have been entitled to recover damages from the defendants.

The defence, and the only defence, is that the plaintiffs have elected to accept compensation for their injuries under the Workmen's Compensation Acts, 1925 to 1931, and that, accordingly, pursuant to sect. 29 (1)
 F of the Act of 1925, the plaintiffs are not entitled to recover. It was argued before me (i) that the plaintiffs had elected to receive workmen's compensation under the section, (ii) that, once it was shown that the plaintiffs had in fact received compensation, that was such positive evidence of an election that it was unnecessary to go any further, and
 G (iii) (although this point was not very much argued before me, I apprehend that counsel for the defendants desired to keep it open) that, inasmuch as, at the end of the subsection, it is provided that the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both
 H independently of, and also under, the Act, the defendants were not, in any event, liable to pay.

It was not disputed that the plaintiffs did receive workmen's compensation under the Acts referred to, but both of them alleged before me (i) that they were ignorant of their right to recover damages at any material time, and (ii) that they were ignorant of their right to

elect, and consequently that there could not be in law a valid election which bound them. They further stated that, when they did discover the true facts which would otherwise have enabled them to make an election, they received workmen's compensation in such a form that they were, in effect, not bound by their acts, so that there was even then no election. Generally on these points each of the parties referred me to my own previous decision in *Selwood v. Towneley Coal & Fireclay Co., Ltd.* (1). A

Each of the plaintiffs received serious injuries to certain fingers of his left hand, but, in view of the suggestions which have been made in at least one of the cases to which my attention has been directed in the course of the argument, I think it right to say that it was not suggested that there were any injuries to either of these two men affecting their general health so that their general understanding of the position was affected in any way. I was satisfied that each of the plaintiffs knew of the regulation to which I have referred, both at the time of the accident and before. They were men who had been working on the docks for some years. Each of them was, in my opinion, a highly intelligent man, and a very good type of dock-labourer, and I came to the conclusion that this was a case in which they knew almost everything which would have enabled them to make a valid election in general with regard to this particular matter. I was satisfied that at any material time, and at the latest within 2 days after the accident, each of them knew how the accident had happened, and that it happened by reason of a breach of the regulation. Each of them knew that he could claim compensation from his employers in respect of an accident, to put it shortly, which happened when he was at work, and I was satisfied that each of them knew that he was entitled to receive, in respect of such an accident, accident money or compensation, which at the Liverpool Docks, apparently, is generally called "compo." Each of them knew that such compensation consisted of half his average weekly wages, and each of them knew what, by the practice of those docks, he had to do to get compensation. In addition, the plaintiff Burke knew that the compensation was payable under an Act of Parliament. Unsworth did not know that until quite recently. B
C
D
E
F

In these circumstances, each of the plaintiffs a few days after the accident inquired from the defendants' servants or servant at the docks what he had to do to obtain his accident money or "compo." He was told, and he did what was required, and on Mar. 18, 1938, each of them attended at the appropriate office of the defendants where Burke received £1 10s. from a clerk in the employment of the defendants, and Unsworth received £1 5s. 9d. Upon receipt of these two sums, each of them signed a sheet which contained against his name the figures of the amount so paid. The sheet is marked "Compensation," although I should doubt whether either of these two people observed that word upon the sheet. There was no reference on the sheet to the Act of Parliament. There G
H

was no statement other than the one to which I have referred—namely, that the money was being paid as compensation in respect of an accident or injury arising out of or in the course of the employment—and the figures upon the sheet are entered in a column which is headed “Net wages paid.” The sheet is apparently one commonly used for the purpose

A of paying workmen’s compensation. It was signed by several other persons who were claiming and being paid compensation upon that day, and I entertain no doubt at all that the defendants were paying and were intending to pay, and that the plaintiffs were claiming and intending to receive, compensation in respect of the injuries which they

B had respectively received in the accident of March 8, 1938.

Thereafter the plaintiff Burke for 20 further weeks up to and including Aug. 5, 1938, and the plaintiff Unsworth for 21 further weeks up to and including Aug. 12, 1938, attended at the office of the defendants and received from somebody on behalf of the defendants similar amounts

C week by week, and signed similar receipts upon similar documents. I find that those subsequent payments were payments which were made by the defendants to the plaintiffs as and for workmen’s compensation in respect of the accident, and were received as such by the plaintiffs, and signed for as such by the plaintiffs unconditionally.

D I stop at that point to consider whether, in those circumstances, and on those facts, it can be said that the plaintiffs had elected to receive workmen’s compensation, and not damages for injuries, such as they have claimed in this action. As I pointed out in the *Selwood* case (1), as I understand the law, election in such a matter must be governed

E by the ordinary law, and it will be sufficient if I say that, for the purposes of this judgment, I direct myself in the terms of the judgment of ATKIN, J. (as he then was), in *Codling v. Mowlem (J.) & Co., Ltd.* (2), at p. 66, and further in the words of BANKES, L.J., in *Bennett v. L. & W. Whitehead, Ltd.* (3), at p. 387. That passage in the judgment of ATKIN, J., in

F *Codling’s* case (2) contains a citation of an earlier opinion of LORD BLACKBURN in *Scarff v. Jardine* (4), at pp. 360, 361, as follows :

The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him ; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side

G in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further ; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.

H In *Codling’s* case (2), however, ATKIN, J., goes on to point out that there cannot be an election without knowledge of the right to elect, citing for that another opinion of LORD BLACKBURN in *Kendall v. Hamilton* (5), at p. 542.

Therefore, in this case I am satisfied that an unequivocal act or series of acts was done between Mar. 18, 1938, and these dates in Aug., 1938,

to which I have referred. The question is, what is the effect of that if it should turn out that there is no knowledge by the workmen, or one of them, of some material fact ?

A man cannot elect, as LORD BLACKBURN points out in *Kendall's* case (5), at p. 542, if he does not know that he has a right to elect. Similarly, as it seems to me, since the whole point of the Workmen's Compensation Act, 1925, s. 29 (1) is whether or not he is taking one remedy in preference to another, if I were satisfied that he had no knowledge of the other remedy, it would be impossible for him to elect. A

In the course of the case, counsel for the plaintiffs stated a proposition which I think is right—namely, that, when one has an act which appears to be an unequivocal act, in the absence of any explanation by the workpeople, what LORD BLACKBURN said in *Scarf v. Jardine* (4), at pp. 360, 361, may be said to conclude the matter. In other words, the onus is then cast upon the workmen—in this case, the plaintiffs—to satisfy the court that the circumstances in which this seemingly unequivocal act took place were such as to render it not a binding election on their part. That point, I think, must be subject to a point which I shall have to discuss later in the case, and a point which I indicated as being reserved by counsel for the defendants in the case. I have come to the conclusion that that contention is right, and that, accordingly, upon proof by counsel for the defendants (which proof he obtained by cross-examining the two plaintiffs) that workmen's compensation had, to the knowledge of these people, been paid to them for weeks and had been accepted by them as such, in the absence of some satisfactory explanation by them, their remedy was barred. B C D E

The explanation given by the two plaintiffs was that they did not know that they had a right to elect, and that they did not know that they had a right to claim damages. The evidence was not quite the same from each man. I think that it was Burke who told me that he had heard of other men at the docks getting damages. Unsworth told me that he knew that one could claim damages, but only in respect of accidents in the streets. I am not prepared to ascribe to these two workmen knowledge which was inferred with regard to workpeople as to their rights in these matters in one of the Scottish cases which was cited to me. I do not infer it for the reason that, having closely watched these two plaintiffs under examination and in cross-examination, not without some hesitation I have come to the conclusion that they satisfy me that they did not know of the right to elect, and did not know that they had a right to claim damages. At all events, for the purposes of this case I shall assume that they did not, and for the purposes of this judgment I shall proceed upon the basis that the acceptance of workmen's compensation down to the two several dates—namely, Aug. 5 and Aug. 12, 1938—was made in the circumstances without the two points of essential knowledge which, in my judgment, it was vital for F G H

these plaintiffs to possess before either of them was capable in law of making an election.

That being so, the task devolves upon me of considering what happened afterwards, in order to see whether or not these two plaintiffs after those dates lost their rights, subject to one other point which I must keep in reserve—namely, whether before either Aug. 5 or Aug. 12, and almost at the last moment, either of them did acquire the necessary information, and still went on receiving workmen's compensation, at first without objection, and later under some sort of reservation, and I find myself obliged to draw a distinction on this part of the case between these two men. So far as Burke was concerned, the situation is that I am satisfied that before the date when he ceased giving an unconditional receipt for workmen's compensation he had obtained information on the two vital points in which I have held that he was formerly deficient.

The evidence about it is not quite as clear as I should have liked, but he told me that, knowing most of these facts, and knowing of other men at the docks getting damages, after he had finished with the hospital (which I took to be some date towards the end of July, 1938), and a fortnight before he went to see a solicitor, he had heard from a man named Swift that it might be possible for him to get damages. He had heard of a man named Rudd, who had been injured in the hold of a ship, and who had recovered damages to the extent of £350. It was not clear to me when he had acquired that information, but I place it at somewhere about the end of July, 1938. He knew that this action on his part was a claim for damages, and not for "compo." He did not know that his employers could redeem workmen's compensation by a lump sum, but he went to see his solicitor to see if he could claim damages. He said :

I only heard a fortnight before that that I might be able to claim damages. I knew I had a right to choose between making a claim for compensation and bringing a claim for damages.

That answer was an answer which was directed to the time when Mr. Swift had put the idea into his head that he had a right to claim damages. He was asked :

Did you know [at that time] that you had a right to choose between making a claim for compensation and bringing a claim for damages ?

His perfectly frank and honest answer to that was : " Well, yes."

He told me that that was after he had finished with the hospital, and it is plain that he did not go to see his solicitors until a fortnight after he had been told those facts. In the meantime, during that critical fortnight, with this added knowledge, I am forced to find that he received from the defendants workmen's compensation knowing that it was being paid to him as such in respect of this accident, and he signed without any question the unconditional receipt in respect of it. In those circumstances, when it comes to the last two or three of these unequivocal payments, if I may so call them, it is plain, not only that

the plaintiff Burke has not discharged the onus of satisfying me that he did not know the relevant and material facts, and all of them, which would make what he did a binding election in law, but it is also plain, on his own admission, that he did. I find it impossible, in these circumstances, to say that Burke is not bound by the receipt of those payments, and that would, in so far as Burke's case is concerned, be an end of the case. Inasmuch, however, as in dealing with Unsworth's case I have to deal, as I shall show in a moment, with other and much more difficult points it is necessary to consider what happened in Burke's case after he had seen the solicitor, although perhaps, strictly speaking, that does not arise as far as Burke's case is concerned. A B

For this purpose it is necessary to look and see what happened after Burke did decide, a fortnight after getting this information, to go to Mr. Silverman, his solicitor. He told me that he went to see his solicitor after he had been told this information :

... because I thought I might be able to get damages. I went to see Mr. Silverman about it to see what he could do for me. C

He appears to have told Mr. Silverman what had been going on. He said :

I thought perhaps he could bring my case to court about my accident. He [Mr. Silverman] asked me did I know anything about damages, and I told him no. D

In face of the answers which subsequently emerged, that was not accurate, but he was apparently warned by Mr. Silverman that there might be a difficulty in the case, and he told me this :

I did not know I could claim damages for breach of regulations. [That was at the time when he was claiming originally.] I found that out when I went to Silverman & Livermore about Aug. 4, 1938, after I had finished with the hospital. E

That must be the time, therefore—a fortnight after his getting the information from Mr. Swift—that he went to Mr. Silverman. I am by no means satisfied that that date—namely, Aug. 4—is right, because on Aug. 5 he signed another of these sheets without any reservation. It is quite plain that Mr. Silverman, giving him the only advice that could really be of the smallest use at that time, as I see the case, if he was going on receiving this money, told him that he was to sign “without prejudice,” and therefore I am satisfied that the interview with Mr. Silverman took place after Aug. 5 and before Aug. 12. F G

I shall have to discuss the effects of the first of the payments marked “without prejudice” when I deal with the other man's case, but at the moment I think I can pass to the general facts relating to Unsworth, down to the date when Unsworth saw his solicitor. Unsworth did not have passed on to him the information which Swift had given to Burke. Unsworth, too, went to Mr. Silverman. I think that he actually saw Mr. Livermore. I should be inclined to draw the inference that his going to Mr. Livermore to be advised was because he had learned something. There is no evidence about it, and Burke himself told me that one of the reasons for going (and I shall pass this as a mantle, as it were, H

over Unsworth, too, although he did not say it) was that he thought it would be better, instead of going down to the docks for 10 years to get "compo," to go off and see if a solicitor could do anything for him. Mr. Livermore asked Unsworth if he knew that he might have been able to claim damages if he had not accepted compensation. Unsworth

A said in evidence :

... and with that knowledge I still went on taking compensation. I had no alternative. I could not afford to wait for a claim for damages. My solicitor told me to sign "without prejudice."

B Accordingly, inasmuch as the first of the "without prejudice" receipts is dated Aug. 12, 1938, in the case of Burke, I put Burke's interview with Mr. Silverman as in the week preceding that and after Aug. 5. I put the interview of Unsworth with Mr. Livermore in the week after Aug. 12 and before Aug. 19.

C We thus come to this situation. On and after Aug. 12, 1938, Burke, and on and after Aug. 19, 1938, Unsworth, continued to attend at the defendants' office, and continued to receive week by week right down to the date of the writ—namely, Nov. 21, 1938—and, more extraordinary still, thereafter right down to the very day when the evidence was being taken before me, the same weekly payments which they and each of them knew were being paid to them by the defendants as and for workmen's compensation in respect of the accident of Mar. 8, 1938.

D There is no evidence before me that, when these men went to the office to receive the payments, Burke of Aug. 12, 1938, and Unsworth of Aug. 19, 1938, they made by word of mouth any reservation of their rights, or said anything by way of objection to whomsoever it was who paid them the money, or that there was any conversation before the money was paid over on each of those two days.

E What they each of them did on those respective days was to append to their signatures upon the same form of document which they had been signing for so many months the words "without prejudice." They were asked why they did that. They each said that it was done upon the advice of their respective solicitors. They were asked what they understood by the words "without prejudice." I think it was Burke who gave, if it were appropriate to use the words at all, a not inapt explanation. He said :

G I put in the words "without prejudice" meaning "no harm done."

He went on rather to modify that by saying : "No ill feeling." Unsworth told me that he thought the words meant "without bias." It is quite plain that neither of the two men really appreciated that what they were seeking to do was to reserve all rights, which in my judgment the words "without prejudice," in the ordinary acceptance of the term, do not mean. I shall have to discuss that at a later part of this judgment.

H However that may be, neither of the men has said that the clerk, who was obviously performing a routine duty in paying workmen's compensation to a number of injured workmen observed, or had his

attention called to, the appending of these words to the signatures. There is no evidence before me that the clerk who paid over those moneys had any authority to pay moneys over on those terms. There is no evidence before me that there was any bargain that the money should be paid over upon the terms that the defendants and the plaintiffs— it must be both of them—were left free to pursue whatever their remedies A were, notwithstanding the payments. There was no evidence before me that the clerk ever knew anything at all about it, and there was certainly no evidence before me that the defendants, the employers, who were responsible under the Workmen's Compensation Act, 1925, s. 12, for continuing to pay that which they had started to pay as work- B men's compensation, ever knew in any way that any sort of reservation was being intended by either of these plaintiffs.

I do not know, although all the subsequent payments were made and signed for "without prejudice," when, if at all, it was ever brought to the notice of the defendants—until the correspondence, much later C in the course of the history—that they were signing "without prejudice," and it seems to me, upon authority to which I shall refer hereafter, with regard at least to the first of the two payments in each case signed for "without prejudice," that, at the moment of the receipt of the money, when the money was being handed over by the clerk or other servant of D the defendants, it was being handed over for workmen's compensation, without equivocating and without any sort of reservation by anybody. It seems to me that it would be an extremely dangerous principle to permit a man to receive money which was handed over to him for a particular purpose, and, having got it in his pocket, then to say: "Now E I will sign a receipt 'without prejudice,' and thereby I shall have reserved all my rights." I accordingly find, with regard to Burke, that, having, as I have found already, with full knowledge of all the facts, elected to receive at least two payments unconditionally prior to Aug. 12, on Aug. 12, at the moment of receipt, he received another payment un- F conditionally.

I find, with regard to Unsworth, that he, not being bound by any election which he had theretofore made, for the reason which I have already indicated (although, as I say, I have come to that conclusion with some doubt), on Aug. 19, with full knowledge of the facts, and with G the advice of his solicitor, without any communication with the defendants before receiving the money that he was receiving it without prejudice, whatever that may mean, and without any reservation of his rights, or, indeed, without any communication to the defendants that he was reserving his rights, except for these words appended to his H signature on the form, on that day elected, with full knowledge of the facts, to receive workmen's compensation.

Accordingly, in my judgment, that is an end of the case. However, inasmuch as I am told that this is one of some cases which may go further, I think it desirable that I should state my views on the next

stage in the case. I am by no means sure—counsel for the defendants elected to call no evidence on behalf of the defendants, and there is no evidence about it at all—that the fact that these two men had signed “without prejudice” was brought to the notice of any responsible officer or person of the defendants, at all events for many weeks, and during those

A many weeks these papers were still being received. In those circumstances, I should have been prepared to hold that to receive money without objection as and for workmen’s compensation, without anything in the nature of an express reservation by prior notice to the defendants, is an election within the meaning of sect. 29 (1) of the Act.

B For this purpose, however, it is necessary, I think, to inquire a little further what is the effect of the words “without prejudice.” First of all, I think that they can only have an effect at all where both parties know that they are being used, and both parties accordingly are presumed to know what the general effect of those words is. So far as I have been

C able to see in the course of the authorities cited before me, the words really relate to an offer of settlement of a disputed claim. They are not, in my judgment, notwithstanding an authority to which I will refer hereafter, appropriate to be used in a case where one party wants to reserve his rights. The usual way in which they are used is that which I have

D mentioned, and I think that their use is strictly confined to cases where people are trying to purchase peace in connection with a contested claim : see PHIPSON ON EVIDENCE, 7th Edn., p. 224, to which my attention was directed by counsel for the defendants, and HALSBURY’S LAWS OF ENGLAND, Hailsham Edn., Vol. 13, p. 703. In cases where they are

E used in connection with other payments, it occurred to me that it might be useful to look and see what effect the courts had given to them, and, without going through a number of authorities, it occurred to me that the question whether or not one could receive rent so as to amount to a waiver if one took it and said, “I will take it without prejudice,” is

F a likely example of the sort of thing which was in my mind.

In *Davenport v. R.* (6), a case of receipt of rent without prejudice, the court laid down that the money was paid as rent and received as rent, and that, accordingly, forfeiture of a lease could not be insisted on, because the receipt of the rent amounted to a waiver. The statement

G was made that, when money is in fact received as rent, there is no right to take the money except as rent. I cannot see what right these plaintiffs had in this case to receive this money as anything other than that which it was. It was offered to them, and they knew it was offered to them, as workmen’s compensation in respect of this accident : see

H also *Croft v. Lumley* (7).

The same sort of point has arisen in bankruptcy, and I was referred by counsel for the defendants to an interesting case, *Re Daintrey, Ex p. Holt* (8), where a debtor thought of a scheme of indicating to a claiming creditor that he was going to call a meeting of his creditors, but said that that was without prejudice. VAUGHAN WILLIAMS, J., at p. 119, in a

passage which I will not cite, had no difficulty in disposing of that argument.

The authorities with regard to rent are further collected in the last edition of *FOA ON LANDLORD AND TENANT*, 5th Edn., p. 608, and particularly in note (a) at p. 635, and that is the view to which I should have come, simply on principle, and apart from authority. Counsel for the plaintiffs, however, have suggested that the matter is disposed of by authority, and indeed in *WILLIS'S WORKMEN'S COMPENSATION*, 31st Edn., p. 492, it is said that payments accepted from an employer without prejudice do not bar the remedy of the workman against a stranger. For that, *Oliver v. Nautilus Steam Shipping Co.* (9) is cited, and it is said that in *Huckle v. London County Council* (10) a Divisional Court took a like view under the present Act. If that statement is right, and if those two cases did decide that, then it seems to me that, by parity of reasoning, I ought to accept that authority as binding on me, having the same effect in a case where payments are accepted from the employer. The trouble is that an examination of those two authorities convinces me that they are quite clearly distinguishable from the present, and that, in the course of the judgments, it was made clear that the court was not accepting the view that a mere acceptance without prejudice, without any agreement or bargain between the workman and the employer, would suffice.

I think that that appears from the judgment of *VAUGHAN WILLIAMS, L.J.*, in *Oliver's* case (9), where he made it clear that the basis of his judgment was that the acceptance of the payments had been stipulated for by the workman. He said, at p. 647 :

Had it not been for the evidence as to the acceptance of payments "without prejudice," which was stipulated for by the workman upon the occasion of receiving the second payment, and which, moreover, was noted by the agent in his book when making that payment, I should have been inclined to say that the action against the person other than the employer could not possibly have been brought, having regard to the terms of sect. 6 of the Act. I think the statement which was made by the workman in the hospital as to the payments being accepted by him "without prejudice," and which was assented to by the agent who made the payments, makes all the difference. Mr. Abel Thomas frankly accepted the proposition that if there had been no first payment made without being subject to this expression of "without prejudice," he could not have supported his case here. He accepted the position that the result of the reservation "without prejudice" was that which was described by the learned judge in his judgment. . .

All that is further dealt with at p. 648, where it appears that, in effect, the two parties agreed together that these payments were to leave each of them in the same position, or at all events leave the workman in the same position as if he had not taken them, and, if later on he had thought it better not to accept the money from the employer, but to elect to take his remedy in another form, he was to be at liberty to do so. I have read the statements made in the same judgment at p. 649, but I do not think that they are really, when closely examined, inconsistent with what I have said is the effect of this judgment. The only point on which the case was really argued was whether, in the circumstances

of the case, a first payment which had been made without any particular stipulation or note was one which was governed by the same considerations as the second. As a question of fact, and as inferences from the facts in the case, all the Lords Justices came to the conclusion that it was.

- A That brings me to this. Counsel for the plaintiffs, in a very forcible reply on the whole argument, took the point that in effect the workman says, "I will take the payments," and subsequently the employer goes on making them, with the words "without prejudice" in the book, and that, he says, although done without agreement, enables those payments
- B to be made and accepted on those terms, and that that will apply to all payments back to the first. I do not find in this case that I am obliged by the authority of *Oliver's* case (9) to come to any such conclusion. I do not draw any such inference. One of the reasons why I do not draw it is that I am not satisfied, and there certainly is no evidence, that
- C the employers, for weeks and weeks, knew anything at all about it.

The second case to which I have to refer on this point—namely, *Huckle v. London County Council* (10)—contains a passage in the judgment of the Divisional Court (PICKFORD and COLERIDGE, JJ.), the judgment apparently being that of COLERIDGE, J., to this effect, at p. 581 :

- D If the receipts had been signed on account of compensation "which may be or become due under the Act," or if the receipts had been signed "without prejudice," we should be disposed to hold that, the money having been thus paid, compensation had not been "recovered" under the Act, because it had not been paid to or received by the workman in such a manner as to bind both parties. . .

He cites for that proposition *Oliver v. Nautilus Steam Shipping Co.* (9).

- E I think that in that passage COLERIDGE, J., must have meant receipts signed "without prejudice" in circumstances similar to those in *Oliver's* case (9). I do not find myself bound by that decision to hold that the mere signing of receipts "without prejudice" is sufficient. In any event, that statement was, I think, *obiter* as far as the decision in the
- F particular case was concerned.

At some time I must, I suppose, assume that the form of those receipts came to the notice of the defendants. I have had correspondence produced to me. There is, so far as I can see, no reference to the words "without prejudice" in it from Aug. 13, 1938, onwards. On the contrary,

- G in a letter of Nov. 9, 1938, the defendants' solicitors, writing to the plaintiffs' solicitors, assert that their clients have elected to accept workmen's compensation, and it looks to me as if the fact of the signature upon these documents, as from the dates in August to which I have referred, being marked "without prejudice" had not at that date come
- H to the notice of the defendants or their advisers. No other correspondence took place before the writ in this action was issued, and that took place on Nov. 21. On that day, as it seems to me, the rights of these parties with regard to election and these other matters must be tested. Accordingly, I find that throughout these workpeople had accepted workmen's compensation knowing what it was, and knowing from some date about the

beginning of Aug., 1938, all the relevant circumstances, and that, accordingly, they have made an election within sect. 29 (1).

I have already dealt incidentally in this judgment with the second point taken by counsel for the defendants—namely, that the mere acceptance of workmen's compensation amounts to an election—and disposed of it adversely to his contention. I must say just a few words A about the third point, which is that the employers, having paid them, are not obliged to pay again. In *Selwood's* case (1), I came to the conclusion—a conclusion to which I adhere—that the words of subsect. (1) of sect. 29 are all of them relating to election, and do not give an independent defence to the employers. What I said in *Selwood's* case (1), B at p. 141, was this :

It looks to me as if all the words of the section must be read together, and I think that the whole section relates to the one question of election.

I referred, of course, to the subsection, and the report must be amended in that particular. I was dealing with subsection (1) of sect. 29, and C nothing else.

I have been referred in this case, as I was referred in *Selwood's* case (1), to certain authorities, and I gather from the report of *Selwood's* case (1) that I did not mention them in the course of delivering that judgment. ATKIN, J. (as he then was), in *Codling's* case (2) appears to have said D something, at p. 61, with which my observations are inconsistent, and, of course, if that were so, I should have been guilty of not following an expression of opinion of the judge, an expression of opinion which not only binds me, but for which I have the utmost respect.

It is perhaps unnecessary for me to say more than that in a later case E that expression of opinion of ATKIN, J., was differed from, that either in the same case or in a still later case he re-expressed the opinion which he had expressed in *Codling's* case (2), but that ultimately, in a judgment which binds us all, in *Kinneil Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell)* (11), it is, as I understand the case, laid down that the F expression of LORD ATKIN that this is a separate and independent defence by the employer, and not a mere part of the general rule about election contained in the subsection, was stated not to be a correct exposition of the law. I refer to the opinion of LORD BUCKMASTER, at pp. 581, 583, to the opinion of LORD WARRINGTON OF CLYFFE, at p. 588, and to G the opinion of LORD THANKERTON, at p. 591. I understand that *Selwood's* case (1) may be considered in another court. I hope that, when it is, those who argue the case will be so good as to call the attention of the Court of Appeal to the fact that these cases to which I have just referred were all mentioned to me in the very careful arguments to H which I listened in *Selwood's* case (1), and that these passages were cited to me by counsel who appeared on each side. That being so, I decide once more against the contention, if it is advanced—it was only very hesitatingly put forward by counsel for the defendants in the present case—that the mere fact that workmen's compensation has been paid by the

employer to the workman does not put an end to the whole controversy. As I said in *Selwood's* case (1), if that were right, I could not appreciate how some of the points which had been argued and decided in some of the other cases could ever have arisen. In these circumstances, I have come to the conclusion that these claims fail, but, in case this should go A further, I have thought and think it my duty to deal with two other matters.

I have observed in WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., p. 493, an opinion expressed in the Court of Session with regard to the statement made in that work about *Oliver v. Nautilus Steam Shipping* B *Co.* (9) and *Huckle v. London County Council* (10). The authorities cited in support of what is stated about the law in Scotland have not been cited before me. I mention this so that whoever has to consider this case afterwards may be aware of what is stated. The passage in WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., then continues as follows, at C p. 493 :

The only question to be asked and answered is whether in fact compensation or damages have been recovered . . . unless there has been some express arrangement which preserves his alternative remedy. . . .

For that, *Kelly v. North British Ry. Co.* (12) is cited as an authority. D If that is right, and if my judgment is right, it would seem to follow that there is no difference between the English view and the Scottish view of this particular matter.

Finally, in case anybody hereafter should take a different view of this case, I must assess what damages I should have awarded if these plaintiffs had been held, or should hereafter be held, entitled to recover them. E [His Lordship then assessed the damages.]

Judgment for the defendants with costs. Workmen's compensation assessed in the case of the first plaintiff.

Solicitors: *Silverman & Livermore* (for the plaintiffs); *Forwood, Williams & Co.* (for the defendants). F

[Reported by M. D. CHORLTON, Barrister-at-Law.]

LANE v. HERMAN.

G [COURT OF APPEAL (Luxmoore and du Parcq, L.JJ., and Humphreys, J.), June 19, 1939.]

Arbitration—Stay of proceedings—"Step in proceedings"—Transfer of summons to counsel's list—Arbitration Act, 1889 (c. 49), s. 4.

H An action was brought upon a contract which contained a provision that all disputes should be submitted to arbitration. The plaintiff issued a summons for judgment under R.S.C., Ord. 14. The defendant thereupon took out a summons asking that the action be stayed, and had both summonses transferred to counsel's list. The plaintiff contended that the act of transferring a summons to counsel's list constituted a step in the proceedings within the meaning of the Arbitration Act, 1889, s. 4 :—

HELD: the mere act of transferring a summons from one list to another is not a step in the proceedings, and the defendant was, therefore,

not debarred from having the action stayed and the dispute referred to arbitration.

[EDITORIAL NOTE.] Where proceedings are brought in relation to a matter which is the subject of a reference to arbitration, the defendant may apply to stay the proceedings, but he is prevented from doing so if he has taken a step in the proceedings. There have been many decisions as to what is a step in the proceedings, but it is here held that the transfer of a summons from one list to another is not such a step. A

AS TO STAY OF PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 639, 640, para. 1087; and FOR CASES, see DIGEST, Vol. 2, pp. 375, 376, Nos. 395-408. See also YEARLY PRACTICE OF THE SUPREME COURT, 1939, p. 2181 *et seq.*

Cases referred to : B

- (1) *Ives & Barker v. Willans*, [1894] 2 Ch. 478; Digest, Pleading, 131, 1198; 63 L.J.Ch. 521; 70 L.T. 674.
- (2) *Ford's Hotel Co., Ltd. v. Bartlett*, [1896] A.C. 1; Digest, Pleading, 151, 1343; 65 L.J.Q.B. 166; 73 L.T. 665.
- (3) *Brighton Marine Palace & Pier, Ltd. v. Woodhouse*, [1893] 2 Ch. 486; Digest, Pleading, 151, 1342; 63 L.J.Ch. 697; 68 L.T. 669. C
- (4) *Richardson v. Le Maitre*, [1903] 2 Ch. 222; Digest, Practice, 508, 1817; 72 L.J.Ch. 779; 88 L.T. 626.

APPEAL by the plaintiff from an order of TUCKER, J., dated May 26, 1939, whereby it was ordered that the action between the parties be stayed. The facts are fully set out in the judgment of LUXMOORE, L.J. D

F. Ashe Lincoln for the appellant.

Neil Lawson for the respondent.

Lincoln : The question here is whether or not the defendant took any step in the action. He should have notified the other side that he was going to take arbitration proceedings, and then applied for a stay. Taking out a summons is a step in proceedings : *Ford's Hotel Co., Ltd. v. Bartlett* (2). [Counsel referred to *Brighton Marine Palace & Pier, Ltd. v. Woodhouse* (3) and *Richardson v. Le Maitre* (4).] In this case, the defendant took the case out of one list and put it into another. That is a step. E

Lawson referred to *Ives & Barker v. Willans* (1). F

LUXMOORE, L.J. : This is an appeal from an order made by TUCKER, J., whereby he dismissed an appeal from an order made by the master directing that the proceedings in the action should be stayed. That order was made because, in an agreement relating to the subject-matter of the action, there was a provision for the reference of disputes and differences to arbitration. A summons was taken out by the defendant in the action asking that the proceedings might be stayed by reason of the provisions of the Arbitration Act, 1889, s. 4. The master and the judge both upheld the defendant's contention and made the order sought. The plaintiff now appeals from that order on the ground that the defendant had taken a step in the proceedings before he made his application G

H

for a stay, and was, therefore, precluded from asking the court to make that order.

The Arbitration Act, 1889, s. 4, provides as follows :

If any party to a submission . . . commences any legal proceedings in any court against any other party to the submission . . . in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings. . . .

It is quite plain from that that the person applying for a stay must not have delivered any pleadings or taken any other steps in the proceedings. There are numerous cases in which those words have been considered, but, so far as I know, there has never been any attempt made to classify what is a "step." In *Ives & Barker v. Willans* (1), LINDLEY, L.J., said, at p. 484 :

The authorities show that a step in the proceedings means something in the nature of an application to the court, and not mere talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings.

What is it which is relied upon in this case as constituting a step in the action ? The writ was issued on Apr. 18. On Apr. 27, an appearance was entered by the defendant. On May 2, the plaintiff issued a summons for judgment under R.S.C., Ord. 14. Before that summons had been issued, the defendant's solicitors wrote to the plaintiff's solicitors, on May 1, referring to the appearance which had been entered and asking whether they would extend the time for delivery of defence pending the hearing of a summons. That letter was answered on May 2 as follows :

We are unable to grant you any further time for delivery of defence herein. We have to-day issued a summons for judgment and enclose same herewith together with an affidavit in support thereof by the plaintiff, service of which please accept by post.

Pausing there, the mere writing of a letter asking for additional time has been held not to be a step in the proceedings within sect. 4, but on May 3 the defendant's solicitors wrote saying that they had received the letter from the plaintiff's solicitors and the copy of the summons for judgment, together with the copy of the affidavit in support, service of which they accepted by post, and continued as follows :

We have to-day had the summons put into counsel's list, and it is No. 3 at 1.30 p.m. on Thursday, May 11.

Nothing further was done until May 9, when the defendant took out a summons to stay the proceedings. That summons and the summons under R.S.C., Ord. 14, appeared in counsel's list on May 11, and counsel attended and the order was made staying the proceedings. The plaintiff says that the action of the defendant's solicitors in getting the summons put into counsel's list was a step in the action. I cannot see that that was so. All that is necessary to be done for a case to be put into counsel's list is for one party to notify the appropriate officer of the court that he intends to appear by counsel. If that is done, the case is

automatically put into counsel's list, unless there are special circumstances, in which case an informal application is made to a practice master. It cannot be said that the defendant has taken a step which is a step in the proceedings. It seems to me that he has done nothing of the sort. All that the defendant has done is to say: "When the summons is heard, I will appear by counsel, and he will take any steps which he thinks fit in the interests of his client." That is not taking a step in the proceedings. Under the Act, it is the taking of a step in the proceedings by the party who makes an application for a stay that prevents the court from ordering a stay. I think that what was said by LINDLEY, L.J., is really the best guide to what is a step in the proceedings in a case of this kind. It must be a step taken in the proceedings in the technical sense if it is to be held to bar an application for a stay under sect. 4. In this case, there was no step taken in any technical sense. I think TUCKER, J., was right, and the appeal must fail, with the usual consequences.

DU PARCQ, L.J.: I agree. In this case, the defendant merely desired to assert through counsel that it was a *bona fide* dispute. He was bound to do that, or summary judgment would be given against him under R.S.C., Ord. 14. I think, therefore, that he did not take any step in the proceedings, and I agree that this appeal should be dismissed.

HUMPHREYS, J.: I am of the same opinion, and I base my decision mainly on the judgment of LINDLEY, L.J., in *Ives & Barker v. Willans* (1), to which LUXMOORE, L.J., has referred.

Appeal dismissed with costs.

Solicitors: *Rowley, Ashworth & Co.*, agents for *Sebag Cohen & Co.*, Sunderland (for the appellant); *Culross & Co.* (for the respondent).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

MATTTHEN AND OTHERS v. TRIVANDRUM DISTRICT MAGISTRATE AND ANOTHER.

[PRIVY COUNCIL (Lord Thankerton, Lord Porter and Sir George Lowndes),
March 30, 31, April 3, June 5, 1939.]

Privy Council—India—Extradition—Surrender of prisoner to native state—Exclusion of writ of habeas corpus—Indian Extradition Act, 1903 (No. 15 of 1903), s. 7—Code of Criminal Procedure, 1898 (No. 5 of 1898), ss. 75, 491, 561A—Government of India Act, 1935 (c. 42), s. 223—Appellate Side Rules of the Madras High Court, rr. 2, 2A.

The appellants were arrested in Madras on warrants, which were not dated, issued by the resident for the Madras States under the Indian Extradition Act, 1903 (No. 15 of 1903), s. 7, and directed to the chief presidency magistrate of Madras, the second respondent. On the following day, when the appellants were about to be taken to Travancore, a petition was presented to PANDRANG ROW, J., a judge of the High Court, at his residence, on behalf of all the appellants, for a writ of

habeas corpus, and with it a further petition for a stay of execution of the warrants, and the judge made an order issuing a rule *nisi*. Subsequently the district magistrate, Trivandrum, the first respondent, presented a petition to the High Court praying that the order of PANDRANG ROW, J., should be quashed, as having been made without jurisdiction. The latter petition came before a Divisional Bench, who referred certain questions of law to a Full Bench and suspended the operation of the writ *nisi*. The Full Bench held (i) that the common law writ of *habeas corpus* did not run in British India in a case such as this one, and that any power which the court formerly had to issue such a writ in a case of this kind had been taken away and the powers conferred by the Code of Criminal Procedure, 1898, s. 491, substituted, (ii) that the Appellate Side Rules of the Madras High Court, rr. 2, 2A, were *intra vires* the court's powers, and that a single judge of the High Court had no jurisdiction to deal with applications in the nature of *habeas corpus*, whether made under sect. 491 or otherwise, (iii) that the order of PANDRANG ROW, J., issuing a rule *nisi* was passed without jurisdiction, and was null and void, and (iv) that the application filed by the appellants under the Code of Criminal Procedure, 1898, s. 491, must, in accordance with the rules of court, be dealt with by the Criminal Bench. The Divisional Bench accordingly made orders dismissing the petition of the appellants and setting aside the order of PANDRANG ROW, J., which had directed the issue of the writ *nisi*. On an appeal from these orders:—

HELD: (i) the first respondent was entitled to intervene by his petition.

(ii) the High Courts Act, 1861, authorised the legislature, if it thought fit, to take away the powers which the court obtained as the successor of the Supreme Court, and subsequent Acts of the legislature left no doubt that the powers to issue the prerogative writ of *habeas corpus*, in matters contemplated by the Code of Criminal Procedure, 1898, s. 491, had been so taken away.

(iii) the Appellate Side Rules of the Madras High Court which were material here were not *ultra vires*.

(iv) the form which the warrants should take was not prescribed by the Extradition Act or the rules. The warrants here clearly described the offences with which the appellants were charged, and the place at which and the person to whom the appellants were to be handed over were sufficiently indicated. There was no provision in the Act or the rules requiring any further particulars or requiring directly or implicitly that the warrants should be dated.

[EDITORIAL NOTE.] This case turns solely upon the law of India relating to the extradition of offenders under the Indian Extradition Act. The suggestion in the case, which, however, was not substantiated, was that the appellants were to be tried for political offences. The most important matter in the appeal is the question whether the common writ of *habeas corpus* has been superseded in India, and this is held to be so. At the same time, the appeal deals fully with the law and practice relating to such extradition.

AS TO EXTRADITION IN BRITISH POSSESSIONS, see HALSBURY, Hailsham Edn., Vol. 11, pp. 217-221, paras. 420-424; and FOR CASES, see DIGEST, Vol. 17, pp. 470, 471, Nos. 351-365.]

Cases referred to:

- (1) *Re Govindan Nair* (1922), I.L.R. 45 Mad. 922.
- (2) *Girindra Nath Banerjee v. Birendra Nath Pal* (1927), I.L.R. 54 Cal. 727.
- (3) *Ferris v. Emperor* (1928), I.L.R. 53 Bom. 149.
- (4) *Re Stallmann* (1911), I.L.R. 39 Cal. 164.
- (5) *Re Ganesh Narayan Sathe* (1889), I.L.R. 13 Bom. 600; 14 Digest 169, case t.
- (6) *Ex p. Terraz* (1878), 4 Ex. D. 63; 14 Digest 187, 1667; 48 L.J.Q.B. 214; 39 L.T. 502.

APPEAL by special leave from 3 judgments of the High Court of Judicature at Madras : (i) a judgment of the Full Bench of the High Court of Madras (SIR ALFRED LEACH, C.J., MADHAVAN NAIR, VERADACHARIAR, WADSWORTH and LAKSHMANA RAO, JJ.), dated Nov. 4, 1938, which on a reference by a Division Bench of the same court (BURN and STODART, JJ.), held that the orders of PANDRANG Row, J., a single judge of the court, on an application for writ of *habeas corpus* and relative applications, were null and void ; (ii) a judgment and order of the Division Bench, dated Nov. 7 1938, in implement of the above judgment, and (iii) a judgment and order of the Division Bench, dated Nov. 7, 1938, dismissing a petition by the appellants for a writ of *habeas corpus*. The facts are fully set out in the judgment of their Lordships delivered by LORD THANKERTON.

D. N. Pritt, K.C., C. Sidney Smith, and V. K. Krishna Menon, for the appellants, referred to *Ferris v. Emperor* (3), *Re Stallmann* (4) and *Re Ganesh Narayan Sathe* (5).

Rt. Hon. Sir William A. Jowitt, K.C., and John G. Foster, for the first respondent, the district magistrate of Trivandrum, referred to *Girindra Nath Banerjee v. Birendra Nath Pal* (2) and *Ex parte Terraz* (6).

J. M. Tucker, K.C., W. Wallach and J. Megaw, for the second respondent, the chief presidency magistrate, Madras.

LORD THANKERTON : This is an appeal from (i) a judgment of the Full Bench of the High Court of Madras, dated Nov. 4, 1938, in Criminal Miscellaneous Petition No. 1,003 of 1938, which, on a reference by a Division Bench of the same court, held that the orders of PANDRANG Row, J., a single judge of the court, on an application for writ of *habeas corpus* and relative applications, and dated Oct. 21, 1938, Oct. 24, 1938, and Oct. 26, 1938, made in Criminal Miscellaneous Petitions Nos. 986, 990 and 985 of 1938, respectively, were null and void ; (ii) a judgment and order of that Division Bench, dated Nov. 7, 1938, made in petition No. 1,003 in implement of the above judgment, and (iii) a judgment and order of that Division Bench, dated Nov. 7, 1938, made in petition No. 985, dismissing the application for a writ of *habeas corpus*.

The appellants challenge the validity of certain warrants issued by the resident for the Madras States under the Indian Extradition Act, 1903 (No. 15 of 1903), s. 7, to the chief presidency magistrate of Madras, under which they were arrested, and they ask to be discharged. The course of procedure which has been followed has raised important questions as to the jurisdiction of the High Court of Madras to issue a writ of *habeas corpus* in the present case, and as to the competency of a single judge of the High Court to issue such a writ or the analogous writ under the Code of Criminal Procedure, 1898 (No. 5 of 1898), s. 491.

The warrant against the first appellant was in the following terms :

Whereas Mr. C. P. Matthen, director of the Travancore National and Quilon Bank, Ltd. (which is now under liquidation), who is now reported to be residing at

Marble Hall, Sterling Road, Nungumbakam, Madras, stands charged with offences punishable under sects. 410, 419, 421, 480 and also sects. 99 and 104 of the Travancore Penal Code corresponding to sects. 409, 418, 420, 477A, 109 and 114 of the Indian Penal Code committed in the Travancore State, you are hereby directed to apprehend the said Mr. C. P. Matthen and surrender him to the frontier police station of the Travancore State for production before the district magistrate, Trivandrum.

The warrants against the other 3 appellants were in the same terms.

- A The fourth appellant denies that he is a director of the bank, but that is not material at this stage. It will be noted that the warrants were not dated. The appellants were all arrested in Madras on the instructions of the chief presidency magistrate, who is the second respondent in this appeal, on Oct. 20, 1938. The Travancore National and Quilon Bank, B Ltd., was formed by the amalgamation of two banks and was incorporated in Travancore in Sept., 1937, though the head office was in Madras and the larger part of its business would appear to be carried on in the Madras presidency. The appellants, who are Travancore subjects, had taken up residence in Madras in 1937, in order to conduct the business there. C The district magistrate, Trivandrum, referred to in the warrants, is the first respondent in this appeal.

- Learning that the appellants were to be taken to Travancore by a train leaving at 11 a.m. on Oct. 21, 1938, and having in view that the High Court did not sit until 10.45 a.m., the sons of the first and second D appellants presented a petition (No. 985 of 1938) under the Code of Criminal Procedure, 1898, s. 491, for a writ of *habeas corpus* in respect of all the appellants early on the morning of that day to PANDRANG ROW, J., a judge of the High Court, at his residence. This petition was supported by an affidavit by the son of the first appellant, and along with it a further E petition (No. 986 of 1938) was presented to the judge asking for a stay of execution of the warrants. On the latter petition (No. 986 of 1938), PANDRANG ROW, J., made the following order :

- F As the matter is extremely urgent the chief presidency magistrate, Egmore, should detain these prisoners in his custody and not send them away from Madras pending further orders of the High Court.

- The appellants had meanwhile been produced before the chief presidency magistrate, and made an application for a reference to the local government under the Indian Extradition Act, 1903, s. 8 (a). While this application was in course of being heard, the order passed by PANDRANG G Row, J., was produced, and the magistrate thereupon remanded the appellants to custody. Subsequently on the same day, the Crown Prosecutor presented a petition (No. 990 of 1938) praying that the order of PANDRANG ROW, J., on petition No. 986 be vacated, mainly on the ground that it was passed without jurisdiction, as, under the Appellate H Side Rules of the Madras High Court, r. 2 (a), jurisdiction under the Code of Criminal Procedure, 1898, s. 491, could only be exercised by a Bench of the High Court, and not by a single judge. This petition, No. 990, was heard by PANDRANG ROW, J., on Oct. 22, 1938, and on Oct. 24 the judge made an order in petition No. 990 refusing to vacate the order for stay in petition No. 986, and dismissing petition No. 990.

The judge held himself to be bound by the decision of a Full Bench of the High Court of Madras in *Re Govindan Nair* (1), to the effect that the High Court had jurisdiction at common law to issue a writ of *habeas corpus*, and not a petition to the High Court to exercise its powers under judges of the High Court, and could not be taken away by rules.

On the same day, Oct. 24, 1938, the first of these petitions, No. 985, A came before a Bench of the High Court (BURN and STODART, JJ.), who refused to proceed with the matter, as PANDRANG ROW, J., was seised of it. In answer to the court, counsel for the applicants stated categorically that the application was for a common law writ of *habeas corpus*, and not a petition to the High Court to exercise its powers under the Criminal Procedure Code, 1898, s. 491. On Oct. 26, 1938, PANDRANG B Row, J., heard petition No. 985, and made an order that a writ of *habeas corpus* should issue to the chief presidency magistrate, returnable before himself on Oct. 28, 1938, and a writ *nisi* was accordingly issued. On C the same day, Oct. 26, 1938, the district magistrate, Trivandrum, the first respondent in this appeal, presented a petition (No. 1,003 of 1938) to the High Court, under the Code of Criminal Procedure, 1898, s. 561A, and the Government of India Act, 1935, s. 223, praying that the orders of PANDRANG ROW, J., dated Oct. 21, 1938, Oct. 24, 1938, and Oct. 26, 1938, respectively, should be quashed as having been made without D jurisdiction, and calling the present appellants as respondents. This petition was supported by an affidavit by the superintendent of police, Criminal Investigation Department, Travancore.

This petition, No. 1,003, came on for hearing on Oct. 27 before BURN and STODART, JJ., who, as the hearing could not be completed on that E day, made an order suspending the operation of the writ *nisi*, issued under the order of PANDRANG ROW, J., dated Oct. 26, and staying further proceedings on petition No. 985 until the further orders of the court should be known, with a direction to the second respondent to keep the prisoners in his custody till further orders. F

After the further hearing on petition No. 1,003, BURN and STODART, JJ., on Nov. 2, 1938, referred the following questions of law to a Full Bench :

(1) Can this High Court or any judge of it issue the common law writ of *habeas corpus* in any of the cases covered by the Code of Criminal Procedure, 1898, s. 491 ?

(2) Can an application for a common law writ of *habeas corpus* or for directions under the Code of Criminal Procedure, 1898, s. 491, be heard and disposed of by a single judge of this court ? In other words : Are the Appellate Side Rules, rr. 2, 2A, *intra* or *ultra vires* ? G

(3) If a single judge has power to issue the common law writ of *habeas corpus*, is the writ issued by PANDRANG ROW, J., on Oct. 26 liable to be quashed by this court for the reason that it has been issued in contravention of the rules in force in the High Court in England ? H

In stating their reasons for the order of reference, the judges dealt with the contentions submitted to them as follows. The petitioner, the first respondent in this appeal, submitted three contentions. In the first place, he submitted that the High Court has no jurisdiction to issue the common law writ of *habeas corpus* in cases, which admittedly include the present

case, covered by the Code of Criminal Procedure, 1898, s. 491. The judges held themselves bound to reject this contention, by reason of the decision of the Full Bench in *Re Govindan Nair* (1), already referred to, but gave reasons why they thought that it should be reconsidered. In the second place, the petitioner maintained that, even if the High Court had still power to issue the common law writ of *habeas corpus*, nevertheless r. 2 was *intra vires* and binding on all judges of the court, and that, accordingly, a single judge had no power to deal with such proceedings. The judges held this to be well-founded. In the third place, the petitioner maintained that, even if a single judge had jurisdiction to issue the common law writ of *habeas corpus*, the procedure in this case had not been proper, in that PANDRANG ROW, J., had made the writ returnable to himself, and not to the court, during term time, which was in contravention of the rules in force in the High Court in England, which would apply in the case of a common law writ in the High Court of Madras. The judges agreed with this contention. The respondents—the present appellants—maintained two arguments. First, they maintained that in a criminal matter, such as this one, there was no right of appeal, but the judges held that the court was entitled to entertain the petition by virtue of the Code of Criminal Procedure, 1898, s. 561A. In the second place, the respondents objected to the *locus standi* of the petitioner, who had not been a party to the application for a writ. The judges rejected this objection. Having regard to the importance of three of the questions argued before them, the judges made the reference already mentioned.

On Nov. 4, 1938, the Full Bench (SIR ALFRED LEACH, C.J., MADHAVAN NAIR, VERADACHARIAR, WADSWORTH and LAKSHMANA RAO, JJ.), having heard arguments, made an order in which the questions were answered as follows :

(1) The common law writ of *habeas corpus* does not run in British India in a case like this. Assuming that the court formerly had the power to issue a writ of *habeas corpus* in a case like this, that power has been taken away and the powers conferred by the Code of Criminal Procedure, 1898, s. 491, substituted.

(2) Rules 2 and 2A of the Appellate Side of this court are *intra vires* the court's powers.

(3) PANDRANG ROW, J.'s, order issuing a rule *nisi* was passed without jurisdiction and is consequently null and void.

(4) The position therefore is that the application filed by the respondents under the Code of Criminal Procedure, 1898, s. 491, must be dealt with in accordance with the rules of the court which means that it must be dealt with by the Criminal Bench.

In the same order, SIR ALFRED LEACH, C.J., directed that the application under sect. 491 (No. 985) should be placed before the Criminal Bench on the following Monday, Nov. 7. The reasons of the Full Bench for their judgment were subsequently given on Nov. 8 in a judgment delivered by SIR ALFRED LEACH, C.J.

The proceedings in petition No. 1,003 were resumed by BURN and STODART, JJ., on Nov. 7, 1938, when they made an order in accordance with the answer of the Full Bench, setting aside the order of PANDRANG ROW, J., in petition No. 985, dated Oct. 26, 1938, which directed the issue of the writ *nisi* already referred to. On the same day, Nov. 7, 1938,

BURN and STODART, JJ., dealt with petition No. 985, which came before them under the direction of SIR ALFRED LEACH, C.J. After hearing arguments and considering the affidavits, the judges delivered judgment and made an order dismissing the petition.

This appeal is taken against (i) the judgment of the Full Bench, dated Nov. 4, 1938, on the questions referred to them in petition No. 1,003, A (ii) the judgment of the Division Bench, dated Nov. 7, 1938, in petition No. 1,003, and (iii) the judgment of the Division Bench, dated Nov. 7, 1938, dismissing petition No. 985.

Counsel for the appellants submitted four contentions—namely, (1) that the first respondent had no *locus standi* in the matter raised in the appellants' petition No. 985, and that, for the same reason, his petition No. 1,003 was incompetent and should not have been entertained, (2) that the Appellate Side Rules, rr. 2, 2A, were *ultra vires*, or, in any event, were not applicable to the present case, (3) that the warrants were illegal and invalid for the following reasons, (a) that there is definite jurisdiction in the High Court to examine, on evidence, whether the conditions laid down by the Extradition Act and the rules made thereunder for issue of the warrants have been complied with, (b) that, when thus examined, it would be found that such conditions had not been complied with, and (c) that, in any event, the warrants were *ex facie* invalid, in respect that (i) they did not show that the conditions had been complied with, (ii) they did not show sufficiently with what offences the appellants were charged, or when they were committed, (iii) they did not sufficiently show where and to whom the appellants were to be delivered up, and (iv) that they were undated, and (4) that jurisdiction to issue the common law writ of *habeas corpus* in a case such as the present still subsisted, and that PANDRANG ROW, J., had jurisdiction to order the issue of the writ *nisi*. D E

On the first contention, their Lordships are clearly of opinion that the first respondent was entitled to intervene in the appellants' petition No. 985, and that the petition No. 1,003 was competently presented by him. Counsel for the appellants referred to the rules made by the Governor-General in Council, under the Indian Extradition Act, 1903, s. 22, as to the Procedure of Political Agents for Surrender of Accused Persons to Native States, 1904 (No. 1862 I.A.), and in particular r. 2, which provides as follows : F G

2. The political agent shall not issue a warrant under sect. 7 of the said Act except on a request preferred to him in writing either by or by the authority of the person for the time being administering the executive government of the state for which he is a political agent, or by any court within such state which has been specified in this behalf by the Governor-General in Council, or by the Governor of Madras or Bombay in Council, as the case may be, by notification in the official Gazette. H

He maintained that the only parties who were entitled to take part in the proceedings relative to the warrants in the present case were (a) the appellants, (b) the second respondent, the chief presidency magistrate,

(c) the British Resident for the Madras States, and (d) the government of Travancore. Their Lordships are of opinion, however, that the terms of the warrants show that the authority to whom, in terms of sect. 7 of the Act, the appellants are to be delivered is truly the first respondent, who will control their custody, though the police of Travancore at the frontier station will receive the delivery on his behalf. Rule 7 of the rules above referred to makes this sufficiently clear. It provides as follows :

In the case of an accused person made over for trial to the court of the state, the political agent shall satisfy himself that the accused receives a fair trial, and that the punishment inflicted on conviction is not excessive or barbarous ; and if he is not so satisfied he shall demand the restoration of the prisoner to his custody, pending the orders of the Governor-General in Council.

It is clear that, if occasion arose for such an application in the present case, it would fall to be made to the court of the first respondent. Their Lordships are of opinion that the first respondent is entitled to vindicate his right to obtain the custody of the appellants, and that this contention of the appellants fails.

It will be convenient to dispose next of the fourth contention of the appellants. On this point, their Lordships agree with the conclusions of the Full Bench in the present case, which are stated in the judgment delivered by SIR ALFRED LEACH, C.J., as follows :

The High Courts Act, 1861, authorised the legislature, if it thought fit, to take away the powers which this court obtained as the successor of the Supreme Court, and Acts of the legislature lawfully passed in 1875 and subsequent years leave no doubt in my mind that the legislature has taken away the power to issue the prerogative writ of *habeas corpus* in matters contemplated by the Code of Criminal Procedure, 1898, s. 491.

Indeed, counsel for the appellants stated that he found difficulty in pressing this contention, and the reasoning of SIR ALFRED LEACH, C.J., on which he based the above conclusion, is so clear and convincing, including his narration of the legislative Acts referred to in his conclusion, that their Lordships are content to adopt it, as also to state that, like SIR ALFRED LEACH, C.J., they are in entire agreement with the judgment of RANKIN, C.J., in *Girindra Nath Banerjee v. Birendra Nath Pal* (2). Accordingly, the appellants' fourth contention also fails. It follows that the appellants' petition No. 985 must be treated as an application under the Code of Criminal Procedure, 1898, s. 491.

The second contention of the appellants related to the Appellate Side Rules of the Madras High Court. The Code of Criminal Procedure, 1898, s. 491, so far as material, provides as follows :

(1) Any High Court may, wherever it thinks fit, direct . . . (b) that a person illegally or improperly detained in public or private custody within such limits [i.e., the limits of its appellate criminal jurisdiction] be set at liberty. (2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section.

The Appellate Side Rules, rr. 2, 2A, provide, so far as material, as follows :

2. The following matters may be heard and determined by a Bench of two judges provided that if both judges agree that the determination involves a question of law they may order that the matter, or question of law, be referred to a Full Bench . . . (4) (c) for issue of a writ of *habeas corpus*.

2A. All applications for writ of *habeas corpus* shall go before a Bench of judges dealing with criminal work.

In view of their Lordships' opinion, already expressed, as to the incompetence of the issue of a common law writ in the present case, the appellants' contention that these rules are *ultra vires*, so far as they affect the issue of such a writ, does not arise, but the appellants maintain that, on proper construction, these rules do not apply to an application for directions under sect. 491, which they maintain is not covered by the words "all applications for writ of *habeas corpus*." Their Lordships are unable to accept this contention, and their view is confirmed by the terms of the statutory notifications in the Fort St. George Gazette as to r. 2A, which first appeared in a somewhat different form in the Gazette, 1925, Part II, p. 307, under date Jan. 3, 1925, in which it is expressly described as an amendment to the rules regulating proceedings under the Code of Criminal Procedure, 1898, s. 491, and it was as follows :

All applications for writ of *habeas corpus* shall go before a Bench of 3 judges, of which the chief justice, unless otherwise ordered, shall be one.

The alteration of the rule to its present form appeared in the Gazette, 1929, Part II, p. 1309, under date Aug. 17, 1929, and the description of the amendment is identical with that in the earlier notification. Accordingly, PANDRANG ROW, J., as a single judge, had no jurisdiction to deal with petition No. 985.

It only remains to deal with the appellants' contentions as to the warrants. In the first place, they maintained that the court is entitled to examine, on evidence, whether the conditions laid down by the Extradition Act and the rules made under sect. 22 of the Act have been complied with, and that the appellants were entitled to an opportunity to satisfy the court (a) that the offences must have been committed in Madras, and (b) that, in reality, the Travancore authorities desired to get the appellants into their jurisdiction in order to charge them with political offences, which would not be extraditable offences. It must be remembered that the warrants are issued by the agent of the government of India, and not by an agent of the Travancore State, and this executive act is safeguarded in various ways by the Act and by the rules. For instance, r. 4 provides that the political agent shall, in all cases before issuing a warrant under sect. 7 of the Act, satisfy himself, by preliminary inquiry or otherwise, that there is, *prima facie*, a case against the accused person. The appellants do not suggest that the resident did not so satisfy himself in the present case, but, if such a suggestion were to be made, their Lordships are of opinion that it would not be properly the subject of inquiry by the court, but should be stated to the magistrate on an application to him to report to the local government under the Extradition Act, 1903, s. 8(a). Their Lordships see no reason why the offences charged cannot have been committed in Travancore, and what they have stated above directly applies to the suggestion that the true object of the extradition is to enable the appellants to be charged with

political offences. It may be added that a bogus trial of the offences in respect of which the extradition is made would appear to fall within r. 7, and to make it the duty of the political agent, in such an event, to demand the restoration of the prisoners to his custody.

Lastly, the appellants contend that the warrants are illegal *ex facie* in respect (a) that they do not sufficiently show with what offences the appellants were charged or when they were committed, (b) that they do not sufficiently identify the place where, and the person to whom, the appellants were to be delivered up, and (c) that they are undated. As regards (a), no form of warrant is prescribed by the Extradition Act or the rules, and the warrants clearly describe the offences with which the appellants are charged, which is all that is required by the ordinary form of warrant of arrest prescribed by the Code of Criminal Procedure, 1898, s. 75, Sched. V, Form II. Their Lordships may also refer to the explanation to the Indian Penal Code, s. 477A. This objection fails. As regards (b), the Extradition Act, 1903, s. 7 (1), uses the words "for his arrest and delivery at a place and to a person or authority indicated in the warrant," and their Lordships are of opinion that all that is required is that the place and person shall be sufficiently indicated to enable the chief presidency magistrate, to whom the warrants are addressed, to act in pursuance of such warrants and to give directions accordingly. It is clear that the second respondent has no difficulty in this regard, and, if there were any doubt on the warrants taken by themselves, which their Lordships are not prepared to assume, the matter is placed beyond doubt by the Government of Madras (Home Department) Order No. 1,293, dated Mar. 10, 1938, under which the government direct that in future all persons extradited should be handed over at "the nearest frontier police station in the Travancore State." That order was addressed, among others, to the second respondent. There can be no difficulty in identifying the nearest frontier police station of the Travancore State for production before the district magistrate, Trivandrum, and, in their Lordships' opinion, a police station is a perfectly lucid description of the authority to whom the surrender is to be made. Contention (c) as to the absence of date also fails, in their Lordships' opinion. While it undoubtedly would be the usual and better practice to date the warrants, no provision in the Act or the rules appears to require directly or implicitly that the warrants must be dated. No period is expressed as running from the date of the warrants. This disposes of all the appellants' objections to the validity of the warrants. Their Lordships have now stated the reasons which led them on Apr. 3, 1939, humbly to advise His Majesty that the appeal should be dismissed.

Solicitors : Hy. S. L. Polak & Co. (for the appellants) ; Sanderson, Lee & Co. (for the first respondent, the district magistrate of Trivandrum) ; The Solicitor, India Office (for the second respondent, the chief presidency magistrate, Madras).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

COWAN *v.* HENDON BOROUGH COUNCIL.

[CHANCERY DIVISION (Farwell, J.), June 20, 21, 1939.]

Town and Country Planning—Access to highway—Carriageway giving access to building behind buildings fronting on highway—Minimum width—“Street”—Public Health Act, 1875 (c. 55), s. 4.

The plaintiff was the owner of a triangular piece of land situated behind certain houses which fronted immediately on a highway. The sole means of access from this triangular area to the highway was a strip of land about 100 ft. long and of a width varying from 13 ft. to 20 ft., also owned by the plaintiff. The plaintiff wished to erect upon the triangular area a building containing 6 flats, and to convert the strip of land leading to the highway into a carriageway for the use of the occupiers of the flats and their visitors. A planning scheme, in force with reference to the area in which this land was situate, defined “street” as having the same meaning as that which it has in the Public Health Act, 1875, and as including part of a street. The scheme prohibited the approval of a plan which was contrary to a bye-law or local Act, but gave the council in proper cases a discretion to permit certain types of new street not likely to be used generally for through traffic. The minimum width of a street under the scheme was 20 ft. :—

HELD : the proposed carriageway would be a street within the meaning of the scheme, and, as it could not be made of the permitted minimum width, the local authority were right in refusing to pass the plans for it.

[EDITORIAL NOTE.] The point in this case is in a very narrow compass, and is purely one of the construction of the planning scheme. The importance of the matter lies in the necessity for access to buildings at the rear of buildings fronting on to a highway, and in the fact that for that reason the precise position in such a case must be known.

AS TO MEANING OF “STREET,” see HALSBURY, Hailsham Edn., Vol. 16, pp. 192-201, paras. 221-233 ; and FOR CASES, see DIGEST, Vol. 26, pp. 268-279, Nos. 79-163.]

ACTION for a declaration that the means of access from the Great North Way to a proposed block of 6 flats upon land belonging to the plaintiff and adjacent to the Great North Way, as shown upon plans submitted on or about July 2, 1938, to the defendants by or on behalf of the plaintiff for their approval, was not a new street within the meaning of the Hendon Planning Scheme, No. 1, cl. 17, and that the defendants were not entitled to refuse their consent to those plans by reason of the provisions of that clause. The defendants pleaded that the means of access was a new street within the meaning of the planning scheme.

Michael E. Rowe for the plaintiff.

E. Milner Holland for the defendants.

FARWELL, J. : The facts in this case are not in dispute, and the question to be determined, though not by any means an easy one, is in a very small compass. The plaintiff is the owner of a piece of land some half-an-acre in extent, which is in the shape more or less of a triangle, situate at the back of certain houses which front immediately upon the Great North Way at Hendon. The plaintiff is also the owner of a strip of land running from one end of the triangular piece down to the Great

North Way. That strip of land runs past the wall of the house No. 194, and is the only reasonable means of access to his land at the rear of those houses. The strip of land in question is some 100 ft. long, and varies in width from some 13 ft. to nearly 20 ft. It runs up into the piece of waste land at the back of the houses, and affords direct access from the

A Great North Way to that piece of land. The plaintiff desires to erect upon a portion of the half-acre of land a building containing 6 flats, and he is proposing to lay out the remainder of that half-acre of land as a garden for the use of the persons who occupy the flats.

The defendants, the Hendon Borough Council, are the local authority

B responsible for this particular area in which this piece of land is situate, and they have prepared a town planning scheme under the Town and Country Planning Act, 1932, which has received the approval of the Minister of Health, and is, therefore, a binding scheme, and controls the

C use of the land in this neighbourhood, including this particular strip of land, the property of the plaintiff. That being so, before the plaintiff can make any use of his land, by building upon it or otherwise, it is necessary for him to obtain the approval and consent of the town council. The plans for the erection of this building, which will contain 6 separate

D flats, have been submitted to the proper authority and have received their approval. So far as the building itself is concerned, there is no difficulty between the parties, but, as part of the scheme which the plaintiff desires to carry out, he is proposing to make up the strip of land leading from the Great North Way. He is proposing to make a carriage-drive and plant certain trees or shrubs on each side of it so as to form a

E ready means of access for the persons who occupy the flats, and for other persons who have business at, or desire to go to, those flats, and, as part of the scheme which has been submitted to the defendant council, there is this plan to make a roadway out of the strip of land which I have mentioned. The whole width of the strip, when made up into a carriage-

F drive, will be less than that which, according to the town planning scheme, is the necessary width for such a road, if it is in fact a street. The defendant council have informed the plaintiff that, although, so far as the building itself is concerned, the use to be made of the half-acre of land is approved, they do not approve and do not consent to the scheme as a

G whole, because they say that this strip of land will be a new street, and, as such, must comply with the regulations of the town planning scheme, and that, as it will not comply with those requirements, they cannot approve the scheme.

The position is one which is unfortunate from the point of view of the

H plaintiff, because he has this half-acre of land which he desires to use in the way I have mentioned, and he has no means of making access to the highway for the persons using the piece of land unless he can make use of the strip. There is a serious difficulty about widening this strip because on one side of the strip there are gardens, or back premises of houses, which face on to Tenterden Drive, and on the other side there is

this house, No. 194, Great North Way, which is the property of the plaintiff, but which would have to be demolished, or partly demolished, in order to widen the strip of land to the extent required, if it be a new street and, as such, must comply with the requirements of the town planning scheme.

In those circumstances, the plaintiff has commenced this action against the defendants, and he asks for :

A declaration that the means of access from Great North Way to a proposed block of 6 flats upon land belonging to the plaintiff and adjacent to Great North Way, as shown upon plans submitted on or about July 2, 1938, to the defendants by or on behalf of the plaintiff for their approval and numbered building application No. A.7593, is not a new street within the meaning of Hendon Planning Scheme, No. 1, cl. 17, and that the defendants were not entitled to refuse their consent to the said plans by reason of the provisions of the said clause.

The defendants, on the other hand, say that this is a new street under their scheme, and that, accordingly, they are entitled, and were in fact bound, to object to the proposed arrangement.

The question which I have to decide, which, as I have said, lies in a very small compass, is whether the laying out of this strip of land in the way proposed will make this strip of land a new street, or whether it is only a means of access somewhat analogous to a carriage-drive from the Great North Way on to the plaintiff's property at the rear. As I have said, both the half-acre of ground at the rear and this strip are in the ownership of the plaintiff. In those circumstances, one has to consider the exact language of the town planning scheme to see what is a street within the meaning of that scheme. There have been many cases in which the question of what is a street has been decided, and counsel have very properly called my attention to some of those cases. It would be, I think, both a useless and a very lengthy operation to refer to all the authorities. Counsel have called my attention to those which they think are most relevant to the question which I have to determine, and they are of some assistance, but, in my judgment, they do not help me very much, except to the extent that I think it appears from all the authorities that this question is really a question of degree, to be determined on the full consideration of all the circumstances of the matter. Therefore, although it is helpful to see how the matter has been dealt with and considered in other cases, I cannot see that they are in any way decisions which regulate the question which I have to determine, and in truth it is largely a matter of construction of this particular town planning scheme.

I turn at once to that scheme to see what is a street within the meaning of the scheme. The first clause in the scheme is an interpretation clause, and I look to see how "street" is defined. I find that "street" has the same meaning as that which it has in the Public Health Act, 1875, and includes part of a street. Therefore it is necessary to see how "street" is defined in the Public Health Act, 1875, and I find that the definition is stated in this way :

"Street" includes any highway (not being a turnpike road), and any public

bridge (not being a county bridge), and any road, lane, footway, square, court, alley or passage whether a thoroughfare or not.

I think it is quite plain that that definition in the Public Health Act, 1875, is a definition of the word "street" which includes many things which in ordinary common parlance would not be called a street. The man in the street would hardly use the term "street" for a square, or a court, and it is obvious that the word is used so as to include a great deal more than what is ordinarily meant by a street. I think that to the ordinary person a street connotes the idea of a way on one side of which, at any rate, there are houses. Indeed, there is to be found in the cases a statement that, ordinarily speaking, a street, even as defined in that Act of Parliament, means a way which has on one side or the other of it more or less continuous houses. In my judgment, however, that statement was not intended to be exclusive, so to speak, so as to exclude from the definition of "street" any way which has not houses on each side of it, or on one side of it only, so long as the way in question can properly be termed a street having regard to the context in which it is used. However that may be, it is clear from the definition that the word "street" is used with an extended meaning.

I turn back to the scheme, and I think that the only clause to which I have to refer is cl. 17, which provides as follows :

Except in relation to streets proposed to be constructed by a highway authority the following provisions shall have effect with respect to new streets proposed to be constructed, whether on land reserved for streets or not. . . . (6) The council shall approve the plans, sections and specifications of the proposed street with or without modification, or disapprove them, and shall forthwith notify the applicant of their decision, but they shall not approve a plan, section or specification which is contrary to any bye-law or local Act, except that they may, in proper cases, permit (a) the laying out or making of a new street not likely to be used generally for through traffic, if it is of one of the types described in the first schedule to this scheme or of a substantially similar type, or a street of such other type as the Minister may from time to time approve ; (b) the temporary laying out or making of a new street of less width, or with narrower carriageways and footways, than authorised by them in approving the street. . . . (7) As soon as the street is made in accordance with the plans, sections and specifications approved under this clause, the council shall, on the application in writing of the person making the street and within 3 months from the date thereof, post a notice in the street declaring it to be, and the street shall thereupon become, a highway repairable by the inhabitants at large.

I do not think that I need read the proviso to that subclause or the next subclause, but subcl. (9) is of some importance. It provides as follows :

An applicant who is aggrieved by (a) a decision of the council under subcl. (6) in regard to (i) the plans or sections of the proposed street ; or (ii) the specifications of the proposed street ; or (b) a refusal of the council to pay any sum which under the preceding subclause they are required to pay ; may appeal.

Then subcl. (10) provides as follows :

A person laying out or making a street shall lay it out or make it in accordance with the plans, sections and specifications approved under this clause, and all conditions applicable thereto contained in the first schedule to this scheme or in the approval shall be binding on him, and, in so far as they relate to the use of any adjoining land on all persons deriving title under him to that land.

I think that there is nothing else to which I need refer in the scheme, except the first schedule, which has been already referred to in that

clause. When I look at the schedule, it provides for the dimensions and conditions which are required, and there are various types defined there. For instance, type A must have a maximum length of street of 1,500 ft., and a minimum width of 36 ft. Then there are other requirements, and the construction of the surface is provided for, and, in connection with other streets, turning spaces and other requirements. I do not think it A necessary to refer to either A or B in any detail, but C is said to be :

Applicable only to streets intended to give access solely to buildings forming 3 sides of a quadrangle or arranged in some other similar manner so as to front on to an open space.

With regard to that, if this building had been erected as a separate B building so as to form 3 sides of a quadrangle, or arranged in some other similar manner so as to form an open space, it is difficult to see why this way would not have been a street within the meaning of this town planning scheme, because it would be a way giving access to buildings in that particular form. That is not, of course, the way in which the building is C proposed to be erected, and, therefore, strictly, this is not applicable. For a street which comes within that definition, however, the requirements are that the minimum width of the street shall be 20 ft., the minimum width of the carriageway shall be 14 ft., the minimum width of each footway shall be 4 ft. 6 in., and the surface of the carriageway shall D be so constructed as to fall to a channel at one side of the carriageway, and so on. Then there are other matters to which I need not refer. Then the next to which I must refer is type D :

Applicable only to streets intended for use as a secondary means of access to premises for the purpose of the removal of house refuse and other matters. E

Type E is :

Applicable only to streets not intended for use as carriageways.

Then there is a note in the following terms :

The street shall not without the consent of the council be used as a principal F means of approach to any buildings.

Whatever the nature of the street may be within that schedule, the proposed way which the plaintiff desires to make would not come within the dimensions which I have mentioned and which are there required.

Having regard to the terms of this scheme so far as it applies to streets, G and to the schedule to the scheme, I think that it is quite plain that the word "street" is here used with a more extended meaning than that which the word ordinarily bears, but that is not in the least inconsistent with the definition which is to be derived from the Public Health Act, 1875, because, as I have already pointed out, the definition itself extends to H things which are not, ordinarily speaking, streets at all.

Really the question which I have to determine comes to this. On the one hand, the plaintiff says : "This is nothing more than a carriage-drive. When it is made, it will be nothing more than a carriage-drive allowing entrance and egress to and from the plaintiff's own land at the

rear, and a carriage-drive of that sort is not a street within the meaning of the town planning scheme at all. Also, there is some authority for saying that, ordinarily speaking, a carriage-drive would not be a street within the ordinary meaning of that word, or even as defined by the Act."

- On the other hand, it is said by the defendants: "This will be a street
A in fact. It will be a way to be used by the persons who occupy the flats, and any other persons having any occasion to go to the flats, and it is essential for us to have control over such a way as this, because, in the unfortunate event of a fire, it will be necessary for the fire engines to get there, and in other ways the matter should be under our control. It is
B not, in truth, simply a carriageway, but it comes within the definition, as derived from the scheme itself, of a street." In my judgment, the answer to the problem is one at which it is by no means easy to arrive, and it may well be that it is a matter in which one person might take one view and another person might take another view, but the conclusion to
C which I have come is one which, I feel, is open to possible question, because there are strong reasons for thinking either way—for thinking this is a street or not a street—but, having regard to the very wide interpretation which I think is put upon the word "street" under the town planning scheme, I have come to the conclusion that this strip of
D land, when made up and used in the way it is proposed to be used, will be, and is, a street, and that, that being so, the defendant council must see to it that the street complies with the requirements of the town planning scheme. I feel some difficulty about seeing exactly where the line is to be drawn between that which is a street and that which is not a
E street. It must be in either case partly a question of construction, and it is a matter of degree, having regard to all the circumstances.

Having given the matter the best consideration I can, and having carefully considered the terms of the town planning scheme so far as they relate to a "street," I have come to the conclusion that this is a street, and

- that, therefore, the town council are bound to exercise control over it.
F In those circumstances, the plaintiff is not entitled to the relief which he seeks, and the action must be dismissed with costs.

Action dismissed with costs.

Solicitors: *Boxall & Boxall*, agents for *Edwin Boxall & Kempe*, Brighton (for the plaintiff); *Leonard Worden* (for the defendants).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

SHACKLOCK v. ETHORPE, LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright and Lord Porter), **April 27, 28, June 27, 1939.**]

Inns and Innkeepers—Care of guests' property—Liability for negligence—Failure of guest to take reasonable care of property—Locking bedroom—Failure to deliver jewellery to innkeeper for safe custody.

The appellant placed her jewels in a jewel-case which she locked. She then placed the jewel-case in a dressing-case which was provided with three locks, all of which she locked. She left the case under the luggage-stand in her bedroom at an hotel owned by the respondents while she was absent from the hotel for some hours. On leaving the hotel, she did not lock the door of her bedroom :—

HELD : the facts that she did not lock the bedroom door and that she did not deposit the jewellery with the hotel-keeper for safe custody were not sufficient evidence that she failed to take the ordinary care which a prudent person would take, and the appellant was entitled to recover damages for her loss.

Decision of Court of Appeal ([1938] 2 All E.R. 315) *reversed and decision of GREAVES-LORD, J.* ([1937] 4 All E.R. 672) *restored.*

EDITORIAL NOTE. In the court of first instance, this case was reported on the question of the place of exhibition of the statutory notice. In the Court of Appeal and the House of Lords, that point has disappeared, but, as those courts have differed on the proper inference to be drawn from the facts, the views of the House of Lords on this question are here included. The matter is one of mixed fact and law, and possibly is largely dependent on the facts of the particular case, but the views of their Lordships cannot now be ignored in considering any similar cases.

AS TO DUTY OF INNKEEPERS IN RESPECT OF GUESTS' PROPERTY, see HALSBURY, Hailsham Edn., Vol. 18, pp. 150-159, paras. 208-218; and FOR CASES, see DIGEST, Vol. 29, pp. 13-15, Nos. 170-187.]

Cases referred to :

- (1) *Reniger v. Fogossa* (1552), 1 Plowd. 1.
- (2) *Nugent v. Smith* (1875), 1 C.P.D. 19; 3 Digest 53, 2; 45 L.J.Q.B. 19; 33 L.T. 731; *reversd.* on another point (1876), 1 C.P.D. 423.
- (3) *Robins & Co. v. Gray*, [1895] 2 Q.B. 501; 29 Digest 19, 240; 65 L.J.Q.B. 44; 73 L.T. 252.
- (4) *Cashill v. Wright* (1856), 6 E. & B. 891; 29 Digest 14, 178; 27 L.T.O.S. 283.
- (5) *Oppenheim v. White Lion Hotel Co.* (1871), L.R. 6 C.P. 515; 29 Digest 14, 179; 40 L.J.C.P. 231; 25 L.T. 93.
- (6) *Calve's Case* (1584), 8 Co. Rep. 32a; 29 Digest 2, 1.

APPEAL from an order of the Court of Appeal, dated Apr. 1, 1938, and reported [1938] 2 All E.R. 315, setting aside a judgment given in favour of the appellant by GREAVES-LORD, J., dated Nov. 29, 1937, and reported [1937] 4 All R.E. 672, in an action wherein the appellant was plaintiff and the respondents were defendants. The facts and the arguments are set out in the opinion of LORD MACMILLAN.

Gilbert Beyfus, K.C., and *Sylvester Gates* for the appellant.

N. L. C. Macaskie, K.C., and *Montague Berryman* for the respondents.

LORD ATKIN : My Lords, I have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend

LORD MACMILLAN, and I entirely agree with it. For the reasons which he has given, it appears to me that there was no reason for interfering with the decision of the trial judge, a decision to which, after considering all the circumstances, I have no hesitation in saying I should myself have come.

A

LORD MACMILLAN: My Lords, I am authorised by my noble and learned friends LORD THANKERTON and LORD PORTER to state that the opinion which I am about to deliver has their concurrence. On Oct. 15, 1935, while the appellant was a guest in the Bull Hotel, Gerrard's Cross, which is owned and managed by the respondents, jewels valued at £578 10s. and £24 in notes belonging to her were stolen from her bedroom. In these proceedings, she seeks to recover from the respondents the amount of her loss. GREAVES-LORD, J., before whom, sitting without a jury, the action came in the first instance, gave judgment in the appellant's favour for £550 and costs, but his judgment was set aside by the Court of Appeal, and the case has now, by your Lordships' leave, been brought to this House for final determination.

B

C

Many authorities were cited at the bar in the course of the hearing, but apparently no previous case on this branch of the law has reached this House. The law was not, however, really in dispute. By the common law of England, an innkeeper is responsible to his guests if any of their goods are lost or stolen while on his premises. As it was put so long ago as 1550 in argument in *Reniger v. Fogossa* (1), at p. 9:

D

E

... by the common custom of the realm, hosts shall be charged for the goods of their guests lost or stolen out of their houses ...

F

The principle, whose origin is discussed by LORD ESHER, then BRETT, J., in *Nugent v. Smith* (2), is common to most, if not all, systems of jurisprudence, and was first promulgated in the prætors' edict, *navitæ, caupones, stabularii*. It has been said historically to have arisen from the view that the goods of travellers were exposed to special risk owing to the danger of collusion between innkeepers and thieves.

G

The innkeeper's liability exists quite apart from any question of negligence on his part. When the old form of writ charges the innkeeper *pro defectu hujusmodi hospitatorum*, the *defectus* means merely "a failure *de facto* to keep safely": HOLMES ON THE COMMON LAW, 1881, p. 201. In the words of LORD ESHER, M.R., in *Robins & Co. v. Gray* (3), at pp. 503, 504:

H

The duties, liabilities, and rights of innkeepers with respect to goods brought to inns by guests are founded, not upon bailment, or pledge, or contract, but upon the custom of the realm with regard to innkeepers. Their rights and liabilities are dependent upon that, and that alone; they do not come under any other head of law ... the innkeeper's liability is not that of a bailee or pledgee of goods; he is bound to keep them safely. It signifies not, so far as that obligation is concerned, if they are stolen by burglars, or by the servants of the inn, or by another guest; he is liable for not keeping them safely unless they are lost by the fault of the traveller himself. That is a tremendous liability: it is a liability fixed upon the innkeeper by the fact that he has taken the goods in ...

It is important to emphasise this because the passage from BULLEN

AND LEAKE'S PRECEDENTS OF PLEADINGS, 3rd Edn., p. 344, which GREER, L.J., quotes in his judgment in the present case, incorrectly states that :

An innkeeper at common law is not an insurer of the goods of his guests but he is liable only for negligence or default in keeping the goods by himself or his servants. The loss of the goods is presumptive evidence of such negligence which it lies upon the innkeeper to rebut.

The error is not repeated in the current edition of BULLEN AND LEAKE, where the form of claim contains no allegation of negligence against the innkeeper. It has always been the law, however, that the innkeeper can escape liability if he can show that, as ERLE, J., delivering the judgment of the court in *Cashill v. Wright* (4), said, at p. 900 :

... the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances.

The word "negligence" is tending in modern legal usage to be restricted to denoting the breach of a duty owed to some other person, but it is not in this correlative sense that the word is used in the present context. The innkeeper's defence is not based on the breach of any duty owed to him by his guest, but simply on the plea that the loss or theft of his guest's property was due to the guest's own carelessness, his own failure to take reasonable care of it. It is technically inaccurate to speak of the guest's contributory negligence.

The respondents originally pleaded the protection of the Innkeepers' Liability Act, 1863, but the trial judge found that the statutory requirement that a copy of sect. 1 of the Act must be exhibited in a conspicuous part of the hall or entrance had not been complied with, and this point has disappeared from the case. Both the trial judge and the Lords Justices asked themselves the right question in the present case—namely, whether the respondents had proved that the appellant by her conduct was herself to blame for the loss of her property—but they have given different answers to the question. It is, therefore, necessary to examine critically the facts of the case. On the day of the theft, the appellant went up to London in the morning. Before leaving the hotel, she had placed her jewels and money in a jewel-case which she locked. She then put the locked jewel-case in a crocodile leather dressing-case or dressing-bag with three locks, described by a police witness as "fairly massive," all of which she locked. Finally she placed the locked dressing-case under a luggage-stand in her bedroom on which there were some other articles of baggage. She did not lock her bedroom door or hand in the key at the office. When she returned in the evening, it was found that the dressing-case had been forced open and the jewel-case abstracted. It was subsequently ascertained that the theft had been perpetrated by an expert thief, who had arrived at the hotel during her absence and taken an adjoining bedroom. The thief was later arrested, and, on his own confession, found guilty and sentenced. Some of the appel-

lant's jewellery, to the value of about £50, was found in his possession and restored to her.

A The main points on which the respondents relied to prove that the appellant had only herself to blame for her loss were that she did not lock her bedroom door and leave the key at the office and that she did not, as she ought to have done, deposit her jewellery in the office for safe-keeping. As to the first point, I may quote the words of MONTAGUE SMITH, J., in *Oppenheim v. White Lion Hotel Co.* (5), at p. 522 :

B I agree that there is no obligation on a guest at an inn to lock his bedroom door. Though it is a precaution which a prudent man would take, I am far from saying that the omission to do so alone would relieve the innkeeper from his ordinary responsibility. The law of *Calve's* case (6) may remain untouched. But the fact of the guest having the means of securing himself, and choosing not to use them, is one which with the other circumstances of the case should be left to the jury. The weight of it must, of course, depend upon the state of society at the time and place. What would be prudent in a small hotel, in a small town, might be the extreme of imprudence at a large hotel in a city like Bristol, where probably 300 bedrooms are occupied by people of all sorts.

C What was "the state of society at the time and place" of the theft here in question? The Bull Hotel is a small hotel with some 20 bedrooms, and is situated in a small country town. The internal arrangements are such that the comings and goings of guests and visitors are under the observation of the staff. The appellant had stayed there on several occasions, and knew the ways of the house. It was not the practice of guests to lock their bedroom doors and leave their keys at the office. D No notice requesting this to be done was placed in the bedrooms or anywhere else in the hotel. There were no duplicate keys or master key for the use of the staff, and on one occasion when the appellant had locked her bedroom door and taken the key away with her she found on her return that her bedroom had not been attended to, as the chambermaid could not get access to it. E On these facts, I find myself in agreement with SLESSER, L.J., who says :

F I do not think that this lady was negligent alone in leaving the door unlocked.

It is apparently on the other ground—namely, that the appellant did not deposit her jewellery in the office for safe keeping—that the Court of Appeal have found that she acted imprudently and carelessly. On this point, several considerations are relevant. There is the question G of the nature and value of the articles. I do not doubt that, if a guest takes jewels of exceptional value to an hotel, this does render it proper for him to take special precautions—for example, by locking his bedroom door, or depositing the articles with the hotelkeeper. The appellant's jewels, however, were of an ordinary description, such as any lady of H her position might have with her. They consisted of 23 miscellaneous items, ranging in value from a diamond ring at £120 to a French paste brooch at 10s. The appellant had not worn them to any extent while staying at the hotel, and it was not known to the management or to the other guests that she had them in her room. In a small room, which served as a reception office and service bar, there was a notice stating

that the proprietors would not be responsible for any property left in the hotel unless deposited at the office for security and a receipt was taken for same, but this notice was not conspicuously exhibited, and the appellant had not seen it. None of the judges of the Court of Appeal makes any reference to this notice, and it is, therefore, not a point which need be taken into account. An incident which took place on the day before the theft is of some significance. The appellant on that day also went up to London, and, before leaving, asked the young woman in the reception office to take charge of her opal necklet for her. On returning in the evening, the appellant received back the necklet, and, as a result of a conversation at the time, seems to have received the impression that there was no safe in the hotel. This was wrong, for there was a safe in the room of the manageress, but the trial judge finds that, as to this, there was a genuine misunderstanding on the part of the appellant, and that she did not know that there was a safe available. GREAVES-LORD, J., with all the facts before him, came to the conclusion that, in the circumstances, the appellant had not failed in due care of her property by not depositing it in the office. The Lords Justices took the contrary view. GREER, L.J., said :

It seems to me quite clear that, if she had deposited her valuable jewellery in the office, had taken her jewellery case or her bag which contained her valuables to the office, no thief could have got at the place where they would have been put—namely, the safe which in facts exists in the office.

This is true, but it is not the question, which is whether the appellant in not so depositing her jewellery had failed to take the ordinary care which a prudent person might reasonably be expected to take in the circumstances. SLESSER, L.J., says that the proper care :

... could very readily have been taken by handing those jewels to the landlady and asking her to keep them in safe custody in the safe which she had ; or alternatively, if she wished to keep them close at hand to have deposited them in a neighbouring bank.

The alternative suggestion seems to me, with all respect, to be quite untenable, but, on the question whether the appellant did not take proper care of her property inasmuch as she did not deposit it at the office, I am of opinion that the conclusion reached by the trial judge was, in the whole circumstances, justified, and ought not to have been disturbed. I am accordingly in favour of allowing the appeal, reversing the judgment of the Court of Appeal, and restoring the judgment of the trial judge, with costs in this house and in the Court of Appeal.

LORD WRIGHT : My Lords, I am in agreement with the opinion which has just been delivered by my noble and learned friend LORD MACMILLAN, and have nothing further to add.

Appeal allowed with costs.

Solicitors : *Vickress & Clare* (for the appellant) ; *Berryman*s (for the respondents).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

FAWCETT v. JOHNSON'S SERVICE GARAGE.

[COURT OF APPEAL (Luxmoore and du Parcq, L.J.J., and Humphreys, J.),
June 19, 20, 1939.]

Practice—Remission of action for personal injuries to county court—Grounds for exercise of discretion—Action against two defendants—Probability of plaintiffs' success in action—County Courts Act, 1919 (c. 73), s. 2.

The plaintiffs claimed damages for personal injuries alleged to have been caused by the negligent driving of a motor vehicle by one or both of two defendants. Each defendant pleaded that the accident causing the injuries had been caused by the negligence of the other defendant. A summons was taken out by the defendants asking that the plaintiffs should give security for costs, or that, in default of such security, the action should be remitted to the county court :—

HELD : as it appeared that the plaintiffs were practically certain to succeed against either one or both of the defendants, there was little chance of their being ordered to pay either of the defendants' costs, and this was, therefore, not a proper case in which to order that security for costs should be given or that the action should be remitted to the County Court.

[EDITORIAL NOTE. Previous authorities have dealt with the retention of cases in the High Court by reason of the amount of damages likely to be awarded and the difficult questions of law likely to be raised. In the present case, it is sought to remit the case to the county court on the ground that the plaintiff has not given security for costs, but the plaintiff is allowed to retain his case in the High Court, for the reason that, on the pleadings, he is practically certain to succeed, and it is most unlikely that he will be called upon to pay any costs.

AS TO REMISSION OF ACTION TO COUNTY COURT, see HALSBURY, Hailsham Edn., Vol. 8, pp. 181, 182, paras. 284, 285 ; and FOR CASES, see DIGEST, Vol. 13, pp. 484, 485, Nos. 340-352.]

Cases referred to :

- (1) *Stevens v. Walker*, [1936] 2 K.B. 215 ; [1936] 1 All E.R. 892 ; Digest Supp. 106 L.J.K.B. 683 ; 154 L.T. 550.
- (2) *Evans v. Bartlam*, [1937] A.C. 473 ; [1937] 2 All E.R. 646 ; Digest Supp. ; 106 L.J.K.B. 568 ; 157 L.T. 311.

APPEAL by the plaintiffs from an order of ASQUITH, J., dated June 6, 1939, confirming an order of the master for security for costs. The facts of the case are fully set out in the judgment of LUXMOORE, L.J.

David Weitzman for the appellants.

D. M. Rosenberg, for the first respondents.

J. F. F. Platts Mills for the second respondents.

LUXMOORE, L.J. : This is an appeal from an order made by ASQUITH, J., by which he affirmed an order made by the master. The master's order directed that, unless the plaintiffs furnished security for the costs of the two defendants in the sum of £20 in each case, the action should be remitted to the county court. The plaintiffs have appealed from that order with the leave of the judge, and they ask that it be reversed and that the action be allowed to continue in the High Court without any security for costs being furnished by them.

The application on which the original order was pronounced was

made by the defendants under the County Courts Act, 1919, s. 2, which provides as follows :

In any action founded on tort commenced in the High Court the defendant may, on an affidavit made by himself or by any person on his behalf showing that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff, apply to the court or a judge for an order to transfer the action to a county court ; and thereupon the court or judge, unless the plaintiff satisfies the court or judge that he has such means, may, if the court or judge having regard to all the circumstances of the case thinks fit so to do, make an order that unless the plaintiff within a time to be limited in the order gives security for the defendant's costs to the satisfaction of the court or a judge the action shall be transferred to such county court to be named in the order as the court or judge may deem the most convenient to the parties.

It is plain that the section confers on the court or judge a discretionary power, but, before the discretion comes into being, the court must be satisfied that, if a verdict is not found for the plaintiff, the plaintiff has no visible means of paying the costs. The defendants' evidence in this case is sufficient to satisfy the court on this point, but of course this is only the first step in the matter. Once the court is satisfied on this point, it is its duty to consider, as the section says, all the circumstances of the case before exercising its discretion and ordering the security sought, or making the order for transfer.

The section has already been considered by this court in *Stevens v. Walker* (1). In that case, DU PARCQ, J., had directed that, unless security was given to the extent named, the case should be remitted to the county court. The cause of action arose out of the alleged tort of a lorry driver in driving his lorry negligently to the injury of the plaintiff, who was a passenger in the lorry. When the application under the section came before the court, no defence had been delivered in the action, nor was there any affidavit on behalf of the defendant disclosing the nature of his defence. It was pointed out in this court that, in the absence of a defence or such an affidavit, it was difficult to form any conclusion as to whether or not there was any likelihood of a successful defence. Speaking for myself, however, I must confess that in many cases the presence of a defence without any evidence on which the allegations in the defence are based must necessarily make the task of the court in ascertaining the chances of the defendant's success, to say the least of it, conjecture. What LORD WRIGHT, M.R., said in that case which is material for the consideration of the matter which is now before us appears, I think, at pp. 221, 222 ([1936] 1 All E.R. at p. 894) :

It was pointed out quite recently that these applications [under the County Courts Act, 1919, s. 2] should not be considered until after the statement of claim had been delivered. I agree with that, and I go further, because I think they should not be considered until the defence has been delivered, or, at least, until there is an affidavit which shows that a defendant is in a position to swear that he has, according to his judgment, a good defence on the merits. What I want to emphasise, therefore, as the most material circumstances to be taken into account by the court under the County Courts Act, 1919, s. 2, are : first, the severity of the injuries in a personal injuries case, and the gravity of the case for the plaintiff, and, secondly, the question whether there is a probable or *prima facie* defence as shown by the defendant. These two matters seem to me to be quite essential for consideration.

He is not saying there that one is more essential than the other. He

is saying that they are both essential for the consideration of the court. I think that CHARLES, J., who was a member of the court on that occasion, emphasised the same point when he said, at p. 225 ([1936] 1 All E.R. at p. 895) :

A The learned judge who considers the matter has to be satisfied, having regard to all the circumstances of the case, whether or no he will make an order under this section. Surely one of the most material considerations, and perhaps the vital consideration, that should be before the learned judge is : Ay or No, is there any defence to the action, or is there any reasonable chance of a verdict not being found for the plaintiff ?

B In the same case, ROMER, L.J., pointed out that, before the discretion can properly be exercised under the section, it is essential that the court or judge shall ascertain precisely what are the issues which will have to be tried when the case comes on for hearing, whether it be in the High Court or in the county court.

C Bearing those matters in mind, I have to consider the material facts of this case, as disclosed in the statement of claim and the two separate defences which have been delivered on behalf of the two defendants. There are three plaintiffs. Each of them is claiming damages for injuries resulting from the overturning of a car in which they were all being driven by the servant of the first defendant. One at least of the plaintiffs
D suffered considerable injuries, but in no case can it be said that the injuries were of so serious a nature as to preclude any order for transfer to the county court from being made. If and so far as the appeal is based upon this consideration, I should not find it possible to disagree with the order which has been made by the judge. The main foundation of the
E appeal, however, rests upon the nature of the defences. As I have said, the action results from the overturning of a car. In the words of the statement of claim, the car was driven on to the grass verge on the side of the road. It got out of control and then passed across into a ditch on the off-side of the road, finishing up against a tree. The plaintiffs
F alleged that this was due either to the negligence of the first defendant, whose servant was driving the car in question, or, alternatively, to the negligence of the second defendant, who was driving a car in the opposite direction to that in which the first defendant's car was travelling, or, in the further alternative, to the negligence of both defendants. The
G first defendant denies any negligence on his part, and says that the accident was due to the negligence of the second defendant, while the second defendant denies negligence on his part and says that the accident was due to the negligence of the first defendant. On these pleadings, one thing seems reasonably plain, and that is that the substantial issue at the
H trial will be whether the first or second defendant is liable to the plaintiffs, or perhaps whether both defendants are liable. It is most unlikely that the plaintiffs will fail to succeed against one or other of the defendants, if they do not succeed against both.

In this case, I feel no difficulty in answering in the negative the test question which was proposed by CHARLES, J., in *Stevens v. Walker* (1),

to which I have already referred—namely, whether or not there is any reasonable chance of a verdict not being found for the plaintiff. Speaking for myself, I find it impossible in these circumstances to exercise the discretion given by the section in favour of the defendants. As I have already said, the matter is one of discretion. The master and the judge have purported to exercise the discretion in favour of the defendants. **A** This court is always slow to interfere with an exercise of discretion, but it is, I think, bound to do so if it is satisfied that the exercise of the discretion is not fair to the plaintiff. If any authority is necessary for such a view, I find it in *Evans v. Bartlam* (2), where I find this statement in the opinion of LORD ATKIN, at pp. 480, 481 ([1937] 2 All E.R. at p. 650): **B**

Appellate jurisdiction is always statutory: there is in the statute no restriction upon the jurisdiction of the Court of Appeal: and while the appellate court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it. **C**

In the same case, LORD RUSSELL OF KILLOWEN pointed to a number of cases where this rule has been observed, including, among others, *Stevens v. Walker* (1), to which I have already referred.

In the present case, we have not had the benefit of any note of a judgment delivered by the judge. Indeed, I gather that no judgment was delivered. Nevertheless, it seems to me, after a careful consideration of all the facts of this case, that he has failed to give proper weight to the fact that in the present case the plaintiffs are in all human probability practically certain to succeed against one or other of the defendants, if not against both. If they succeed against one of them, the probable order as to costs will provide for the payment of the successful defendant's costs by his unsuccessful co-defendant, and not by the plaintiffs. Consequently, there is little chance of the plaintiffs being ordered to pay any costs, and such a chance is a remote one. For these reasons, I think that the appeal should succeed, the order of the judge and the master should be discharged, the summons for security or remission to the county court should be dismissed, and the costs both here and below should be the plaintiffs' costs in any event. **D** **E** **F**

DU PARCQ, L.J.: I agree, and I think it undesirable to add anything, because I could only repeat what has been said by LUXMOORE, L.J. I entirely agree with everything which has fallen from him. **G**

HUMPHREYS, J.: I agree with the result proposed by LUXMOORE, L.J., and the reasons given for it. **H**

Appeal allowed with costs. Judge's order discharged. Summons for security or remission dismissed.

Solicitors: *Silkin & Silkin* (for the appellants); *S. Rutter & Co.* (for the first respondents); *Wm. Easton & Sons* (for the second respondents).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

ADABLA (substituted for AFIANU, deceased) on behalf of himself and all other members of the ANYIGBE TRIBE v. GBEVLO AGAMA AND OTHERS.

[PRIVY COUNCIL (Lord Russell of Killowen, Lord Romer and Sir George Rankin), **May 2, 15, 1939.**]

Privy Council—West Africa—Practice—Appeal from high native tribunal—Leave to appeal—Jurisdiction of Court of Appeal to hear appeal although leave to appeal not given—Native Administration Ordinance, 1927 (No. 18 of 1927), s. 77—Native Administration Amendment Ordinance, 1935 (No. 18 of 1935), s. 13.

The provisions relating to appeals from high native tribunals, otherwise paramount chiefs' tribunals, are contained in the Native Administration Ordinance, 1927 (No. 18 of 1927). Sect. 77 of the ordinance provides as follows: "(1) A party desiring to appeal from a paramount chief's tribunal shall first obtain the leave of such tribunal so to do; provided that, if the said tribunal shall have refused such leave, the provincial commissioner's court or the district commissioner's court may nevertheless grant leave to appeal. (2) Leave to appeal from a paramount chief's tribunal shall not be granted unless and until the appellant shall either have paid the costs in such tribunal or shall have deposited therein or in the court to which the appeal is being taken a sum of money sufficient to satisfy such costs; and such court shall not grant a stay of execution with respect to the said costs." This section was amended by the Native Administration Amendment Ordinance, 1935 (No. 18 of 1935), s. 13, which provides as follows: "Sect. 77 (2) of the Native Administration Ordinance shall be amended by adding at the end thereof the following proviso: 'Provided that notwithstanding anything in this section contained the West African Court of Appeal may in its discretion, for the purpose of doing substantial justice between the parties, hear and determine any appeal brought before it on such terms and conditions as it may deem just.'" After a judgment of the high native tribunal, and within the time required, an order was made by the provincial commissioner's court granting to the appellant leave to appeal from the decision of the tribunal, and on the hearing the appeal was allowed. The respondents thereupon appealed to the West African Court of Appeal, and contended that the provincial commissioner had no jurisdiction to grant leave to appeal to his court, as application for leave to appeal had not been made to the high native tribunal. Upon inquiry being made, no record could be traced in the high native tribunal of any application by the appellant for leave to appeal, and for this reason the Court of Appeal for West Africa by a majority allowed an appeal:—

HELD: the proviso introduced by the Native Administration Amendment Ordinance, 1935 (No. 18 of 1935), s. 13, operated as a qualification of the whole of the Native Administration Ordinance, 1927 (No. 18 of 1927), s. 77. The Court of Appeal had jurisdiction to hear and determine the appeal on its merits, if, in its discretion, it thought proper to do so.

[EDITORIAL NOTE. The Court of Appeal in West Africa were of opinion that they had no jurisdiction to hear an appeal from a judgment of the provincial commissioner where it did not appear that the Paramount Chief's Court had given leave to appeal. This is held, upon the construction of the relevant ordinances, to be a wrong view, and the Court of Appeal has a discretion to hear an appeal in such a case.

AS TO WEST AFRICAN COURTS, see HALSBURY, Hailsham Edn., Vol. 11, p. 203, para. 386; and FOR CASES, see DIGEST, Vol. 17, pp. 452, 453, Nos. 212-216.]

APPEAL from a judgment of the West African Court of Appeal, Gold Coast Session (SIR DONALD KINGDON, C.J. (Nigeria), SIR PHILIP PETRIDES, C.J. (Gold Coast), and WEBBER, C.J. (Sierra Leone), dated Dec. 9, 1936, allowing an appeal by the respondents from a judgment of the provincial commissioner's court (Eastern Province) of the Gold Coast, dated Aug. 16, 1934. The latter judgment had reversed a judgment of the high native tribunal of Ada, dated Jan. 18, 1929, in favour of the respondents. The judgment of their Lordships was delivered by LORD RUSSELL OF KILL-OWEN.

W. H. Stoker for the appellant.

The respondents did not appear before their Lordships' Board.

LORD RUSSELL OF KILLOWEN: This appeal is brought from a judgment of the West African Court of Appeal (Gold Coast Session) allowing the appeal of the respondents from a judgment of the provincial commissioner's court (Eastern Province) of the Gold Coast in favour of the plaintiff in the proceedings. That judgment had reversed a judgment of the High Native Tribunal of Ada given in favour of the respondents. The appellant has been substituted in the course of the proceedings for the original plaintiff, who had died. The litigation is between representatives of two tribes—namely, the Anyigbe tribe and the Fieve tribe—and relates to the ownership of land. The representative of the Anyigbe tribe is the appellant before the Board, but their Lordships are not, on this appeal, in any way concerned with the merits of the dispute between the litigants. The appeal relates to the questions whether, in the circumstances of the case, the judgment of the provincial commissioner's court was pronounced without jurisdiction, and, if so, whether the Court of Appeal (in its discretion) could, and should, have heard and determined the appeal therefrom. The answer to these questions depends primarily upon the true construction and effect of the Native Administration Ordinance, 1927 (No. 18 of 1927) and the, Native Administration Amendment Ordinance, 1935 (No. 18 of 1935). The relevant sections of the first-named ordinance are sects. 75, 76 and 77, which provide as follows:

75. In any suit or matter relating to the ownership, possession, or occupation of any land an appeal shall lie from the decision of the paramount chief's tribunal to the provincial commissioner's court.

76. No appeal shall lie under sect. 73, sect. 74, or sect. 75 unless the party appealing shall give notice of appeal within the proper periods hereinafter in this section prescribed, reckoning from the date of the decision appealed against, namely, (1) From a divisional chief's tribunal to a paramount chief's tribunal, within 2 months; (2) From a paramount chief's tribunal to the district commissioner's court, within 4 months; (3) From a paramount chief's tribunal to the provincial commissioner's court, within 6 months.

77. (1) A party desiring to appeal from a paramount chief's tribunal shall first obtain the leave of such tribunal so to do; provided that, if the said tribunal shall have refused such leave, the provincial commissioner's court or the district commissioner's court may nevertheless grant leave to appeal. (2) Leave to appeal from a paramount chief's tribunal shall not be granted unless and until the appellant shall either have paid the costs in such tribunal or shall have deposited therein or in the court to which the appeal is being taken a sum of money sufficient to satisfy

such costs ; and such court shall not grant a stay of execution with respect to the said costs.

The Native Administration Amendment Ordinance, 1935, s. 13, provides as follows :

A Sect. 77 (2) of the Native Administration Ordinance shall be amended by adding at the end thereof the following proviso : " Provided that notwithstanding anything in this section contained the West African Court of Appeal may in its discretion, for the purpose of doing substantial justice between the parties, hear and determine any appeal brought before it on such terms and conditions as it may deem just."

The facts relevant to the present appeal may now be shortly stated. After the judgment of the High Native Tribunal (which is a paramount B chief's tribunal), and within the 6 months required by sect. 76 (3), an order was made (dated Apr. 16, 1929) by the provincial commissioner's court granting to the plaintiff leave to appeal from the decision of the paramount chief's tribunal on certain conditions. The conditions were duly complied with, and on May 15, 1929, the conditional leave was made C final. There is at present no material available to show that any application for leave to appeal had been made to the paramount chief's tribunal, or that, if made, it had been refused. On the one hand, their Lordships were told by counsel for the appellant that the affidavit which was filed in support of the application leading up to the order of Apr. 16, D 1929, and which was not printed in the record before the Board, had been read by him, and that it contained no reference to any application to the paramount chief's tribunal for leave to appeal. On the other hand, their Lordships find it difficult to believe that the commissioner would act under sect. 77 (1) without being satisfied that the conditions precedent E to his being competent to make any order thereunder which are therein specified had been complied with.

However that may be, the plaintiff's appeal was subsequently heard and adjudicated upon in the provincial commissioner's court, with results favourable to the plaintiff. The defendants thereupon appealed to the F West African Court of Appeal. The appeal came on for hearing before SIR DONALD KINGDON, C.J. (Nigeria), SIR PHILIP BERTIE PETRIDES, C.J. (Gold Coast), and ARTHUR WEBBER, C.J. (Sierra Leone), on Apr. 28, 1936. Counsel for the defendants contended (amongst other grounds of appeal) that the provincial commissioner had no jurisdiction to grant G leave to appeal, and that, consequently, his judgment on the hearing of the appeal was without jurisdiction. Counsel for the plaintiffs asked that inquiry be made. The case was accordingly adjourned for a report from the provincial commissioner upon two points—namely, (i) whether there were any proceedings in the native tribunal by way of application H filed for appeal between the date of the original judgment and the date of the order of the provincial commissioner's court giving conditional leave to appeal, and (ii) the delay which had apparently occurred in the case. The report of the commissioner gave an explanation of the delay, but gave no information on the first point.

The adjourned hearing of the defendants' appeal took place on Nov. 16.

1936, when the matter was again adjourned in order to get a reply on the first point from the commissioner. At the further hearing on Dec. 3, 1936, a telegram from the commissioner was read which stated as follows :

No record can be traced in Ada Manche's tribunal [*i.e.*, the native tribunal in question] of any proceedings by way of application for leave to appeal between Jan. 18, 1929, and Apr. 16, 1929.

Counsel for the plaintiff desired to read a letter written by direction of the paramount chief (who, he said, was illiterate) indicating that leave must have been granted, but the court refused to look at it. Judgment was reserved, and was delivered on Dec. 9, 1936.

It was held by ARTHUR WEBBER, C.J., that the proviso introduced by the Native Administration Amendment Ordinance, 1935 (No. 18 of 1935), qualified only sect. 77 (2) of the Native Administration Ordinance, 1927 (No. 18 of 1927), and that since no record could be traced in the paramount chief's tribunal of any application for leave to appeal, the proceedings before the provincial commissioner's court amounted to a nullity. He was also of opinion, however, that, assuming that the proviso applied also to sect. 77 (1), the case was not one for exercising the discretion conferred by the proviso, because the granting of leave by the paramount chief's tribunal was discretionary, and might or might not be granted, and in his (the Chief Justice's) view : " an appeal should not be entertained when this essential step has been omitted." SIR DONALD KINGDON, C.J., concurred in that judgment. SIR PHILIP BERTIE PETRIDES, C.J., concurred with that part of the judgment which dealt with the exercise of discretion under the proviso, but dissented from the construction of the Native Administration Amendment Ordinance, 1935, (No. 18 of 1935), s. 13. He was of opinion that the proviso qualified both subsections of sect. 77, feeling unable to depart from the ordinary meaning of the word " section " in the proviso. In the result, an order was made allowing the defendants' appeal, setting aside the judgment of the provincial commissioner's court and restoring the judgment of the High Native Tribunal.

The appellant now asks His Majesty in Council to discharge that order and to remit the matter for reconsideration by the West African Court of Appeal, on the grounds (i) that the majority misconstrued the proviso in question, (ii) that the court had jurisdiction in the proper exercise of its discretion to hear and determine the defendants' appeal, notwithstanding that the provisions of sect. 77 (1) had not been complied with, (iii) that in their hypothetical use of their discretion as stated in the judgments the judges had proceeded on wrong grounds, and (iv) that in any event the court should have presumed that everything had been duly performed, and that the provincial commissioner's order of Apr. 16, 1929, had been lawfully made, unless and until it had been affirmatively proved that the conditions precedent to the existence of his jurisdiction had not been fulfilled.

The defendants did not appear before their Lordships' Board, so their

Lordships did not have the advantage of hearing the questions argued adversely to the appellant. Nevertheless, they feel no doubt that the matter should not rest where it is. In their opinion, the construction of the Native Administration Amendment Ordinance, 1935, (No. 18 of 1935), s. 13, is, from its language, reasonably plain. The word "section"

A admits of no doubt. It does not in its natural signification mean "subsection," and it certainly cannot mean it in a section which itself uses both words in its opening line. The only possible ground for suggesting the contrary (for the marginal note must be disregarded) is that sect. 13 enacts that "subsect. (2) . . . shall be amended." The
B word "amended" in that context, however, need mean no more than "altered," and is not inconsistent with the alteration introduced into that subsection operating as a qualification of the whole section. Their Lordships agree with the opinion of SIR PHILIP BERTIE PETRIDES, C.J. The Court of Appeal had accordingly jurisdiction to hear and determine
C the appeal on its merits, if, in its discretion, it thought proper to do so. The judges have intimated that, upon the hypothesis of jurisdiction, they would not exercise their discretion in favour of hearing the appeal. To that extent they have hypothetically used their discretion, but they have also stated the grounds upon which they would in this case
D exercise their discretion in the particular way indicated. They say that, since the granting of leave under sect. 77 (1) is discretionary in the paramount chief's tribunal, and might be refused there, an appeal should not be entertained—that is, the discretion given by the proviso should never be exercised—in cases where the essential step of applying
E to that tribunal has been omitted. This view, however, would reduce the operation of the proviso on sect. 77 (1), to which *ex hypothesi* it applies, to a nullity. Their Lordships are accordingly of opinion that the Court of Appeal has, in the present case, exercised the discretion conferred upon it on wrong grounds.

F Their Lordships do not feel able in the present case to act upon the presumption that leave to appeal was asked for and was refused by the paramount chief's tribunal. The fact that the affidavit above-mentioned is silent upon the point is an important fact in this connection. On the other hand, it may be doubtful whether the absence of a record on the
G files of the tribunal is necessarily conclusive. That is a question which can best be answered by those who are familiar with the degree of care and accuracy with which such records and files are kept. It is, however, a matter into which further inquiry might well be made, and upon which any communication authorised by the paramount chief would be of
H value. In the result their Lordships are of opinion that the order appealed from should be discharged and the appeal remitted for rehearing to the West African Court of Appeal. Their Lordships will humbly advise His Majesty accordingly. On such rehearing, if and when satisfied that the provisions of sect. 77 (1) have not been observed, the discretion conferred by the proviso in question should be exercised after a consideration

of the relevant facts subsequent to the original judgment, including, their Lordships would suggest, the question whether the omission to apply to the paramount chief's tribunal for leave to appeal was deliberate or accidental or the result of a *bona fide* mistake. If the court decides to exercise the discretion in favour of hearing the appeal, it will do so on such terms and conditions as it may deem just. The respondents A must pay the costs of this appeal.

Appeal allowed. Order appealed from discharged and appeal remitted for rehearing to the West African Court of Appeal.

Solicitors: *Sydney Redfern & Co.* (for the appellant).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*] B

INLAND REVENUE COMMISSIONERS *v.* DELAMERE (LORD).

[KING'S BENCH DIVISION (Lawrence, J.), **June 7, 9, 1939.**] C

Income Tax—Disposition in favour of children—Settlement—Full discretionary trust to pay income to father, any wife of his, and his issue—No power of revocation—Revocable settlement—Finance Act, 1936 (c. 34), s. 21 (8) (10).

By a settlement made in 1932 the income of certain land was, so far as is here material, to be paid or applied for the benefit of all or any one or more exclusively of the following persons: namely the husband, who was the settlor, his wife or children in such manner generally as the trustees of the settlement in their absolute discretion might think fit. The settlement contained no power of revocation. It was contended that this was a revocable settlement within the meaning of the Finance Act, 1936, s. 21:— D

HELD: (i) the Finance Act, 1936, s. 21 (10) must be construed together with subsect. (8) of that section. E

(ii) this settlement, despite the absolute discretion given to the trustees, provided for payment to the settlor within the meaning of the Finance Act, 1936, s. 21 (8).

(iii) the settlement provided for payment to the settlor during the life of a child of the settlor to or for the benefit of whom any income was or might be payable. F

(iv) the Finance Act, 1936, s. 21, applies to income paid during the year Apr. 6, 1936, to Apr. 5, 1937, and is not limited to commence from the date of the passing of the Act in July, 1936.

[EDITORIAL NOTE.] The real question in this case is whether subsect. (10) of the Finance Act, 1936, s. 21, is to be read as an enactment by itself, or whether it is to be read and construed with subsect. (8) of that section. It is held that the two subsections are to be construed together and, therefore, a settlement including a full discretionary trust to pay income to a father, mother or children in a settlement made before Apr. 22, 1936, is a revocable settlement, although it, in fact, contains no power of revocation. G

AS TO DISPOSITIONS IN FAVOUR OF CHILDREN, see HALSBURY, Hailsham Edn., Vol. 17, pp. 268-270, para. 538; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 575a, 575b.] H

CASE STATED under the Finance Act, 1927, s. 42 (7), and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

In pursuance of articles of agreement entered into on June 13, 1924, by the respondent (then the Hon. Thomas Pitt Hamilton Cholmondeley) prior to his marriage, a deed of settlement was executed on June 20, 1932, under which deed of settlement the respondent, referred to as "the husband," conveyed certain properties referred to as "the settled land" to trustees upon trust during the life of the husband to pay or apply the profits and income of the settled land "unto and for the maintenance and support or otherwise for the benefit of all or any one or more exclusively of the other or others of the following persons for the time being in existence namely: the husband and his wife if any for the time being living and his children and remoter issue for the time being living whether by his present or any future marriage and whether minors or adults and the other persons for the time being interested in remainder or reversion whether absolutely or contingently in the settled land under the limitations hereinafter contained such payment to be made at such times upon such terms and conditions and in such manner generally as the trustees in their absolute discretion and without being liable to account for the exercise of such discretion shall think fit and so that they shall have full power if they so think fit to permit any of the said persons either successively or concurrently to occupy or enjoy personally any part or parts of the settled land upon any terms or conditions which the trustees may think fit to impose but so that such permission shall in any case be revocable at any time and shall not give any right to continued or future enjoyment." In the course of the year 1936/37 (partly before and partly after July 16, 1936), the trustees, acting in their absolute discretion, paid sums for the benefit of the respondent's 3 infant children, amounting in the case of each child to approximately £500 net. They paid practically the whole of the balance of the trust income to the respondent.

The Finance Act, 1936, s. 21 (10), provides as follows:

This section applies to every settlement, wheresoever it was made or entered into and whether it was made or entered into before or after the passing of this Act, except a settlement made or entered into before Apr. 22, 1936, which immediately before that date was irrevocable.

On behalf of the respondent, it was contended (i) that the word "irrevocable" was used in the Finance Act, 1936, s. 21 (10), in its ordinary plain meaning, that the settlement of June 20, 1932, was "a settlement made or entered into before Apr. 22, 1936, which immediately before that date was irrevocable, and that it was, therefore, outside the operation of the section, (ii) that the settlement was a discretionary trust, that its terms did not, within the meaning of the words of subsect. (8), "provide for" any payments to be made to the settlor or his wife, and that it was therefore not covered by subsect. (8), even if, contrary to contention (i), the provisions of subsect. (8) had any bearing on the construction of subsect. (10), (iii) that the terms of the settlement did not provide for payments to the settlor or his wife within the meaning of the words of

subject. (8) "during the life of any child of the settlor," and that the settlement was therefore not covered by subject. (8) even if, contrary to contention (i), the provisions of subject. (8) had any bearing on the construction of subject. (10), and (iv) that, in any event, the Finance Act, 1936, s. 21, could not affect any applications of income made before July 16, 1936, when the Finance Act, 1936, was passed.

On behalf of the Crown, it was contended (i) that the settlement of June 20, 1932, was not an irrevocable settlement within the meaning of the Finance Act, 1936, s. 21, but was a settlement to which sect. 21 applied, (ii) that the settlement provided by cl. 2 for payment of income to, *inter alios*, the settlor or his wife during the life of a child of the settlor to or for the benefit of whom any income might be applicable under the settlement, and (iii) that, in consequence, the settlement of June 20, 1932, was a settlement to which the Finance Act, 1936, s. 21, applied, and that the whole of the sums applied for the benefit of the respondent's children in the course of the year 1936/37 had rightly been included in the computation of the respondent's liability to sur-tax for the year 1936/37.

The commissioners decided as follows :

... that the word "irrevocable" in the Finance Act, 1936, s. 21 (10), was used in its ordinary sense, and was not to be interpreted by reference to the provisions of subject. (8). We accordingly held that the settlement of June 20, 1932, was, within the meaning of subject. (10), "a settlement made or entered into before Apr. 22, 1936, which immediately before that date was irrevocable," and that it was, therefore, not a settlement to which sect. 21 applied. The sums paid for the benefit of the respondent's children during the year 1936/37 should therefore not be treated as the income of the respondent for the purposes of sur-tax for that year.

Accordingly, the assessment of the respondent's total income was reduced to £6,298.

The Crown appealed.

The Solicitor-General (Sir Terence O'Connor, K.C.), J. H. Stamp and Reginald P. Hills for the appellants.

Cyril King, K.C., and F. Grant for the respondent.

LAWRENCE, J. : This case raises certain questions upon the construction of the Finance Act, 1936, s. 21. The commissioners have decided the case in favour of the respondent, on the view that the Finance Act, 1936, s. 21 (10), is not affected by sect. 21 (8), and that the settlement in question in this case was an irrevocable settlement within the meaning of subject. (10), which is to be construed irrespective of subject. (8), and on that view it was clear, in the opinion of the commissioners, that this settlement was irrevocable. The settlement here in question was made in 1932, in pursuance of articles of agreement made in 1924. It provided that during the life of the husband—that is, the respondent—the trustees should stand possessed of the settled land upon trust to pay the proceeds for the benefit of all or any one or more exclusively of the other or others of the following persons for the time being in existence, namely, the husband, his wife or his children, in such manner generally as the trustees in their absolute discretion should think fit. Thus, the settlement pro-

vided that the trustees had absolute discretion to pay to the father, or to any of the children in their absolute discretion. There was no power of revocation in the settlement, so that, in the ordinary sense of the English language, the settlement was not revocable. The question is, however, whether, on the true interpretation of sect. 21, subsect. (10) must not be read along with subsect. (8), and whether the word "irrevocable" in subsect. (10) is not given an extended meaning by subsect. (8). Subsect. (8) provides as follows :

B For the purposes of this section, a settlement shall not be deemed to be irrevocable, if the terms thereof provide—(a) for the payment to the settlor or, during the life of the settlor, to the wife or husband of the settlor for his or her benefit, or for the application for the benefit of the settlor or, during the life of the settlor, of the wife or husband of the settlor, of any income or assets in any circumstances whatsoever during the life of any child of the settlor to or for the benefit of whom any income, or assets representing it, is or are or may be payable or applicable by virtue or in consequence of the settlement. . . .

C The contention of the Crown in this appeal is that the judgment of the commissioners was wrong in construing subsect. (10) irrespective of subsect. (8), and that, if one construes subsect. (10) by the light of subsect. (8), the settlement here in question was not an irrevocable settlement within the meaning of subsect. (10), and, therefore, sect. 21 applies to it. D In my opinion, *prima facie*, subsect. (10) must be read with subsect. (8), because subsect. (8) provides as follows :

For the purposes of this section, a settlement shall not be deemed to be irrevocable. . . .

E Subsect. (10) is, of course, a part of the section. It is contended by counsel for the respondent, however, that the words in subsect. (8) "a settlement shall not be deemed to be irrevocable," being in the future tense, cannot be treated as applicable to the word "irrevocable" in subsect. (10), because subsect. (10) was clearly dealing with the past, in that it excepted settlements made before Apr. 22, 1936, which immediately before that time were irrevocable. On the other hand, counsel for the Crown contended that, as there are only two parts of sect. 21 in which the irrevocability of the settlement is mentioned—namely, subsect. (3) and subsect. (10)—and in both those subsections the past is dealt with, the respondent's argument makes the provision of subsect. (8) altogether nugatory. As counsel for the Crown argued, the words used in subsect. (8) really are descriptive, and are not historic, and might just as well have been : "a settlement shall not be deemed irrevocable." As he said, the point of time considered by subsect. (8) was the point of time when the revenue authorities would be considering whether or not a settlement was then, at that moment, irrevocable, and therefore the words "to be irrevocable" were aptly used. In my opinion, the argument of the Crown on this matter is correct, and there is nothing in the use of the words "shall not be deemed to be irrevocable" instead of the words "shall not be deemed to have been irrevocable" which indicates an intention not to refer in subsect. (8) to the settlements excepted by sub-

sect. (10). I am unable, therefore, to agree with the ground upon which the commissioners have based their decision.

However, there are other grounds which were presented to the commissioners which I must consider. The first is as to the words of subsect. (8) :

... if the terms thereof [of the settlement] provide—(a) for the payment to the settlor. . . .

It was said that here the terms of the settlement did not provide for payment to the settlor, because the matter rested entirely within the discretion of the trustees, and the trustees might never have paid any money to the settlor. But the subsection then goes on to say, if the terms of the settlement provide “for the payment to the settlor of any income or assets in any circumstance whatsoever.” It is said on behalf of the Crown that a circumstance is the exercise of their discretion by the trustees to pay to the settlor, and that it is impossible to say, when the trustees have exercised their discretion and paid the settlor, that they have not done so in accordance with the provisions of the terms of the settlement. In my opinion, the Crown’s argument upon this point is right. I do not think that one can say that one of the circumstances is not the exercise of the discretion of the trustees, and, in that circumstance, the terms of the settlement have provided for a payment to the settlor.

The next point raised on behalf of the respondent is that the settlement in question does not fall within the terms of subsect. (8), because the payment to the settlor provided for by the settlement is not in any way dependent upon the existence of the life of a child, and does not necessarily continue during the life of a child. In my opinion, however, this argument does not hold good, because it is impossible to say that the settlement has not provided for the payment to the settlor in certain circumstances during the life of a child, to whom an income is or may be payable. The trustees had the power under the settlement to pay to the settlor during the life of a child to whom the income might be payable by virtue of the settlement. Such a settlement as that, in my opinion, fulfils the words of subsect. (8). For these reasons, I think, reading subsect. (10) with subsect. (8), as I hold that it must be read, that this settlement is a settlement to which sect. 21 applies.

The only other point which is raised is as to the period between Apr. 6 and the time when the Finance Act, 1936, was passed. It is contended on behalf of the respondent that any income paid during that period would not be affected by sect. 21. In my opinion, there is no substance in this argument, which depends, I think, on the words of sect. 21 (1) :

Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year and not as the income of any other person.

In my view, it is clear that the year of assessment is the year from Apr. 6, 1936, to Apr. 5, 1937, and not from the time in July when the

Finance Act received the Royal Assent until Apr. 5, 1937. Equally, the commencement of the year at which time the child must be an infant and unmarried was Apr. 6, 1936. I am of opinion, therefore, that any income paid to the children during the period between Apr. 6, 1936, and the time when the Finance Act, 1936, received the Royal Assent is affected by

A sect. 21. The appeal will therefore be allowed with costs.

Appeal allowed with costs.

Solicitors: *Solicitor to the Inland Revenue* (for the appellants); *Williams & James* (for the respondent).

B

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

Re BROWN'S SETTLEMENT, PUBLIC TRUSTEE v. BROWN.

[CHANCERY DIVISION (Morton, J.), May 18, 19, 1939.]

C

Powers—Release of power—Release as regards one particular object—Whether fiduciary relationship between donee and objects—Whether distinction between release and covenant not to exercise power.

A settlement executed on Sept. 18, 1895, gave a power of appointment to the survivor of the settlor and his wife exercisable in favour of the issue of the settlor and of his then or any future wife, such issue being born in the lifetime of the settlor, and such appointments to take effect not earlier than the time when such issue should attain 21 years of age or marry. The wife survived the settlor, and then released the power to appoint in favour of a granddaughter, and later by her will made an express appointment in favour of that granddaughter. It was contended that the donee of a power was in a fiduciary relationship to the objects thereof, and could not validly release the power:—

E

HELD: the release precluded the donee from making any subsequent appointment under the power in the granddaughter's favour.

[EDITORIAL NOTE. The judgment in *Re Evered* (1) makes it clear that the donee of a power can covenant not to exercise it in favour of a particular object of the power. The fact that, in dealing with the similar case of a restriction of the power as to part of the property subject to it, SIR H. H. COZENS-HARDY, M.R., had used the words "release or covenant" caused a doubt whether a release was applicable in the case of the exclusion of a particular object. The judgment herein considers all the authorities, and decides that a release in such a case is valid and operates to exclude the particular object from taking any benefit by an exercise of the power subsequent to such a release.

F

AS TO RELEASE OF POWER, see HALSBURY, Hailsham Edn., Vol. 25, pp. 588-592, paras. 1041-1044; and FOR CASES, see DIGEST, Vol. 37, pp. 518-521, Nos. 1092-1116.]

G

Cases referred to:

- (1) *Re Evered, Molineux v. Evered*, [1910] 2 Ch. 147; 37 Digest 520, 1115; 79 L.J.Ch. 465; 102 L.T. 694.
- (2) *Palmer v. Locke* (1880), 15 Ch.D. 294; 37 Digest 508, 1008; 50 L.J.Ch. 113; 43 L.T. 454.
- (3) *Re Little, Harrison v. Harrison* (1889), 40 Ch.D. 418; 37 Digest 519, 1108; 58 L.J.Ch. 233; 60 L.T. 246.
- (4) *Re Radcliffe, Radcliffe v. Bewes*, [1892] 1 Ch. 227; 37 Digest 520, 1111; 61 L.J.Ch. 186; 66 L.T. 363.

H

- (5) *Davies v. Huguenin* (1863), 1 Hem. & M. 730; 37 Digest 520, 1113; 32 L.J.Ch. 417; 8 L.T. 443.
- (6) *Re Somes, Smith v. Somes*, [1896] 1 Ch. 250; 37 Digest 504, 971; 74 L.T. 49; *sub nom.*, *Re Somes, Somes v. Somes*, 65 L.J.Ch. 262.
- (7) *Digges's Case* (1600), 1 Co. Rep. 156b.
- (8) *Green v. Green* (1845), 2 Jo. & Lat. 529; 44 Digest 486, case r.
- (9) *Re Chambers* (1847), 11 I. Eq. R. 518; 37 Digest 517, case n.
- (10) *Stuart v. Kennedy* (1851), 3 Ir. Jur. 305.
- (11) *Hurst v. Hurst* (1852), 16 Beav. 372; 37 Digest 520, 1112; 22 L.J.Ch. 538.

ADJOURNED SUMMONS taken out by the Public Trustee as the present trustee of a settlement, dated Sept. 18, 1895, made between William Wallace Brown (hereinafter called the settlor) of the one part and Charles Franklin Brown of the other part to determine, *inter alia*, whether or not the release, by the donee of a power of appointment, of the power to appoint in favour of one of the objects of the power precluded the donee from exercising the power in favour of that object. The defendants to the summons were Leslie Wallace Brown, the settlor's son, Kathleen Isabel Brown and Irene Ethelwyn Stafford, the settlor's daughters, and Constance Ethelwyn White, a granddaughter of the settlor.

The summons asked (i) whether or not the release operated to preclude Mary Brown from making, under the power of appointment in the settlement, any appointment in favour of Constance Ethelwyn White, (ii) if it did so operate, whether Mary Brown's will operated to appoint one-third of the capital of the trust funds comprised in the settlement to Kathleen Isabel Brown absolutely, a life interest in another third to William Wallace Brown, and a life interest in the remaining third to Irene Ethelwyn Stafford, but had no further or other operation as an appointment of the capital, and (iii) if the release did not so operate, whether Mary Brown's will operated to appoint one-third of the capital of the trust funds to Kathleen Isabel Brown absolutely, a life interest in another to William Wallace Brown and an absolute interest in remainder in that third to Constance Ethelwyn White, and a life interest in the remaining third to Irene Ethelwyn Stafford, but had no further or other operation as an appointment of the capital.

Geoffrey Cross for the Public Trustee.

F. B. Alcock for William Wallace Brown, the settlor.

G. C. Dare for Kathleen Isabel Brown and Irene Ethelwyn Stafford, the settlor's daughters.

E. M. Winterbotham for Constance Ethelwyn White, the settlor's granddaughter.

MORTON, J. : This summons raises an interesting question in regard to the limiting of special powers of appointment which does not appear to be covered by any authority. On Sept. 18, 1895, an indenture of settlement was executed between William Wallace Brown of the one part and Charles Franklin Brown of the other part. It was a settlement of certain securities, and the trusts of the settlement were as follow :

The trustee [Charles Franklin Brown] shall pay the income of the trust funds to

Mary Brown the wife of the said William Wallace Brown during her life for her separate use and so that she shall not have power to dispose thereof in the way of anticipation and after her death shall pay the said income to the said William Wallace Brown if he shall survive her [William Wallace Brown in fact pre-deceased Mary Brown] and from and after the death of the survivor of them the said Mary Brown and William Wallace Brown shall stand possessed of the trust funds in trust for all or any one or more of the issue of the said William Wallace Brown as well by the said Mary Brown as by any future wife (such issue being born in the lifetime of the said William Wallace Brown) at such ages or times, age or time (not being earlier as to any object of this power than his or her age of 21 years or day of marriage) in such shares if more than one and in such manner as the survivor of them the said Mary Brown and William Wallace Brown shall by deed or will appoint and in default of such appointment and so far as any such appointment shall not extend in trust for all the children of the said William Wallace Brown as well by the said Mary Brown as by any future wife who being a son or sons shall attain the age of 21 years or being a daughter or daughters shall attain that age or marry in equal shares and if there shall be only one such child the whole to go to that one child.

Then follows a hotchpot clause and an ultimate trust if there should be no child to take in trust for the settlor, William Wallace Brown, absolutely. William Wallace Brown died on Jan. 1, 1914. He was married once only—namely, to Mary Brown—and there were issue of such marriage 3 children, all of whom were born during the lifetime of William Wallace Brown and have attained the age of 21 years. One of these 3 children—namely, Leslie Wallace Brown—is married, and has one child and no more—namely, the defendant to this summons, Mrs. Constance Ethelwyn White, who was born on May 5, 1909. Accordingly, she was born during the lifetime of William Wallace Brown, and is one of the objects of the special power of appointment given to Mary Brown, in the events which have happened, by the settlement of Sept. 18, 1895. On Aug. 21, 1928, Mary Brown executed what is described in the opening words as a “release.” It is a deed poll, and it begins as follows :

This release is made by Mary Brown of Enfield House, Baring Road, Grove Park, in the county of London, widow.

Then there follow a recital of the material parts of the settlement of Sept. 18, 1895, and a recital of the family of William Wallace Brown and Mary Brown. Then there is a recital that there were issue Leslie Wallace Brown, a son of that marriage born during the lifetime of the said William Wallace Brown and that he had one daughter born—namely, Constance Ethelwyn Brown, who is an infant. Constance Ethelwyn Brown married Mr. White, and is the defendant Constance Ethelwyn White. Then the document proceeds as follows :

And whereas the said William Wallace Brown died on Jan. 1, 1914, and whereas the said Mary Brown has determined to release the power of appointment in favour of the said Constance Ethelwyn Brown which in the events which have happened is vested in her by the settlement Now This Deed Witnesseth that in pursuance of such determination she the said Mary Brown hereby releases the trust funds or the stocks funds shares and securities now or at any time hereafter representing the same from the power of appointment in favour of the said Constance Ethelwyn Brown so vested in her as aforesaid.

Looking only at the terms of this deed, I think that it is in the plainest possible terms a release of the whole of the trust funds from the power of appointment in favour of one particular member of the class of possible objects of the power, and the intention is declared that she, Mary Brown,

the donee of the power, may be absolutely precluded from exercising the power in favour of that particular object of the power.

Mary Brown made her will on Sept. 15, 1937. After certain dispositions, which I need not read, she devised and bequeathed her residuary real and personal estate unto her trustees upon trust for sale and conversion, with power to postpone such sale and conversion, and she directed that out of the clear moneys to arise from such sale and conversion her trustees should pay her debts, funeral and testamentary expenses, and the legacies given by that her will or any legacies given by any codicil thereto, and the duties on all legacies given free of duty. The will proceeded as follows :

... and subject thereto my trustees shall stand possessed of the proceeds of sale calling in and conversion of my said real and personal estate and any money belonging to me at my death and any part or parts of my said real and personal estate for the time being unconverted (hereinafter called my residuary estate) upon the following trusts namely (a) my trustees shall divide my residuary estate into 3 equal shares or parts and shall pay or apply one equal third share or part to my said daughter Kathleen Isabel Brown absolutely (b) my trustees shall stand possessed of another equal third share or part of my residuary estate or of the investment representing the same (hereinafter called the L. W. Brown fund) upon trust for my son Leslie Wallace Brown and his daughter the said Constance Ethelwyn White upon the trust and subject to the conditions hereinafter mentioned (c) my trustees shall stand possessed of the remaining one-third share or part of my residuary estate (hereinafter called the I. E. Stafford fund) upon trust for my daughter Irene Ethelwyn Stafford and her sons upon the trusts and subject to the conditions hereinafter mentioned.

Leslie Wallace Brown, Kathleen Isabel Brown and Irene Ethelwyn Stafford were the 3 children of the marriage of William Wallace Brown and Mary Brown. Clause 6 is in the following terms :

My trustees shall stand possessed of the L. W. Brown fund upon the trusts following that is to say (a) to pay the income thereof to my said son Leslie Wallace Brown during his life and from and after his death (b) upon trust as to both capital and income for his said daughter Constance Ethelwyn White absolutely.

Clause 7 sets out the trusts of the I. E. Stafford fund, which are trusts in favour of Irene Ethelwyn Stafford during her life and after her death upon trust in favour of her two sons. I need not read that at length, but there is the following provision :

And in the further event of both the said sons failing to attain the age of 25 years and dying without leaving issue who attain the age of 21 years then the I. E. Stafford fund shall go and accrue in equal proportions to augment the share of my residuary estate given to my said daughter Kathleen Isabel Brown and the L. W. Brown fund respectively.

Clause 8 provides as follows :

In exercise of the power conferred upon me by a settlement dated Sept. 18, 1935, and made between my husband William Wallace Brown of the one part and Charles Franklin Brown of the other part I hereby appoint that the trust funds shall be held by the trustee or trustees for the time being of the said settlement upon similar trusts *mutatis mutandis* as those declared by cl. 6 and 7 of this my will in respect of my residuary estate in favour of my said daughter Kathleen Isabel Brown my said son Leslie Wallace Brown and his daughter and my said daughter Irene Ethelwyn Stafford and her sons as therein mentioned.

For reasons which I shall state hereafter, I have no doubt that the reference to cl. 6 and 7 of the will was intended to be a reference to cl. 5, 6

and 7 of the will, and that I ought to supply in this case a reference to cl. 5. However, apart altogether from that question, it is to be observed that the testatrix, having in 1928 released the trust fund from the power of appointment in favour of Constance Ethelwyn White, has by cl. 8 appointed that one-third of the settlement fund over which she has this special power of appointment shall be held upon trust to pay the income to Leslie Wallace Brown during his life and from and after his death upon trust as to both capital and income for Constance Ethelwyn White absolutely.

Mary Brown died on Apr. 19, 1938, and the first question which I have to decide is whether or not the release of Aug. 21, 1928, operated to preclude Mary Brown from making any appointment thereafter in favour of the defendant Constance Ethelwyn White under the power of appointment reserved to Mary Brown by the settlement of 1895. I have been referred to the judgments of the Court of Appeal in *Re Evered, Molineux v. Evered* (1), and in particular to the judgments of SIR H. H. COZENS-HARDY, M.R., at pp. 156, 157, and of BUCKLEY, L.J., at p. 161. SIR H. H. COZENS-HARDY, M.R., after dealing with the particular case which he had to decide, proceeded as follows, at pp. 156, 157 :

I think it will be convenient to state shortly some of the propositions which are either elementary and beyond dispute or which have been so settled by authority as to bind us. In the first place, a power to appoint by will cannot be executed by deed. In the second place, a covenant to appoint by will in a particular way cannot be the subject of specific performance or have any legal operation: *Palmer v. Locke* (2). In the third place, an exercise of the power by will is not rendered invalid by reason of the fact that the appointor has covenanted to make such an appointment, there being no other circumstances which might render the appointment invalid apart from the covenant: see *Palmer v. Locke* (2). In the fourth place, a release by the appointor, or a covenant by the appointor not to exercise the power, is not open to objection even though the effect of the release is for the benefit of the appointor. This is expressly enacted by the Conveyancing Act, 1881, s. 52, and decided by this court in *Re Little, Harrison v. Harrison* (3) and *Re Radcliffe, Radcliffe v. Bewes* (4). In the fifth place, such a release or covenant may apply either to the whole of the settled property or to a part only, leaving the power intact as to the rest of the property.

Pausing there, it is manifest that SIR H. H. COZENS-HARDY, M.R., has not dealt with the case which I have to decide, which is a case where the donee of the power purported to release the trust fund from the power of appointment in favour of one of the classes of beneficiaries who were objects of the special power. Then SIR H. H. COZENS-HARDY, M.R., proceeds as follows, at p. 157 :

In the sixth place, the appointor may covenant not to exercise his power in favour of a particular object of the power, and in such case the power could thereafter only be exercised subject to the fetter or limitation thus imposed by the negative covenant.

It is to be noted that, when SIR H. H. COZENS-HARDY, M.R., is dealing with a release of the whole or a part of the settled property, he uses the words "a release" or "a covenant," but, when he is dealing with the case where it is intended to exclude any particular object of the power from any appointment, he uses the word "the appointor may covenant," and Mr. Winterbotham, who has argued that this release is of no effect,

has relied upon that as indicating that, while there may be a release of a power of appointment so far as regards a part of the property, there may not be a release of the power of appointment so far as regards one or more of the objects of the power. It is certainly clear, I think, that SIR H. H. COZENS-HARDY, M.R., is not in any way stating the law in regard to the precise point which I have to decide, but I think his judgment is of great assistance to me, for reasons which I shall state shortly. BUCKLEY, L.J., said in *Evered's* case (1), at p. 161 :

The law is that the donee of a power exercisable only by will cannot by deed appoint or do any act equivalent to appointing the fund or any part of it. He cannot affirmatively by deed affect the fund in any way. But he can by deed negatively tie his own hands as to the manner in which he shall thereafter exercise his testamentary power. He can release his power or covenant that he will never exercise it (which will be equivalent to a release), or can covenant that he will not exercise it so that a defined distribution of the fund or of some part of it shall not result. Thus he may covenant that a particular beneficiary shall not have less than a certain share. In such a case he will retain his power over the whole fund, but will be restricted as to the use of the power. He will remain at liberty to exercise the power by appointing by will to that beneficiary the named sum or share, or by so appointing by will to other beneficiaries as that there shall remain unappointed such a sum as, with the assistance of a hotchpot clause, if any, shall result in the particular beneficiary receiving the named sum or share. But he will by reason of his covenant be precluded from so exercising the power as that his covenant shall be defeated. Any act purporting to be an exercise of the power which will defeat the covenant will be an invalid exercise of the power to the extent to which the covenant will be defeated. Subject to what I have to say as to *Davies v. Huguenin* (5), all the authorities seem to me consistent with this view of the law.

I apprehend that, when BUCKLEY, L.J., says that he may covenant that a particular beneficiary shall not have less than a certain share, it would equally be true to say that he may covenant that a particular beneficiary shall not have any share at all. There again, however, one gets this reference to a covenant when BUCKLEY, L.J., is dealing with cutting out a particular object of the power.

The other cases to which I have been referred are, first of all, *Re Somes, Smith v. Somes* (6), which decided as follows :

The fact that a release of a limited power of appointment will result in a benefit to the donee of the power is not sufficient to make the release fraudulent and void. The doctrines applicable to the fraudulent exercise of a power of appointment do not apply to the release of a power not coupled with a duty.

In that case, CHITTY, J., said, at p. 255 :

... I may say that it appears to me that there is a fallacy in applying to a release of a power of this kind the doctrines applicable to the fraudulent exercise of such a power. There is no duty imposed on the donee of a limited power to make an appointment; there is no fiduciary relationship between him and the objects of the power beyond this, that if he does exercise the power of appointment, he must exercise it honestly for the benefit of an object or the objects of the power, and not corruptly for his own personal benefit; but I cannot see any ground for applying that doctrine to the case of a release of a power; the donee of the power may, or he may not, be acting in his own interest, but he is at liberty, in my opinion, to say that he will never make any appointment under the power, and to execute a release of it.

Thus, it appears that the donee of a power is not in a fiduciary relationship to the class of people who are objects of the power. He can release the power so that he will be precluded thereafter from exercising it in

favour of any of the objects. That being so, it would seem that there is no logical reason *prima facie* for holding that he cannot release the power to a limited extent so as to preclude himself from afterwards making an appointment in favour of one particular object of the power. Mr. Winterbotham has referred me to SUGDEN ON POWERS, 8th Edn., pp. 82, 83, and in particular to the following passage on p. 83 :

It seems to have been doubted whether a power can be released in part ; but there appears to be no sufficient foundation for the doubt.

At first sight, that passage would seem to be helpful, but Mr. Winterbotham has referred me to the case cited, which is *Digges's case* (7), and I think he is right in saying that the observation in SUGDEN ON POWERS probably applies only to a release of a part of the property which is subject to the power from the power of appointment. I cannot found myself upon that passage. Then Mr. Winterbotham has also referred me to *Green v. Green* (8), and in particular to where SUGDEN, L.C., said, at p. 541 :

There is no doubt upon the authorities, that a man having a power, may bind himself not to execute it, save subject to particular restrictions and conditions. He may release it altogether ; or covenant to execute it in a particular manner ; and the court will give effect to such a covenant. Where the donee of the power restricts and limits himself in the execution of it, he must execute it accordingly, or not at all.

Mr. Winterbotham relies on that passage by reason of the contrast in the words : " He may release it altogether ; or covenant to execute it in a particular manner . . ." I do not think, however, that there is any limit upon the generality of the words which follow :

Where the donee of the power restricts and limits himself in the execution of it, he must execute it accordingly, or not at all.

These words may be directed only to a restriction and limitation by covenant, but they are equally applicable as they stand to a restriction or limitation by deed which is not a deed of covenant. I do not think that I need refer to the other cases cited by Mr. Winterbotham of *Re Chambers* (9) and the subsequent case of *Stuart v. Kennedy* (10), as I do not think that they carry the matter any further.

It is clear from *Re Evered, Molineux v. Evered* (1) and the summary of the law which I have quoted that an appointor may covenant not to exercise his power in favour of a particular object of the power, and that in such a case the power could thereafter only be exercised subject to the fetter or limitation imposed by the negative covenant. That being so, I cannot see any good reason why I should hold that the donee of a power may not by deed release the property subject to the power from the power, so far as relates to a particular object, with the intent of precluding himself from appointing in favour of that object. The reason why a covenant can have this effect is stated as follows in FARWELL ON POWERS, 3rd Edn., p. 19 :

The powers to which the rule refers [the rule which appears on p. 16 of the edition] may be affected either by dealings inconsistent with their exercise or by express

or implied release. A covenant or agreement not to execute a power operates, in equity, either entirely or *pro tanto*, as the case may be, as a release of the power.

Hurst v. Hurst (11) and *Davies v. Huguenin* (5) are then cited, and the paragraph proceeds as follows, at p. 19 :

And a covenant may have this effect, although it is merely voluntary.

It appears to me that, if a covenant operates in equity as a release of the power *pro tanto*, and a covenant may have this effect, although it is merely voluntary, there can be no good reason why a donee should not achieve the same result by executing a release which is not in the form of a covenant at all. By the Law of Property Act, 1925, s. 155, it is provided as follows :

A person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power.

In the present case, in the events which have happened, Mary Brown had a power to appoint amongst a number of people, of whom Constance Ethelwyn White was one. She chose to release the property subject to the power from any power she had to appoint in favour of Constance Ethelwyn White. I can see no reason why that document should be invalid, and I propose to hold, in the absence of any authority which counsel have been able to find which decides the matter one way or the other, that the release in question operated to preclude Mary Brown from making any appointment thereunder in favour of the defendant Constance Ethelwyn White.

As to question (ii), after careful consideration I have decided that, cl. 8 of this will, which refers to the trusts declared by cll. 6 and 7 of the will, ought to be read as including a reference also to cl. 5. I think that the present case comes precisely within the principle which is stated as follows in *JARMAN ON WILLS*, 7th Edn., p. 556 :

Where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context.

In the present case, I think that it is abundantly clear that the testatrix intended to insert the number 5 before the number 6 in cl. 8. She refers in cl. 8 to :

... similar trusts *mutatis mutandis* as those declared by cll. 6 and 7 of this my will in respect of my residuary estate in favour of my said daughter Kathleen Isabel Brown my said son Leslie Wallace Brown and his daughter and my said daughter Irene Ethelwyn Stafford and her sons as therein mentioned . . .

If one inserts a reference to cl. 5, that is a perfectly clear and sensible clause. By cll. 5, 6 and 7, trusts were declared in respect of the residuary estate in favour of the persons named. On the other hand, if cl. 5 is omitted, trusts are not declared in favour of the residuary estate at all, but in favour of the L. W. Brown fund and the I. E. Stafford fund, and nothing is given to Kathleen Isabel Brown except an ultimate remainder in one-half of the I. E. Stafford fund in a certain event therein mentioned.

I cannot believe that the testatrix intended cl. 8 to have only this operation so far as Kathleen Isabel Brown was concerned, and, moreover, unless I insert a reference to cl. 5, I think that it is uncertain what shares of the appointed fund are dealt with by cl. 8. For these reasons, I have no hesitation in writing in a reference to cl. 5.

A Solicitors: *Alfred Powell* (for the Public Trustee); *Long & Gardiner* (for the settlor); *Goodman, Brown & Co.* (for the settlor's daughters); *Rochester Pusey & Co.* (for the settlor's granddaughter).

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

Applied. R. v. PORTER. [1949] 1 All E.R. 646.

B

MILNE v. COMMISSIONER OF POLICE FOR CITY OF LONDON.

LEONARD v. COMMISSIONER OF POLICE FOR CITY OF LONDON.

C BOUNDFORD v. COMMISSIONER OF POLICE FOR CITY OF LONDON.

[HOUSE OF LORDS (Lord Maugham, L.C., Lord Atkin, Lord Macmillan, Lord Wright and Lord Porter), April 20, 21, 24, June 27, 1939.]

D Gaming and Wagering—Betting houses—Club—Used by bookmaker—Special user—Betting Act, 1853 (c. 119), s. 3.

E The defendant M. was the manager of a club the members of which came there in the afternoon during the hours when bets are usually made. A servant of a bookmaker had an office directly above the premises occupied by the club, and the members of the club placed their bets with him by telephone. It was not proved that there was any ready-money betting, but it was proved that the servant of the bookmaker came down to the club premises after the result of each race had been declared, whereupon the members either received their winnings or paid their losses. The judge directed the jury that it was not sufficient that the bookmaker's servant should use the club premises as an ordinary member of the club, but that it was necessary that he should have had some special user of the club for the purpose of the betting transactions. He added: "... supposing the bookmaker was present and that what was said on the telephone was said to him in person, then, clearly, the premises would be used for the purpose of making bets." The jury convicted the defendant M., with two other defendants, of conspiring together to keep a betting house, contrary to the Betting Act, 1853, s. 3:—

G HELD: the mere use of the telephone, in the circumstances of this case, was not a sufficient user to establish the offence of using the premises for betting purposes. It was wrong to shift the local situation of the bookmaker from the place in which he was when using the telephone to the club premises. In this respect, the jury were not properly directed, and the convictions must be set aside.

Decision of the Court of Criminal Appeal ([1939] 1 All E.R. 529) reversed.

H [EDITORIAL NOTE. The real point in this case is whether club members using the telephone on the club premises for the purpose of betting with a bookmaker thus cause the bookmaker to be using the premises for betting purposes. In the courts below, the view had been taken that, as the bookmaker had, and was using, a room immediately above the club premises, there was a colourable user of those premises. The House of Lords have rejected this view, and, so long as

the bookmaker is not actually on the club premises, there is no user of the premises.

AS TO USER OF PREMISES FOR PURPOSES OF BETTING, see HALSBURY, Hailsham Edn., Vol. 15, pp. 513-516, paras. 919-921; and FOR CASES, see DIGEST, Vol. 25, pp. 445, 446, Nos. 380-394.]

Cases referred to :

- (1) *Samuel v. Adelaide Club, Ltd.*, [1934] 2 K.B. 69; Digest Supp.; 103 L.J.K.B. 561; 151 L.T. 116. A
- (2) *Powell v. Kempton Park Racecourse Co.*, [1899] A.C. 143; 25 Digest 441, 358; 68 L.J.Q.B. 392; 80 L.T. 538; *affg.*, [1897] 2 Q.B. 242.
- (3) *Hawke v. Dunn*, [1897] 1 Q.B. 579; 25 Digest 437, 339; 66 L.J.Q.B. 364; 76 L.T. 355.
- (4) *Young v. Darrah*, [1929] S.C. (J.) 17; Digest Supp. B
- (5) *R. v. Brown*, [1895] 1 Q.B. 119; 25 Digest 446, 395; 64 L.J.M.C. 1; 72 L.T. 22.
- (6) *R. v. Preedy* (1888), 17 Cox, C.C. 433; 25 Digest 436, 337.
- (7) *R. v. Deaville*, *R. v. Deaville*, *R. v. Simpson*, [1903] 1 K.B. 468; 25 Digest 446, 392; 72 L.J.K.B. 272; 88 L.T. 32.
- (8) *R. v. Crawshaw* (1860), Bell, C.C. 303; 25 Digest 457, 457; 30 L.J.M.C. 58; 3 L.T. 510. C
- (9) *Bradford v. Dawson*, [1897] 1 Q.B. 307; 25 Digest 445, 385; 66 L.J.Q.B. 191; 76 L.T. 54.

APPEALS from an order of the Court of Criminal Appeal (LORD HEWART, L.C.J., CHARLES and HUMPHREYS, J.J.), dated Dec. 19, 1938, and reported [1939] 1 All E.R. 529, affirming convictions for conspiring together to keep a betting house, contrary to the Betting Act, 1853, s. 3. The facts and the arguments are fully set out in the opinion of LORD WRIGHT.

A. T. Denning, K.C., and *H. C. Leon* for the appellants.

J. G. Trapnell, K.C., and *E. Clarke* for the Crown. E

LORD MAUGHAM, L.C.: My Lords, this is an appeal from the decision of the Court of Criminal Appeal of Dec. 19, 1938, in the matter of the convictions of Florence Milne, John Charles Leonard and Howard Boundford, under the Betting Act, 1853. The appeals of those persons to the Court of Criminal Appeal were dismissed, and the persons convicted have each of them presented petitions of appeal, the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance having been duly obtained. F

The facts will be carefully stated by my noble and learned friend LORD WRIGHT, whose opinion I have had the advantage of reading, and I will not detain your Lordships by going through them. It will be sufficient to say that the indictments were based on a conspiracy to keep a betting house, and on the keeping of a betting house contrary to the Betting Act, 1853, s. 1, and one of the appellants—namely, the appellant Boundford—was charged with assisting in keeping a betting house, contrary to the Betting Act, 1853, s. 3. The trial took place before His Honour JUDGE BEAZLEY and a jury. The three appellants were found guilty. The appellant Milne was sentenced to pay a fine of £50, and the appellants Boundford and Leonard were sentenced to pay a fine H

of £25. The appeal to the Court of Criminal Appeal was based on the contention that the judge had given a wrong decision on a question of law, that there had been certain misdirections, and that there had been a miscarriage of justice. In the Court of Criminal Appeal, which consisted of LORD HEWART, L.C.J., and CHARLES and HUMPHREYS, JJ., it was held that there was no ground for interfering with the convictions, and the appeal was dismissed.

The facts may be summarised by saying that the appellant Milne was the tenant of the first floor of No. 72, Bartholomew Close, in the City of London, where she carried on the business of the Byculla Club, which was largely used by the members for the purpose of betting, that the appellant Boundford had assisted her in the management of the club, of which he was a member, and that the appellant Leonard, who was also a member of the club, and made many bets whilst there, was alleged to be aware of an undefined arrangement made between the appellants Milne and Boundford for facilitating the betting of members. The fee for membership was 1s. per annum. The bookmaker, with whom most of the bets by members were made, was one Payne. There were 2 public telephones, and the bets of the members were made with Payne, who did not himself come into the premises for the purpose of betting, by the use of one or other of those telephones. There was no ready-money betting on the club premises. A clerk employed by Payne, one Green, occupied some premises taken in the name of Payne above the club premises. The amounts won or lost by members upon the bets by telephone were communicated by Payne to Green by a telephone to Green's room, and, after the day's racing was over, members settled their accounts with Green in the rooms on the second floor, although on occasions Green came down to the club premises and settled those matters with the appellant Milne.

This summary is not in any way intended to represent the whole of the case against the appellants, for which reference should be made to the judgment of my noble and learned friend LORD WRIGHT, and I also accept and gratefully adopt his statements as to the indictment, the directions given to the jury by His Honour JUDGE BEAZLEY, the decision of the Court of Criminal Appeal, and the two main objections to the summing up. For the purpose of my remarks, I propose to assume that the club premises were used mainly as a betting club, that all three appellants were fully aware of the methods employed for facilitating betting by members, but, on the other hand, that the bets were made on a public telephone with Payne (and sometimes with other bookmakers), who did not come to the club premises for that purpose. I should add that the judge, on the authority of a case which I shall consider later—namely, *Samuel v. Adelaide Club, Ltd.* (1)—was of opinion that the use of the telephone by Payne or others for the purpose of making bets with members was such a use of the club premises as would justify the jury in finding that the position was precisely the same as if the bookmaker was actually

on the premises, or was standing at the door of the club and making bets with the members. The Court of Criminal Appeal adopted the same view. One of the questions which your Lordships have to decide is whether this view, which formed part of the directions to the jury, was correct.

In the present instance, we are dealing with a case where there was "an office, room or other place used for the purpose" of betting taking place with "persons resorting thereto." The rooms, as I have said, were a part of No. 72, Bartholomew Close, and the "persons resorting thereto" were the members of the Byculla Club, which occupied those premises. The question as to what is a place, which in other cases has occasioned a good deal of doubt, does not arise here. The difficult question is in relation to the activities of the bookmaker Payne. It is beyond dispute that betting is not an unlawful act, and that no offence is committed by opening, keeping, or using a club for the purpose of the members betting with each other. To justify a conviction under sects. 1, 3 and 4 of the Act, the place must be opened, kept, or used for one of the two purposes mentioned in sect. 1. The first purpose is the one asserted to apply here. That is, it is said that the place was open, kept, or used for the purpose of certain specified persons betting with (in this case) the members of the club. These persons must be in one or more of the following descriptions or categories, in sect. 1 of the Act :

. . . (1) the owner, (2) occupier, or (3) keeper thereof, or (4) *any person using the same*, or (5) any person procured or (6) employed by or (7) acting for or on behalf of such owner, occupier, or keeper, or person using the same, or (8) of any person having the care or management or (9) in any manner conducting the business thereof . . .

I have supplied the numbers for the sake of clarity, and have italicised the words which are said to apply.

It is alleged for the prosecution that the bookmaker Payne "used" the club rooms for betting with the members who were there, and the question is whether or not he so used them within the meaning of the word "use" in that part of sect. 1 of the Act. To avoid misconception, I will add that the difficulty is not as to the word "used" in the preliminary words "shall be opened, kept, or used," as to which there is no trouble in the present case, but as to the words employed in the description of the first purpose mentioned in the section—namely, ". . . for the purpose of the owner, occupier, or keeper thereof, or any person using the same . . ." In what follows, I am mainly confining my remarks to the meaning of "person using the same" in this part of the section.

The Betting Act, 1853, is certainly not a model of good drafting, and a generation of judges has been puzzled by it. The numerous decisions in regard to the sections cannot altogether be reconciled, but, on the other hand, it is, I think, impossible for this House wholly to disregard them and to start *de novo*. It is, moreover, plain that we are bound to follow the decision of this House in *Powell v. Kempton Park Racecourse*

Co. (2), if, and in so far as, it applies. It may be useful to attempt a simplification of sects. 1, 3 and 4 of the Act. For that purpose, I shall employ the word "place" for the words "house, office, room or other place," the word "used" for "opened, kept, or used," and the words "any designated person" for the nine classes or categories I have above mentioned. With these abbreviations, sects. 1, 3 and 4 would in substance run as follows, the numbers and letters being supplied by me for the sake of clarity :

1. No "place" shall be "used" (1) for the purpose of "any designated person" betting with persons resorting thereto ; or (2) for the purpose of any money or valuable thing being received by or on behalf of "any designated person" (a) as . . . consideration for any . . . promise, or agreement . . . to pay . . . thereafter any money or valuable thing on any event . . . relating to . . . sport, or exercise, or (b) as . . . consideration for . . . the paying or giving by some other person of any money or valuable thing on any such event. . . .
3. Any person who, being the owner or occupier of any "place" or a person using the same, shall "use" the same for the purposes . . . mentioned . . . and any person who being the owner or occupier of any "place," shall knowingly . . . permit the same to be "used" by any other person for the purposes . . . and any person having the care or management of or . . . assisting in conducting the business of any "place" "used" for the purposes . . . shall, on summary conviction . . . be liable to [a fine of £100 or 6 months' imprisonment].
4. Any person, (a) being the owner or occupier of any "place" "used" for the purposes aforesaid, or either of them, or (b) . . . acting . . . on behalf of . . . such owner or occupier, or (c) . . . having the care or management or . . . assisting in conducting the business thereof, who shall receive . . . any money or valuable thing as a deposit on any bet on condition of paying any . . . money . . . on the happening of any event or contingency of or relating to . . . any . . . race, or any fight, game, sport, or exercise, or as or for the consideration for any . . . promise, or agreement . . . to pay . . . money . . . on any such event or . . . (d) giving any acknowledgment . . . on the receipt . . . purporting . . . to entitle the bearer . . . to receive any money . . . on . . . any . . . event . . . shall [be liable to a fine of £50 or 3 months' imprisonment].

Some points on these somewhat artificial provisions are worth noting. Sect. 1 deals with the user of the place for one of two defined purposes, and the user is made a common nuisance and illegal. The sanctions are in sects. 3 and 4, and they both refer to the user of the place for one or other of the purposes mentioned, but the sanctions are more severe under sect. 3 than under sect. 4. It may be noted in passing that, under sect. 3, the persons mentioned in 6 of the categories above-mentioned (the owner, occupier, keeper, the person using, the person managing, and the person conducting the business) are made liable, but it omits the persons procured, and the persons employed on behalf of the owner, etc., and the agent of the manager. Sect. 4 inflicts the lower penalty on all the 9 classes or categories who receive money, etc., as a deposit or on a promise to pay, or who give an acknowledgment or receipt.

As I have already said, the question arises whether Payne was a "person using" the place—namely, the club premises—and, in order to answer this question, it is necessary to determine as a matter of construction what meaning is to be given to the word "using," having regard to its association with the words "owner, occupier, or keeper" of the place. The "person using" may clearly procure or employ, or appoint an agent to bet, but that does not take us very far. It is

also clear (from sect. 3) that a person using the place may use it for the purpose of some person using the place betting with persons resorting thereto, and that the owner or occupier may permit the place to be used by any other person for the purpose of some person using the place betting with persons resorting thereto. The constant repetition of the word "using"—not always, it would seem, in the same sense—is one of the circumstances which has given rise to decisions which are not very easy to reconcile. A

The important case of *Powell v. Kempton Park Racecourse Co.* (2) must now be considered. It did not, of course, arise on a prosecution under the terms of the Betting Act. The matter was brought before this House by means of a friendly action brought by a shareholder in the company against the company, for the purpose of obtaining a decision as to the legality of the betting carried on in an uncovered enclosure of about a quarter-of-an-acre adjacent to the racecourse, to which enclosure the public, including bookmakers, were admitted on payment of a small entrance fee. The injunction was to restrain the use of that part of the company's premises for what was alleged to be an illegal purpose, and the question before this House was whether the purpose for which the enclosure was in fact being used was illegal. If it was, the injunction ought to have been granted. If not, the action ought to have been dismissed. It may be mentioned that there were one or two hundred professional bookmakers accustomed to attend in the enclosure, and from five hundred to two thousand members of the public, most of whom entered the enclosure for the purpose of backing horses with the bookmakers. The bookmakers, who were accompanied by their clerks, did not use any apparatus, such as a desk, stool, umbrella or tent, but particular bookmakers were usually to be found in or near the same part of the enclosure calling the odds to attract backers. This use of the enclosure was known to, and permitted by, the company. B C D E F

The trial judge was LORD RUSSELL OF KILLOWEN, L.C.J., who, upon the authority of *Hawke v. Dunn* (3), gave judgment for the plaintiff and granted the injunction. The Court of Appeal, consisting of LORD ESHER, M.R., and five Lords Justices, allowed the appeal (RIGBY, L.J., dissenting), but in the elaborate judgments the main point was taken to be whether the enclosure to which I have referred could be described as a place within the meaning of the Betting Act, 1853, ss. 1, 3. In this House, the appeal was dismissed, and *Hawke v. Dunn* (3) was overruled. There were only two opinions with full reasons for the decision of the noble Lords, the elaborate opinion of the EARL OF HALSBURY, L.C., and a shorter one by LORD JAMES OF HEREFORD. The former was concurred in as regards the conclusion by six Lords. LORD WATSON stated that he was of the same opinion "for substantially the same reasons." LORD MACNAGHTEN and LORD MORRIS simply concurred in the motion proposed by the EARL OF HALSBURY, L.C. G H

LORD SHAND was of the same opinion. LORD JAMES OF HEREFORD concurred in the proposed motion on the ground that the enclosure was not within the word "place" upon the true construction of the sections already referred to. LORD HERSCHELL, who was present at the hearing, and who saw the opinion of the EARL OF HALSBURY, L.C.,
A but did not live to hear it delivered, had concurred in the views expressed by the EARL OF HALSBURY, L.C. The Lord Chancellor of Ireland, who had assisted at the hearing, said that he also agreed with the judgment proposed to the House. On the other hand, LORD HOBHOUSE and LORD DAVEY delivered dissenting judgments.

B It should be noted at the outset that the EARL OF HALSBURY, L.C., stated that he did not think that the important question was, what is a place? He said that any place which is sufficiently definite and in which a betting establishment might be conducted would satisfy the words of the statute. From his opinion, it seems that in his view
C the true ground on which the case fell for decision was the meaning to be given to the word "using" in the phrase "for the purpose of owner, occupier or keeper thereof, or any person using the same betting with persons resorting thereto," and, after criticising the reasoning of LORD HOBHOUSE and LORD DAVEY, he said, at p. 160 :

D It is not the repeated and designed, as distinguished from the casual or infrequent, use which the employment of that word imports here, but the character of the use as a use by some person having the dominion and control over the place, and conducting the business of a betting establishment with the persons resorting thereto.

A little later he says, at pp. 161, 162 :

E It seems to me clear that the thing against which the enactment is levelled is any place used in the sense I have explained. There must be a business conducted, and there must be an owner, occupier, manager, keeper, or some person who, if these designations do not apply to him, must nevertheless be some other person who is analogous to and is of the same genus as the owner, keeper, or occupier, who bets or is willing to bet with the persons who resort to his house, room, or other place. In this view it is not an offence under this Act of Parliament to allow
F persons to assemble for the purpose of betting with each other; there is, upon this hypothesis, no business being conducted at all. The different betting people, or each individual bettor, is conducting his own business, and doing it in a house used indeed, but only used, just as he might do it on the racecourse or on the high-road. There is no betting establishment at all, and there is no keeper of one.

It is important to note that the EARL OF HALSBURY, L.C., expressed
G strong approval of what he called the "luminous judgment" of A. L. SMITH, L.J., in the Court of Appeal, and I think it is desirable to quote a passage from that judgment which the EARL OF HALSBURY, L.C., must, I think, be taken to be approving. A. L. SMITH, L.J., after an elaborate consideration of the various sections, observed, at p. 276 :

H If a person carries on the business of betting in a place akin to a betting house, whether such place is set up upon a racecourse or elsewhere, then he is guilty of the betting made illegal by the Act, for he is then carrying on the business of a betting house in a prohibited place. There must however be an user such as takes place in the keeping of a betting house or office to be within the Act, and the user of a place in common with mankind in general is not such an user as is contemplated by the Act. It is this user of the prohibited place for the business of betting which is struck at by the Act.

My Lords, I am not able to take the view that this House is bound to accept the language of the EARL OF HALSBURY, L.C., as if the words employed were those of a statute. The passage which I have quoted, which requires that the character of the use must be a use by some person having the dominion and control over the place, is a passage which, I think, cannot be regarded as being expressed in technical language. The word "dominion," as its derivation shows, is one which in strictness indicates that the person has a legal right over the place and can in general exclude others by virtue of that dominion, and I doubt very much whether the word "control" is used in a sense indicating that the person has the right either of legal control or of exclusive control. I am confirmed in my opinion by the view that a succession of judges during the last half-century has given a somewhat wide meaning to the phrase in question. I cannot think that at this date it would be possible to doubt that dominion and control must include dominion or control *de facto*. I agree with the judgment of LORD JUSTICE-GENERAL CLYDE in *Young v. Darrah* (4), when he said, at p. 21.:

I think LORD HALSBURY'S *dictum* must be interpreted, not necessarily to refer to any kind of *de jure* dominion or control, but to include dominion or control *de facto*.

I do not take the view that this means that the user in question is equivalent to the popular sense of the words "making use of," and, if there must be some description of the limitation which, I think, should be placed upon the phrase "person using the same," I prefer the language of A. L. SMITH, L.J., with which, as I have said, I think the EARL OF HALSBURY, L.C., agreed, that the user must be such as takes place in the keeping of a betting house, or, I will add, the carrying on of some kind of betting business in some localised place in order to come within the Act. I doubt whether it is satisfactory to substitute for the words "dominion and control" a reference to permissive user, or an introduction of what I may call the doctrine of permission. Admittedly there was a permissive user in the *Kempton Park* case (2). Nor do I think it is proper to divide the racecourse decisions from those relating to other premises, except in so far as the actual facts of each case may require different considerations arising from those facts. Finally—and this is the decisive feature, as I think, as regards the question with which I am dealing—I can find no words in any part of the Act, including the preamble, which justify the view that the user involves a dominion and control, using the words in the ordinary legal sense.

The question must now be answered, did Payne, by employing public telephones for the purpose of sending and receiving messages to and from the members in the club, so communicate with, or make such an employment of, the club premises that he was "a person using the same" within the meaning of the Act? The answer, if I am right so far, must

depend on whether the user was in a fair sense a user similar or analogous to that which takes place when an owner, occupier, or keeper of a house or place carries on a betting business there with persons resorting to it. Before we answer this question, we should consider what the position would be if Payne had sent letters, or telegrams, through the Post Office

A to members of the club at the club premises. Would that make Payne "a person using the club" within the section? If so, what shall we say if the members of the club take the initiative and ring up the bookmaker, who merely answers by quoting the odds and accepting the bets? Does he "use" the premises if he merely uses a public telephone for

B that purpose? Does a man who speaks to a house, whether near or distant, by means of a public telephone for any purpose "use" the house within the sense of that word in sect. 1 of the Act? If the view I have indicated as to the meaning of the decision in the *Kempton Park* case (2) is accepted, it does not seem to me possible to answer these

C questions in the affirmative, because there is in truth in such cases (assuming there is nothing more to indicate user of the place) no use similar or analogous to that which exists when an owner, occupier, or keeper carries on a betting business in the place.

My Lords, I think we are driven to the conclusion that the owner

D or other persons in control of the place who open, keep or use it for the first purpose mentioned in sect. 1 of the Act are only doing something illegal if the "user" is one which involves that the betting with persons resorting thereto is carried out by the owner, occupier or keeper, or by a person using the place in a popular sense who, if not present

E by himself or some agent or nominee, is permitted to exercise, or in fact exercises, some *de facto* control or some privilege or right over the place in question not being a control, privilege or right possessed by the public at large. Such a conclusion might be arrived at if the owner, occupier or person using the place received a commission on the bets,

F or if he permitted the bookmaker to instal and use a private telephone, or if he allowed the bookmaker to stand outside at an open window and to call out the odds. Other examples might be given of permission, express or implied, extended to the bookmaker in, near, or over the room or place for the purpose of enabling him to make bets with persons

G resorting there which would be special to him, and not given to the public, and clearly allowed to him merely for the purposes of betting. In those cases, the surrounding circumstances may well establish that there is such a user of the place as comes within the grounds of the decision in the *Kempton Park* case (2). I am unable to see in this case

H how the mere use of the public telephone by Payne is sufficient to establish the offence against the appellants. They doubtless knew that Payne was ringing up members, and was being rung up by them, and they doubtless in a sense "permitted" these things, but how could they prevent them if there was a public telephone? Members were doing nothing unlawful by communicating on the telephone and making

bets with a bookmaker. It may be observed in this connection that bookmakers, who send and receive from their offices messages by telephone or telegram which lead to, or which are the evidence of, betting contracts, are not liable under the Act, because the persons with whom they bet are not "persons resorting" to the house, office, room or other place where the bookmakers carry on their business, for resorting must imply a physical presence in or close to the place: *R. v. Brown* (5). To prevent misconception, I should add that "user" does not, in my opinion, necessarily imply a physical presence in or near the place, if the circumstances above referred to exist. A

My Lords, as I have said, the question before the House in the *Kempton Park* case (2) was not concerned with a conviction under the Betting Act, and the EARL OF HALSBURY, L.C., was accordingly not called upon to express any opinion as to the question which should be submitted to the jury in a prosecution under the Betting Act. Your Lordships are not in that fortunate position, but it is not possible to do more than to indicate the general lines on which the jury should be directed in such a case, since the circumstances vary to an almost unlimited extent. C

I will add a few remarks on *Samuel v. Adelaide Club, Ltd.* (1). The plaintiff had leased premises to the defendants on condition that they should not be used for any illegal purpose. The defendants permitted a social club to occupy the premises. They made an arrangement with a bookmaker for facilitating bets by the members with him, and private telephones were installed between the club premises and the bookmaker's office. A commission was paid by him to the club on all bets made by the members through him. The decision by ATKINSON, J., was that the defendants were permitting the premises to be "used" for the purpose of a person (the bookmaker) "procured" by the club, as occupiers of the place, betting with the members as persons resorting thereto. In my opinion, this decision was quite correct. ATKINSON, J., also expressed the view that a person so "procured" by the occupier must be "procured to bet for the benefit of the occupier." That was the fact in the case before him, and it would almost always be a reasonable inference from the circumstance that the occupier had so procured the person in question. It should be noted that the case turned on the phrase: "any person procured or employed by or acting for and on behalf of such owner, occupier, or keeper . . ." It did not turn on the meaning of the words: "or any person using the same." D E F G

My Lords, if the views above expressed are accepted, it must follow that the directions given by the judge on the trial of this case were incorrect, and that the convictions of the appellants cannot stand, and should be set aside. The appeals should, accordingly, be allowed. H

LORD ATKIN: My Lords, the appellants were convicted at the Central Criminal Court at a trial before His Honour JUDGE BEAZLEY

and a jury on indictments which charged them with offences against the Betting Act, 1853. They appealed to the Court of Criminal Appeal under the Criminal Appeal Act, 1907, s. 3 (a)—that is, on grounds of appeal which involve questions of law alone. No leave of the Court of Criminal Appeal was asked, and therefore no question of fact, apart
A from law, is, or can be, raised. The Court of Criminal Appeal dismissed the appeal. The Attorney-General granted his certificate that the decision involved a point of law of exceptional public importance, and that it was desirable that a further appeal should be brought, and thereby enabled the appellants to appeal from the decision to this House
B (sect. 1 (6)). I mention the section in order to support the view that, whatever be the point of law upon which the Attorney-General grants his certificate, once it is granted, there is “a further appeal” to this House upon all the grounds open to the court below. The appeal is not limited to the point of law of exceptional public importance, which,
C indeed, is not specified in the certificate. The result is that this House is armed with all the powers of the Court of Criminal Appeal in like case, and, amongst other matters, may act upon the proviso to sect. 4 (1) if it were to consider that, though the point of law was wrongly decided, no substantial miscarriage of justice has occurred.

D The facts and contentions have been so fully set out in the opinion of my noble and learned friend LORD WRIGHT that I need not recapitulate them. I would only say that I am not impressed by the novel procedure in this case of providing an “agreed statement of facts.” Speaking generally, facts cannot be agreed in a criminal case, and in fact we were
E referred at some length to the evidence as recorded in the shorthand note.

I wish in the first place to call attention to the form of the charges made against the appellants in this case, for it appears to me that some confusion has arisen in the books and in the practice in dealing with the sections of the Betting Act, 1853. Sect. 1 of the Act, in my opinion,
F is directed, by way of suppression of the evil mentioned in the preamble, to making the keeping or using a house, etc., for the purposes mentioned a common nuisance. No penalty is imposed, for the persons responsible would be guilty of a common law misdemeanour. They could only be proceeded against by indictment, and the punishment would be that
G applicable to common law misdemeanour—namely, a fine without limit of amount, with or without imprisonment for a term not exceeding now, I think, 2 years. However, in addition to the remedy by proceedings against a common nuisance, the Act, by sect. 3, constitutes a criminal offence which may be committed by the persons named in
H the section in the manner specified, the obnoxious purposes being taken from sect. 1, which specifies them for the purpose of defining the common nuisance. These offences are only triable summarily before any two justices of the peace, and on conviction the “penalty” imposed may be any sum not exceeding £100, and the offender may also be imprisoned with or without hard labour for any period up to 6 calendar months.

In any case, it is plain that proceedings under the two sections were mutually exclusive. The one constituted an indictable offence, the other a summary offence, and the penalties under the latter had no relation to the former. Before 1879, offences under these two sections could not be tried together. By the Summary Jurisdiction Act, 1879, however, a person charged with a summary offence under which he was liable to imprisonment for a term exceeding 3 months could claim to be tried by a jury, and thereupon the offence was for all purposes to be deemed as regards that person to be an indictable offence. This means that a person charged under sect. 3, if he elects to be tried by a jury, will be committed as though the summary offence were an indictable offence and will be indicted accordingly. The indictment, therefore, will be under sect. 3, and will follow its terms. The ordinary procedure in indictable cases will be followed, however, and the indictment may therefore contain any charge which would be justified on the evidence disclosed in the depositions, and may therefore no doubt contain a charge so supported for causing a common nuisance under sect. 1. The question arose in *R. v. Brown* (5). The accused, having been charged before the justices as the occupier of a house for using it for the purpose of betting with persons resorting thereto, elected to be tried by a jury, and the indictment contained a count making this charge and also other counts charging him with using the house for ready-money betting, and also using the house without alleging that he was occupier. The Court of Crown Cases Reserved held that all these counts were in order, being founded on evidence disclosed in the depositions. HAWKINS, J., at p. 131, incidentally seems to express the construction of sect. 1 to which I have referred. He had already in *R. v. Preedy* (6), at p. 436, expressed the same view :

The object of the first section undoubtedly was to render liable to prosecution for causing a public nuisance any person who, having the control, over any house or other place, used or sanctioned its use for the illegal purposes mentioned. The third section, however, had as it seems to me a very much more extensive object in view, viz., to render liable to pecuniary penalties not only those who being . . . occupiers . . . used . . . but also those who, though not owners or occupiers actually used . . .

In this case, the appellants were, as we are told, charged before the court of summary jurisdiction under sect. 3. They elected to be tried before a jury. When the indictment is looked at, however, it will be found that only in the case of Boundford was any charge made against them under sect. 3. He was charged with assisting in conducting the business of premises used for the purpose of persons using the same betting with persons resorting thereto. All the appellants were charged with conspiracy to effect a common nuisance, on which count alone Leonard was convicted, and Milne was on count 2 charged with the offence of, as occupier, using the premises for the purpose of persons using the premises betting with persons resorting thereto, and, though convicted on counts 1 and 2, was only sentenced on count 2. The offence charged in that count was stated to be "keeping a betting house contrary

to sect. 1," and the count appears to have been clearly defective under that section for not alleging the common nuisance. Green, who was acquitted, was indicted on a count expressed to be based on sect. 1, which was similarly defective. I have examined, I think, all the cases reported as offences under this Act. In all the cases after 1879 but one, A the accused seems to have elected to be tried on indictment, and the indictments quite properly follow the words of sect. 3. In the one case excepted, *R. v. Deaville* (7), there is no indication how the case B would be on proceedings originally taken summarily. In the only case I have found tried on indictment before 1879—namely, *R. v. Crawshaw* (8)—the counts of the indictment based on the Betting Acts plainly alleged a common nuisance. I venture to think that the form of indictment to be found in the present edition of ARCHBOLD ON CRIMINAL PLEADINGS, C p. 1373, which is said to be for keeping a betting house contrary to the Betting Act, 1853, s. 1, is mistaken. It would be correct if expressed to be contrary to sect. 3. If under sect. 1 it omits to charge the common nuisance. The note wrongly imports the penalties from sect. 3. The appellants have not relied on defects in the form of the proceedings D as grounds of appeal, but, inasmuch as this House has the opportunity of reviewing the law on this difficult topic, I have thought it desirable to comment on the proper procedure.

On the merits of the appeal, before discussing the alleged misdirections in point of law complained of, it seems desirable to formulate for oneself E what is the law against which the appellants are said to have offended. No question here arises as to the appellants being owners or occupiers of the premises in question, for in the counts on which they were convicted the material charges were that they *used* the premises for the purpose of persons *using* the premises betting with persons resorting F thereto. There is there the double application of the word "using" which is also to be found in the statute. The charge is not that they used the premises to bet with persons resorting thereto, but that they used the premises for the purpose of a third person—in the present case a known person Payne, a bookmaker—using the premises for betting G with persons resorting thereto. Incidentally, I think that the indictment was clearly faulty for not stating the name of the person alleged to have used the premises for the betting purpose. When known, the particulars should be given. Where unknown, it should be so stated. The precedent in ARCHBOLD ON CRIMINAL PLEADINGS above referred to in H this respect is correct. I am myself not clear that in the section the two "users" are not intended to be the same person, *reddendo singula singulis* to owner, occupier or user, so that the present offence should be covered by the express words in the section :

. . . knowingly or wilfully permitting the same to be used by *any other persons* for the purposes aforesaid . . .

Otherwise, it is not easy to see the necessity for the words quoted. Assuming, however, that the section can be construed in the way suggested by the prosecution, there are at least two essentials of the offence—namely, (i) that a house, office, room or other place is used, and (ii) that the house, office, room or places is used by some person for betting with persons resorting thereto. (i) The present case does not raise the question whether the premises in question are a place within the meaning of the Act, the debated question which is supposed to have been decided in *Powell v. Kempton Park Racecourse Co.* (2). That case seems to be relevant here only in the guidance it gives as to the meaning of using in connection with a house, office, room or place. In the present case, there can be no question as to the premises being a house or room. However, as the argument discussed fully the cases dealing with room or place, and the supposed decision of this House in *Powell's* case (2) that no room or place can fall within the section unless the person using it for betting has dominion or control over the room or place, I think it desirable to say something on that topic. I doubt whether it would be said that the majority of the learned Lords taking part in the decision expressed their assent to the particular words of the EARL OF HALSBURY, L.C., which are relied on, but it seems to me clear that, when he referred to “the character of the use by some person having dominion and control over the place,” he was not confining himself to legal dominion and control. They would be inadequate words to express use by a person having a licence from the true owner. I cannot think, however, that the EARL OF HALSBURY, L.C., meant that, if a bookmaker took possession of an unoccupied house or premises, and there, without the knowledge of the lawful owner, carried on the business of betting with persons resorting thereto, he would not be committing an offence. An apparent dominion and control must be sufficient to satisfy the words of the EARL OF HALSBURY, L.C. It seems to be agreed that the use of an umbrella or stand on an unauthorised racecourse would be the use of a place. Could it be relevant that the use of the umbrella or stand had escaped the attention of the owners of the course? So in the public-house cases I cannot see why, if the bookmaker uses the bar of the public-house for betting in conditions which make it an offence if committed with the permission of the licensee of the premises, exactly similar user fails to be an offence if done without the licensee's permission. The user appears to be the same in both cases. I think, therefore, that *R. v. Deaville* (7) and the cases that followed it were wrongly decided, so far as they laid down the test of permission by the occupier.

(ii) What, then, is the meaning of using the premises for the purpose of betting with persons resorting thereto? It is conceded that it does not apply to members of a club using the club premises and therein betting with other members of the club. It is a different kind of user from that of the persons who resort to it for betting. Further, it seems to me primarily to convey the idea of physical presence at the place.

That does not exclude a secondary meaning which must be discussed, but primarily it has the meaning suggested, and there will hardly be found a case in the books where the ultimate offender "using the premises for betting" was not in fact by himself or his agent on the premises.

A It is on this aspect of the case that things were said in the courts below which have no doubt led to the certificate being given which authorised this appeal. The trial judge used language which perhaps was sufficient to convey to the jury that telephoning was not enough, though he did say :

B You must be satisfied that there was some definite arrangement between Milne and himself that he should be there for that purpose. . . . The intervention of the telephone does not eliminate the user and take the bookmaker outside the forbidden persons.

In the judgment of the Court of Criminal Appeal, however, these words occur, at pp. 533, 534 :

C It was [said in *Samuel v. Adelaide Club, Ltd.* (1), and rejected] that it could not be said that in that case the bookmaker was using the premises, because he was only telephoning to the premises. As ATKINSON, J., pointed out, and as this court is clearly of opinion, it is the right and only view that a person who uses the telephone by permission of the owner of the premises, and who telephones, and continues telephoning the whole afternoon, to the members of the club, is acting in exactly the same way as if he stood at the door of the club and talked to the members and made bets with them. It is his voice which reaches the members at the other end of the telephone, and the oral arrangement which is sufficient to make the bet is made on the telephone in exactly the same way as that in which it would be made if those persons were face to face, instead of being separated, as they were, by a distance of 50 yds.

E The distance of 50 yds. was the distance between the appellant's club and Payne's offices. My Lords, one would agree that, if the bookmaker stood at the door and made his bets verbally with the members, he would be using the premises for betting with the members. It cannot matter whether it was during the whole afternoon or less, and it cannot matter whether he did so with the permission of the owner or not. I entirely disagree, however, with the notion that, when two persons converse on the telephone, they are to be considered, for any purpose of locality, to be both face to face. It seems to me to be an unscientific conception which is plainly wrong. If A in London speaks to B in Manchester, are they face to face in London, or in Manchester, or in both? Moreover, G if the parties are in London and Paris, or Ostend, or New York, is the same proposition true? Also, if A, the bookmaker, when telephoning to B, his customer, at the club, is face to face with him at the club, is B, the customer, face to face with A at the bookmaker's office? If so, is B resorting to the office? I think that, though it is true that bets H can be made by telephone, and may be completed, according to circumstances, either at the club or at the bookmaker's office, the bookmaker while at the office is not using the club, any more than the butcher or the baker is using his customer's residence when orders are given and accepted over the telephone. If this is so, it surely can make no difference that the owner of the premises "permits" the use of the telephone.

The use of the telephone, therefore, does not constitute the bookmaker a user of the premises so that he can be said to be physically there. On the other hand, it is plain that he may be using the premises for betting if an agent is there conducting betting business for him. I also think that he can be said to be using the premises if he has such a degree of control over them that it can be said that the premises are a place where he is carrying on his betting business. I do not think that he need have any legal right of occupation, or that he need be a partner with the actual occupier. Payments made to the occupier or keeper or user of the premises, either by way of commission or otherwise, for the privilege of betting with the persons resorting to the premises, the installation by the bookmaker on the premises of facilities for betting with him, such as a private telephone, or possibly a private letter-box, the provision by the occupier, etc., of the premises of special messengers to convey betting communications, or special facilities given on the premises for the reception of such messengers, special facilities given to the occupier for procuring betting credit for the persons resorting to the premises (as suggested in the present case), might well afford evidence of the question of fact whether the bookmaker was in fact carrying on his business on the premises. Possibly none of these facts would be sufficient of itself, but in every case it must be a question of fact for the jury whether the business was carried on as stated, and a question of law for the judge whether there is any evidence to satisfy the onus of proof which exists in every criminal case. It would have to be pointed out that the business on the premises need not be the whole, or even the principal part, of the betting business. In this respect, it does not seem to be necessary to decide that the occupier had in fact "arranged" with the bookmaker that he should carry on his business there. As I have said, premises can be "used" in contravention of the Act without the permission of the occupier. It will be obvious, however, that the kind of evidence which I have suggested would not usually exist without the consent of the owner.

I have not dealt with the case of the occupier procuring a bookmaker to bet with persons resorting to the premises. The facts suggested above might also be evidence of "procuring"—a question of fact which was decided against the occupier in *Samuel v. Adelaide Club, Ltd.* (1). There was, no doubt, evidence to support such a finding. The only objection to the decision is that it led to the view as to telephoning taken by the Court of Criminal Appeal in the present case. The passage in the judgment is at p. 74. For the reasons I have given, so far as it suggests that the two persons telephoning are in personal contact at the place where the message is received or sent, it seems to me, with respect, to be wrong.

The question, then, to be considered by the tribunal of fact, whether justices or jury, when a charge is made that a bookmaker has used premises for the purpose of betting with persons resorting thereto, is the

same whether the bookmaker has been actually present on the premises or not—namely, has he in fact been carrying on his betting business there, betting with persons resorting thereto? The jury should be warned, and justices should remember, that the fact has to be established beyond reasonable doubt, as in all criminal proceedings.

- A In the present case, I think that all your Lordships are of opinion that the summing up did not sufficiently define the offence, and that the conviction must be quashed on that ground. I will not enumerate the various passages which are assailed by the appellants. It is sufficient to say that, though the judge repeatedly warned the jury that it was not
- B sufficient to show that in fact bets were made by telephone with Payne, yet he repeatedly told them that the offence would be constituted if they were satisfied that in addition an “arrangement” existed between Payne and the appellant Mrs. Milne, but he never defined what that arrangement must be. To give one instance, the judge said :

- C You must be satisfied that there was an arrangement between him, Payne, and Mrs. Milne, that betting should take place.

He then went on to say :

- D If you are satisfied that there was an arrangement—tacit, if you like, but which was perfectly well understood—that it was to the advantage of both of them that Payne should have the connection with the club which he undoubtedly had, that that room upstairs was taken by him or his clerk in furtherance of that arrangement—as I have said to you, it may be a useful pointer to you when you consider what Green said, that it was an arrangement with the club that that room was there—if you are satisfied of that, then the offence has been committed.

- E My Lords, for the reasons I have given, this passage does not appear to me to state at all accurately or definitely the true issue. Standing alone, however, in my view, it would be sufficient to cause the conviction to be quashed, for the judge, no doubt inadvertently, upon the very issue which he had repeatedly told the jury they must find—namely, an arrangement between Mrs. Milne and Payne—told the jury that the
- F statement of Green, which was evidence only against himself, was evidence against Mrs. Milne of that very arrangement. I am myself quite unable to follow the passage in the judgment of the Court of Criminal Appeal which says, at pp. 534, 535 :

- G The expression “it may be a useful pointer to you” is not quite the same as saying—indeed, it is quite a different thing from saying—“I direct you that you may consider that evidence.”

- Surely any member of a jury told that a fact referred to was a pointer towards a conclusion at which he was invited to arrive would think that he was being told that the fact would guide him to the conclusion—in
- H other words, that it was not only evidence, but strong evidence, of the conclusion. At any rate, I know that I should. In view of the unsatisfactory evidence as to the alleged arrangement, this direction might well have led to the conviction. For these reasons, I am clearly of opinion that the appeal should be allowed and the conviction set aside.

LORD MACMILLAN : My Lords, I agree with the opinions which have been expressed by my noble and learned friends LORD MAUGHAM, L.C. and LORD ATKIN, and also with those about to be expressed by or on behalf of my noble and learned friends LORD WRIGHT and LORD PORTER, all of which I have had the advantage of reading in print.

LORD WRIGHT : My Lords, these appeals have been brought under certificates, given under the Criminal Appeal Act, 1907, s. 1 (6), by the Attorney-General, that the decisions of the Court of Criminal Appeal which are appealed from involve points of law of exceptional public importance, and that it is desirable in the public interest that the appeals should be brought. They raise questions under the Betting Act, 1853, which will be described as the Act. The substantial issue may be said to be whether the appellant Florence Milne used or kept certain premises called the Byculla Club, of which she was occupier, for the purpose of one Payne, a bookmaker, using the same for betting with persons resorting thereto contrary to the Act.

Your Lordships were furnished with a statement agreed by all parties to this appeal, prepared for the use of your Lordships subsequently to the decision of the Court of Criminal Appeal. However, transcripts of the shorthand notes of the evidence at the trial were also supplied, and certain passages have been referred to in argument before your Lordships. The agreed statement of facts was as follows :

The appellant Milne at the time of the prosecution was the tenant of the first floor of premises at 72, Bartholomew Close, in the city of London, where for over 4 years she had carried on the business of a club known as the Byculla Club. The appellant Boundford, who is her step-brother, had for the 2 years prior to this prosecution assisted her in the management of the club of which he was also a member.

The club had approximately 600 members, who paid a yearly subscription of 2s. 6d. until Jan., 1938, afterwards reduced to 1s. Meals and refreshments, including alcoholic liquor, could be obtained at the club which opened at 11 a.m. and closed at 7 p.m., and there were facilities for playing darts. The club premises consisted of a club room (in which was a bar), a kitchen, and two other rooms. One of those rooms was extensively used by the club members for making credit bets by telephone, mostly with a bookmaker called Payne, but also with other bookmakers. There were two coin-operated telephones on the club premises, one in the passage and the other in the room above described as extensively used for making bets by telephone. Both of the telephones were rented by the appellant Milne.

The bookmaker, Payne, had his office situated at 43, Little Britain, some 50 yds. from the club premises. Members used to make credit bets with him by telephone from the club to him at 43, Little Britain. About 2 years before this prosecution, Payne, who had been a member of the club for over 3 years, rented 2 rooms on the second floor of 72, Bartholomew Close, immediately above the club premises, and 2 months before the prosecution he engaged a member of the club named Green as a "settlement clerk" at 30s. per week and installed him on the said second floor. The rooms rented by Payne on the second floor had an ordinary post-office telephone in them which was rented by him. There were telephone communications between Payne at 43, Little Britain, and Green on the said second floor for the purpose of informing Green the amounts won or lost on the betting transactions made by telephone from the club with Payne at Little Britain. Green on occasions left the keys of the rooms on the second floor with the appellant Milne for safe custody when he went out, and the appellant Milne was permitted to store bottles in one of them. None of the appellants had any measure of control over Payne's premises on the second floor. There was no ready-money betting on the club premises or on the said second floor.

Observation was kept in the club premises between May 18, 1938, and June 24, 1938. During that time it was established that many members whilst at the club premises made bets by telephone with Payne at his office at 43, Little Britain, and on no occasion was a single stake heard to exceed 10s. The amounts won or lost by members upon these bets were communicated by Payne to Green by telephone to his room on the second floor above the club premises and after the day's racing was over members settled their accounts with Green in the rooms on the second floor, although on occasions Green came down to the club premises and settled with Mrs. Milne the winnings or losses on bets which she had previously made with Payne by telephone to his office at 43, Little Britain.

The appellants Milne and Boundford were present on the premises at all material times and were aware of the arrangements between Green and Payne (described in para. 3 above) to facilitate the payment after the races of losses and winnings upon bets made by the members of the club. The appellant Leonard, who was a member of the club, was also aware of this arrangement. He attended regularly at the club on Mondays to Fridays inclusive during racing hours, and used to make up to 12 bets a day by telephone with Payne at his office at 43, Little Britain, usually for himself but occasionally for somebody other than himself. The appellants Milne and Boundford also made bets by telephone with Payne at his office at 43, Little Britain, both for themselves and for others.

Documents in Green's possession established that the daily stakes in respect of bets made by members of the club occasionally exceeded £40, and averaged £20. During the 3 weeks prior to June 24, the appellant Leonard paid £19 19s. 2d. and the appellant Milne, mainly on behalf of others, paid £25 12s. 5d. During the observation each of the appellants were heard in the club room to refer to the making of bets or to the results of races or bets.

There was no evidence of any express agreement between Payne and any of the appellants that any betting facilities should be provided. It was not, however, denied that all the appellants knew and acquiesced in the method by which the betting and settling was carried on and that it had only so been carried on for 2 months prior to May, 1938.

Payne in his evidence denied that the mere fact that a man was a member of the Byculla Club was a sufficient qualification to open an account with him so that he could telephone his bets from the club. He said that he would meet the member, perhaps at the club, and, if satisfied with him, would accept his bets by telephone from the club. The appellant Mrs. Milne, who had an account, would often, according to the evidence, put through it bets for other members who had no account in their own name, as did also the appellants Leonard and Boundford.

The indictment consisted of five counts. Of these, counts 1, 2 and 3 are now material. Leonard was acquitted on count 4, which charged him with using the premises of the Byculla Club for betting with persons resorting thereto. Green was acquitted on count 5 which charged him with ready-money betting. Count 1 was a charge of conspiracy to commit the offence of using premises for betting, contrary to sect. 1 of the Act. The 3 appellants were convicted under that count, Green being acquitted. The appellant Milne was convicted under count 2 of keeping a betting house contrary to sect. 1 of the Act—namely, that on May 18, 1938, and other days between that date and June 24, 1938, she used the premises of the Byculla Club for the purpose of persons using the premises betting with persons resorting thereto. At the trial, the category of "persons" so using the premises, who were not identified by name in count 1, was limited to Payne, and the count was treated as restricted to him. Boundford was convicted under count 3 of assisting in conducting the business of the Byculla Club as a betting house. The case was tried

before His Honour JUDGE BEAZLEY at the Central Criminal Court on Sept. 27, 1938. The appellant Milne was sentenced under count 2 to pay a fine of £50 and to pay the costs of the prosecution. No sentence was passed on her, under count 1. Boundford was sentenced to a fine of £25 on count 2, and Leonard was sentenced to a fine of £25 on count 1. The appellants appealed against the conviction and sentences to the Court of Criminal Appeal, which on Sept. 19, 1938, dismissed the appeals. The ground of appeal was that the judge had misdirected the jury in respect of certain directions on the law which he gave in his summing-up. Before your Lordships, the appeals have been based on the grounds that the summing-up to the jury contained statements which expressed or involved errors of law, in particular on the construction and effect of the Act as applied to the facts of the case. A B

The judge explained to the jury that credit betting, whether or not by telephone, was not *per se* an offence, but he said that the case made by the prosecution was that the premises of the club were used primarily for betting : C

Member after member comes in and bets and mostly with the same bookmaker—that is, Payne—and . . . here there was a perfectly obvious artifice to try to get out of the Act.

As to sect. 1 of the Act, the judge said that it was necessary for the prosecution to show, not merely that the club premises were in fact used for betting, but also that the owner, occupier or person using the same was using them for the purpose of betting with persons resorting thereto. It will be convenient to set out the most material passages relied on by the appellants as constituting the misdirection. The judge stated that the case for the prosecution was that it was not necessary for Payne, the bookmaker, to be there on the premises, if an important part of the transaction, such as telephoning the bets, was done in the premises in the way that the members did to Payne, Green also being put by Payne in the room above, and that the jury were driven to an irresistible conclusion that there was an arrangement that it should go on. It is not quite clear how much of this was merely a statement of the case for the prosecution, but the judge went on to say as follows : D E F

There is no evidence in this case that Payne paid Mrs. Milne anything for it, but you can see for yourselves, members of the jury, when you get a club of that type, the advantage that the club gets from it. These people come to make bets there. Mrs. Milne knows perfectly well what is going on there, and she knows that they come and make bets, and, as far as the evidence goes, for precious little else. Of course, they can get a glass of beer, or a sandwich, but what is the main purpose for which this place has been used ? If you come to the conclusion that the main purpose for which that club was used was for making bets with Payne, then, members of the jury, you would be entitled, when you look at all the circumstances of the case, if you were satisfied that they irresistibly pointed to the conclusion that Mrs. Milne and Payne, although they may have had no written agreement about the thing and although there was no evidence that there was any oral agreement, no evidence of anything except what actually went on—you may well come to the conclusion that there was a tacit arrangement between these two all along that it would be a very fine thing for the club to get this sort of thing going on there, and that it should be done. Now, members of the jury, if you come to that conclusion, and it is entirely a matter for you, I should then say that Payne, the G H

bookmaker, does come within the category of a person using that club, because he is so identified with the owner or occupier of it as to bring him within the section.

A little later the judge said :

If you think that there was no arrangement between Payne and Mrs. Milne at all, and if you think that this was merely the case of members of a club going to the place and ringing up their bookmakers and placing bets with them, or, if you like, asking Green or Leonard to do so for them, and that there was nothing more to it than that, then there is no offence. . . . If, on the other hand, having weighed all the evidence, you came to the conclusion that this place was used by Mrs. Milne for the purpose of the persons who used it, in the sense that they were identified with her by an arrangement, that it should be so used, for the purpose of betting with the members—if you are satisfied of that, then the offence would be committed.

Later on, there is a further passage in the summing up which is complained of. The judge was stating the two questions to be considered by the jury before they could find a verdict of guilty. The first was whether the premises were in fact used for the purpose of betting. Then the judge stated the second question as follows :

Is Payne a person using the said premises in the sense I have tried to point out to you, for the purpose of persons betting with persons resorting thereto ? That is to say, is he in the description of forbidden persons ? I hope, also, I have made that clear to you, that, in order that he should come within that class, you must be satisfied that there was some definite arrangement, or understood definite arrangement, between Milne and himself, that he should be there for that purpose. There is no doubt that the mere fact that the bets were telephoned does not take the case outside the Act. The intervention of the telephone does not eliminate the user and take the bookmaker outside the forbidden persons. You can see that for yourselves, because what is the position, supposing the bookmaker was present and that what was said on the telephone was said to him in person ? Then, clearly, the premises would be used for the purpose of making bets. The essential parts towards the completion of the bet occurred at the premises.

The judge went on to summarise the material facts, and referred to the constant telephone messages by members of the club, “ most of them to Payne ” and to the room Green had on the next floor under a lease separate from that of the club, and went on as follows :

Members of the jury, it is entirely a matter for you. If you are satisfied that Payne had that room there, and that Payne had these bets with the members—I mean bets in the sense that they were telephone bets—and that it was all in pursuance of an understanding between him and Mrs. Milne, I do not think you will have very much hesitation in coming to the conclusion that those club premises were used consistently for the purpose of bets being made through the telephone with Payne and that Payne was in fact a person using those premises for the purpose of betting with persons resorting thereto.

The judge told the jury to exercise their common sense and knowledge of the world, and proceeded as follows :

But if, on considering the whole of the evidence, you come to the conclusion—and there is plenty of evidence for it—that this place was used for very little else except for the purpose of betting, that that was the major portion of its duty, and that Payne had that office upstairs, with Green officiating there, on an understanding, because it was convenient for him, because there seemed to be a lot of members betting at that club, that they should be able to telephone those bets to Payne, and that he, Payne, should have Green on the spot to make settlements after the race—because it was a business that did earn a bit of commission—if you are convinced of that, then they would be guilty of the offence with which they are charged.

Finally, the judge concluded his direction to the jury on this part of the case as follows :

You have got to be satisfied of two things—that the club premises were used for the purpose of betting, and that Payne was a person using those premises for the

purpose of betting with the persons resorting thereto, in the sense I have endeavoured to describe. The onus of proof is on the prosecution to satisfy you of that. You must be satisfied that there was an arrangement between him, Payne, and Mrs. Milne that betting should take place. Mr. Clarke [for the Crown] in his final speech to you went so far as to say that Mrs. Milne procured Payne to carry on that business. He went so far as that, but I do not think it is necessary that you should go so far as that. If you are satisfied that there was an arrangement—tacit, if you like, but which was perfectly well understood—that it was to the advantage of both of them that Payne should have the connection with the club which he undoubtedly had, that that room upstairs was taken by him or his clerk in furtherance of that arrangement—as I have said to you, it may be a useful pointer to you when you consider what Green said, that it was an arrangement with the club that that room was there—if you are satisfied of that, then the offence has been committed.

The jury were not directed as to what “arrangement,” if there were one, between the appellant Milne and Payne would in law be sufficient to constitute Payne a person who was using the club premises in breach of sect. 1 of the Act. Payne was not charged in the indictment. The facts as to his position seem to have emerged only at the trial.

The Court of Criminal Appeal held that there was no misdirection by the judge, and approved of his summing up. In particular, the court expressed the opinion that a person who uses the telephone by permission of the owner of the premises and makes bets is acting in exactly the same way as if he stood at the door of the club and talked to the members and made bets with them. Hence it was said Payne used the premises just as much as if he made the bets with the members face to face, and thus used the club premises as his betting office, though all the time he stayed on his own premises, for the essential part of the business of making a bet—that is, the acceptance of the bet. The mere fact, it was said, that he used the telephone for that purpose could make no difference to the legal position.

The two main objections to the summing up are (i) that the jury were told that Payne, in receiving at his own office bets telephoned by the members from the club premises, was as much using the club premises as if he were personally present in them, and (ii) that the jury were not instructed what kind of arrangement between Milne and Payne might constitute a user of the club premises by Payne for betting with persons resorting thereto. Both these objections turn on the construction of the essential provision of the Act which forbids the using of any house, office, room or other place for the purpose of the owner, occupier or keeper thereof or any person using the same (in this case, Payne) betting with persons resorting thereto. There is no question that the club premises constituted a “place,” or that the members were persons resorting thereto. The question is, was Payne using the club premises for betting with the members resorting thereto? The two main objections to the summing up thus involve two separate questions, but, though they are distinguishable, and have to be considered apart from each other, they involve under associated aspects the question of law, what is the meaning of “using” the premises for the purpose specified? On the first point, it is said that Payne used the club premises for the purpose of betting with the members resorting thereto, because the members telephoned from

the premises the bets to him and he accepted them by telephone to the members who were in the club. This seems to me to be a distortion of the ordinary meaning of the plain word "using." The people who use the club premises for telephoning the bets are the members, not Payne, who in turn uses his own premises to telephone the answer. The mechanical
A device of the telephone enables people at a distance to speak to each other and hear each other's voices, but it does not change the local position of each speaker, or *per se* make Payne a person using the premises at which, at the moment, he is not. How far the respondent's contention is removed from ordinary parlance becomes obvious when it is
B seen to follow from it that the local tradesman who accepts a telephoned order from my cook is, on that view, using my house and similarly that, when a member of an ordinary social club telephones a bet from the club to his bookmaker, the bookmaker is using the club. In this connection, distance would be immaterial. If a man telephones from England to a
C bank in New York, can he be said to be using the bank premises in New York? If the banker replies, can he be said to be using the premises of his interlocutor? I am for the moment treating this point in abstraction, as indeed it must be considered. Nor can the accuracy of the abstract proposition that a person who telephones to another person who is in other
D premises, is thereby using those premises be affected in any way because the telephoning is repeatedly done, or because it is done in the course of betting. The question which for the moment must be separately examined is simply whether the bookmaker is using the premises to which he telephones. If he is not, then the further and more complex question
E of user of the premises for the purpose of betting with persons resorting thereto does not arise, unless there are further circumstances showing such user. The court has no right to give an unnatural meaning to a plain word because the particular mechanical device was undreamt of at the time of the Act, or because it might be thought that the particular
F operation is within the mischief of the Act. The Act must be construed according to the natural meaning of the language used, all the more so since it is an Act creating a criminal offence. It is for the legislature, if they so desire, to amend the law to meet the new circumstances.

In my opinion, the judge misdirected the jury when he told them
G that the intervention of the telephone did not eliminate the user. He went on to say :

You can see that for yourselves, because what is the position, supposing the bookmaker was present and that what was said on the telephone was said to him in person, then, clearly, the premises would be used for the purpose of making bets.

H The latter statement is correct. The misdirection is in treating the use of the telephone as shifting the local situation of the bookmaker from the place in which he actually was, and which he was using, to the club premises, which not he, but the club member who resorted thereto, was using, quite lawfully, so far as he was concerned, for the purpose of making bets. It follows that I cannot agree with the perhaps clearer statement

to the same effect on this matter made by the Court of Criminal Appeal to which I have referred. If a similar statement is involved in the judgment of ATKINSON, J., in *Samuel v. Adelaide Club, Ltd.* (1), I do not agree with it. That case was a case of "procuring" under sect. 1 of the Act, and is not directly material in this case.

The second objection, which is different in principle, and requires A
separate consideration, turns on the references by the judge in his
summing-up to an "arrangement" between Mrs. Milne and Payne, which
would justify the jury in finding that Mrs. Milne was using the premises
for the purpose of Payne using them for his betting business. I do not
question that there might be an arrangement such as to make Payne a B
person using the premises though he was not personally upon them. For
instance, it might have been proved that Mrs. Milne was simply a nominee
or agent of Payne, and, in that way, Payne, though not physically on
the premises, was using them by her instrumentality in the conduct of
his betting business with the members. Short of so clear a case, the same C
result might be achieved by a less obvious machinery. The actual occupier
of the house, office, room or place might be in partnership with the
bookmaker, or in some other way the premises and the business of betting
done thereon might be conducted by the occupier and the bookmaker
on a joint basis of co-operation in some form or other. I do not attempt D
to imagine all the schemes which ingenuity and desire of gain might
devise to enable the bookmaker to use the premises for his betting
business without appearing to do so. The scheme might depend on a
variety of concurrent circumstances. For instance, if a private telephone
was installed in the club premises, especially if it was done at the cost E
of the bookmaker for use by the members for betting with him, and the
occupier of the premises was paid a commission on all bets telephoned,
these circumstances, perhaps combined with others, might constitute
evidence on which a jury would be entitled to find that the bookmaker
was using the house or place for betting with persons resorting thereto. F
I am not attempting to exhaust the possible permutations and com-
binations of fact which the jury might have to consider. It must be a
question of fact for the jury and for the justices in all the circumstances
of the particular case. The vice of the judge's summing up under this G
aspect is that he gave the jury no guidance as to what they had to con-
sider or what they had to find in order to convict. There was, in fact,
so far as I can see, no evidence of any arrangement between Mrs. Milne
and Payne which would justify the conclusion that the former was using
the premises for the purpose of Payne using them for his betting business.
So far as the evidence went, the club was used, indeed, for betting, but it H
was so used by the members, which was not unlawful. The presence of
Green in the separate premises on the floor above no doubt was a con-
venience in the prompt settlement of bets, but in itself it was legitimate.
Payne gave no special facilities to the members, and Mrs. Milne used the
open account of her own which she had with Payne to make bets for

members with Payne, so far as appears, in order to help the members, not Payne. This is all that appears on the evidence, and is consistent simply with the position that Payne's business was the bookmaker's business which was most largely, though not exclusively, patronised by the club members. The judge never warned them what sort of arrangement they would have to find between Mrs. Milne and Payne before they could find that Payne, though not personally present and conducting a betting business at the club premises, was in fact using the premises for that purpose. All he did was to speak vaguely of Mrs. Milne being identified with Payne, or of an arrangement that it should go on. I do not think that convictions by a jury who were left in such confusion as to the facts of which they must be satisfied before they could convict can be supported. This is a matter larger than, and distinct from, the mere use of the telephone. Moreover, it is a further defect of the summing up that the two matters are confused, and never separately put before the jury by the judge, and thus the defectiveness of the summing up is aggravated.

I have not found much assistance from the cases cited, except in so far as they illustrate such general propositions of law as that it is not unlawful for members of a club to bet with each other, or with book-makers. Some reference was made to the phrase of the EARL OF HALSBURY, L.C., in *Powell v. Kempton Park Racecourse Co.* (2), where he said, at p. 160, that under the Act the illegality depends on :

... the character of the use as a use by some person having the dominion and control over the place, and conducting the business of a betting establishment with the persons resorting thereto.

It is not clear, but I shall here assume that the opinion of the EARL OF HALSBURY, L.C., represented the opinion of the majority of the House. It may be that these words would, if taken in their full and literal significance, at once rule out Payne from the category of a person using the club premises. Equally, however, they would rule out other cases where the offence has been held to have been committed, rightly as I think, such as the case of the bookmaker who used a slag heap on waste land as the place for his betting business, or the workman in Scotland who, without the knowledge or permission of his employers, used the room in which they were allowed to have their dinner to conduct a betting business with his fellow-workmen : *Young v. Darrah* (4). I agree with that decision. A like case would be that of a bookmaker who, without the permission of the publican or any authorised agent of his, carried on his betting business in the bar of the public-house. Permission is, I think, immaterial in cases of this type if in fact the place is used for the prohibited purpose. The offence may be committed by a licensee or by one who is not even a licensee and has no permission from the occupier. I think that the EARL OF HALSBURY, L.C., meant no more by these words than such *de facto* dominion and control as enabled the bookmaker to ply his trade in the place. I do not need further to discuss the much

canvassed case of *Powell v. Kempton Park Racecourse Co.* (2) which does not seem to throw light on the questions discussed here. There is here obviously no question that the club premises were potentially a place within the meaning of the Act. The question whether they were used in the prohibited manner turned on considerations different from those in *Powell's case* (2).

On the questions of procedure discussed by my noble and learned friend, LORD ATKIN, I agree with what he has said. In my opinion, the convictions appealed from cannot stand, and the appeals should be allowed.

LORD PORTER [read by LORD MACMILLAN]: My Lords, your lordships have already heard from the opinion of my noble and learned friend LORD WRIGHT what are the facts proved in evidence, and that the question to be determined is whether the judge's summing up was accurate in point of law or adequate in point of fact. In considering these questions, it is necessary to bear in mind exactly what the charge was, and to eliminate the possibility of a conviction for some other offence. Your Lordships have not analysed the evidence for the purpose of considering whether a conviction for offences other than those for which the appellants were found guilty could have been supported, and no question arises as to whether a charge of opening, keeping or using the Byculla Club for the purpose of a person procured or employed by or acting for or on behalf of the owners betting with persons resorting thereto could have been sustained. If, then, the charge actually preferred alone be considered, the question of the correctness of the summing up and the liability of the appellants may be adequately discussed by confining the attention to count 2 of the indictment—namely, that against Milne for using the premises for the purpose of a person, Payne, using the premises betting with persons resorting thereto. It is unnecessary to consider the question of conspiracy, since, to be convicted of that offence, the parties would still have to conspire to commit the offence charged in count 2.

In the present case no question arises as to whether there was a defined place such as directly arose in *Powell v. Kempton Park Racecourse Co.* (2). The house the user of which is complained of is identified. The charge is of user of the Byculla Club. Nor is there any question whether persons resorted thereto, or whether those persons used the club for betting with Payne. The evidence was ample to prove both facts. The matter to be determined, however, is not whether the club premises were used for betting—as indeed they were—but rather whether Payne used them for betting with the members.

Apart from authority, I should have said that a *de facto* user of the premises must be proved but that a *de jure* user is unnecessary. X may commit an offence by using the place for the purpose of X himself using the premises betting with persons resorting thereto or by using it for

the purpose of Y using the premises betting with such persons, and, in the second case, Y also commits an offence under sect. 1. However, Y, who is himself merely a user, may commit an offence even if the owner or occupier is ignorant of his action, provided that his acts constitute a user of the premises for the purpose of Y betting with persons resorting thereto. In either of the first two cases, X must have some sort of control over the premises. Otherwise, he could not use the premises. So likewise in the second and third cases must Y have some measure of control, and for the same reason, but neither the one nor the other need be an owner, occupier or keeper. A defined place and sufficient control over it to stay there and bet with persons resorting thereto would seem to be enough. However, there must be a place to which people can resort and sufficient occupation of it in fact by some person to enable them to bet with him.

So far as Milne is concerned, the evidence showed that she was tenant of the premises and carried on the club, and the place was opened, kept or used—any of the three words is appropriate—by her. Moreover, it was used for the purpose of Payne betting with persons resorting thereto—namely, the members. Those matters are not in question, but are not enough to support a conviction. In order that the conviction may be affirmed, Payne must, it is true, bet with persons resorting to the premises, but he must also use the premises for that purpose.

What, then, is meant by “user”? No doubt physical presence might be enough, and, though the mere opening of the house for the purpose specified before any actual betting took place would constitute an offence, yet as a rule some evidence of the repetition would be required to show the purpose for which the premises were opened, kept or used. User through a servant or agent including a partner would also, I think, suffice. Some physical control, such as a private telephone connecting other premises with those alleged to be used, might be enough, and some sharing of profits or payment for the privilege of betting with members might constitute a user of the premises, but I doubt if it is possible to find a formula which would fit all cases. The draughtsman of the Act has adopted the word “user,” and, though the wording might have been clearer, I doubt whether any more definite word would express the meaning more accurately. If no general definition is possible, one is thrown back upon a consideration of the evidence in the present case to discover if there was in fact a user by Payne. It is true that he was a member of the club, but there is no evidence that he used the club premises in any different way from the other members, except that Green came down from the room above and settled members’ accounts, either by collecting or paying money. That, however, is not to bet, but to settle bets which have previously been made, and is no offence under the section: *Bradford v. Dawson* (9). It is true also that Milne had a betting account with Payne, and was accustomed to use that account

in order to place bets and at times to pay winnings to, or recover losses from, members, but to do so is *prima facie* to act as agent for the members, and not as agent for Payne, and, though her action constitutes a user of the premises by the members for betting with Payne, it does not constitute a user by Payne for betting with the members. Nor, in my view, is the fact, even if established, that Payne would accept members of the club as clients more readily than outside persons a user of the premises. I doubt whether an expectation, even if justified, or even an arrangement, that members of the club would receive special consideration from an individual bookmaker would, without more, constitute a user of the premises by that individual. However, no such arrangement was proved or found by the jury to exist, and it is not necessary finally to determine this question. A B

Finally, it was suggested, upon the authority of *Samuel v. Adelaide Club, Ltd.* (1), that Payne might be said to be present at the club because Milne or the club members were accustomed to use a particular room in order to make bets with Payne by telephone. The telephone was a public one, and, though the members no doubt used the room for betting, Payne did not. If he were held to have done so, then a bookmaker might be said to use any premises from which his clients communicated with him. It is said, however, that the primary use of the room was for telephoning to, and receiving message from, Payne as a result of which bets were made either on the club premises or at Payne's offices. If an arrangement had been proved between Milne and Payne that the room should be reserved for Payne's purpose, or even partially so reserved, that might amount to a user by Payne, but no such reservation was proved, and, in any case, the summing up was not directed to the existence of any such arrangement, or, indeed, of any defined arrangement. It was to this last aspect of the case that the appellants directed their main attack against the summing up. Some arrangement between Milne and Payne, they acknowledged, might constitute a user of the premises by Payne, but the judge who tried the case never directed the attention of the jury to the kind of arrangement required, but left them to imagine that any arrangement aiming at the encouragement of betting between Payne and members of the club was sufficient. The judge says that Payne need not be there, and adds : C D E F G

... if an important part of the transaction such as telephoning the bets is done on the premises, and you come to the conclusion that it is in pursuance ... of some arrangement between Milne and Payne, that would be sufficient to bring Payne within the description of a person using the same.

Elsewhere he speaks of "an arrangement between Milne and Payne that it" (presumably telephone betting) "should go on," and again of "a tacit arrangement between these two that it would be a very fine thing for the club to get this sort of thing going on there and that it should be done," and of Payne thereby "being identified with the owner." Later he says that there must be some definite arrangement H

between Milne and Payne that Payne should be there for the purpose of betting with members, and adds :

The mere fact that the bets were telephoned does not take the case out of the Act.

Later again, he says, after speaking of the room which Payne had hired
A in the same building as the Byculla Club :

If you are satisfied that Payne had that room there, and that Payne had these bets with the members—I mean bets in the sense that they were telephone bets—and that it was all in pursuance of an understanding between him and Mrs. Milne, I do not think you will have very much hesitation in coming to the conclusion that those club premises were used consistently for the purpose of bets being made
B through the telephone with Payne, and that Payne was in fact a person using those premises for the purposes of betting with persons resorting thereto.

Finally he says :

You have got to be satisfied of two things : that the club premises were used for the purposes of betting, and that Payne was a person using those premises for the purpose of betting with the persons resorting thereto in the sense I have
C endeavoured to describe. The onus of proof is on the prosecution to satisfy you of that. You must be satisfied that there was an arrangement between him, Payne, and Mrs. Milne, that betting should take place. Mr. Clarke [for the Crown] in his final speech to you went so far as to say that Mrs. Milne procured Payne to carry on that business. He went so far as that, but I do not think it necessary that you should go so far as that. If you are satisfied that there was an arrangement—tacit if you like, but which was perfectly well understood—that it was
D to the advantage of both of them that Payne should have the connection with the club which he undoubtedly had, that that room upstairs was taken by him or his clerk in furtherance of that arrangement—as I have said to you, it may be a useful pointer to you when you consider what Green said, that it was an arrangement with the club that that room was there—if you are satisfied of that, then the offence has been committed.

I have quoted in each case from that part of the summing up complained
E of, and at the end I find it difficult to ascertain what the suggested arrangement was. An arrangement ; an arrangement that it would be a very fine thing for the club to get this sort of thing going ; an arrangement that Payne should be there for the purpose of betting, and he might be there though bets were telephoned ; the taking of the upstairs
F room and telephone bets with members in pursuance of an understanding ; an understanding that the members should be able to telephone bets to Payne and Payne should have Green on the spot to make settlements ; a procurement of Payne is not necessary ; it is enough if there was an arrangement that Payne should have the connection with the club which
G he undoubtedly had.

Those are the explanations given of the kind of arrangement required to make Payne a user of the premises. I do not think that they give sufficient guidance. There was no evidence that the upstairs room was taken under an arrangement with Milne except a statement of Green,
H admissible, indeed, against him, but against no one else, yet a jury might possibly have thought that taking the room upstairs was a sufficient arrangement, and would in any case consider telephone betting a contravention of the Act, provided it was done with Milne's connivance.

No case gives any real measure of support to the present decision. The Court of Criminal Appeal base their judgment substantially on the

ground that the judge left to the jury the question whether there was an arrangement between Milne and Payne that Payne should have facilities for betting with members of the club, and that Payne might none the less be using the club though he spoke only through the telephone. They said, at p. 533 :

... a person who uses the telephone by permission of the owner of the premises, and who telephones, and continues telephoning the whole afternoon, to the members of the club, is acting in exactly the same way as if he stood at the door of the club and talked to the members and made bets with them.

For this statement, they quoted *Samuel v. Adelaide Club, Ltd.* (1). That case, however, was decided, so far as the bookmaker was concerned, not on the ground that he was "a person using" the premises, but on the ground that he was "a person procured" by the owner. In the present case, no question of procurement arose, and the jury neither found nor were asked to find that Payne was given any special privileges in the club itself, though, like anyone else, he could telephone or be telephoned to.

Many cases have been decided upon the terms of the section, mostly with reference to the meaning of the word "place," but also with reference to the "user" required to create an offence. Both matters were discussed in *Powell v. Kempton Park Racecourse Co.* (2). That case is primarily a decision as to what is a "place," and determines that Tattersalls' ring, in which many bookmakers congregate, is not a place within the meaning of the Act, inasmuch as no bookmaker, though usually to be found at a particular spot, takes his stand at an individual place, nor has any particular spot been allotted to him. He is free to bet on any part of the course, and, though the owners of the course know that he goes to Tattersalls' ring, yet they do not set aside any particular part of the course for his use. The appeal was heard by 10 Lords of Appeal, and, of those, 4 appear also to have held that "user" was not established unless the person using had some sort of control over the place used, and 2 more concurred in the general result.

The EARL OF HALSBURY, L.C., who delivered the leading opinion, indicated that in his view the person using the place must occupy a position analogous to an owner, occupier or keeper of the place, and that, unless he did so, there was no user such as was contemplated in the wording of the section.

The action was a civil one brought by a shareholder of the defendant company claiming an injunction to restrain that company from opening or keeping the inclosure known as Tattersalls' inclosure for the purpose of persons using the same for the purpose of betting with persons resorting thereto. Its object was to test the correctness of the judgment in *Hawke v. Dunn* (3), which, being decided upon a case stated, was not appealable beyond the Divisional Court. In *Hawke v. Dunn* (3), it was held that a bookmaker who carried on the business of betting in Tattersalls' ring at Hurst Park was guilty of unlawfully using that enclosure

for the purpose of betting with persons resorting thereto, contrary to the Betting Act, 1853, s. 3. *Powell v. Kempton Park Racecourse Co.* (2) in effect overruled that decision. In neither case, however, was any *de jure* user proved—the bookmaker had no more rights in the ring or elsewhere on the course than any other member of the public—and no *A de facto* user was established because no particular place was set aside for, or used by, any particular bookmaker. Moreover, though the result was concurred in by all save two of their Lordships, I do not think that the majority necessarily indorsed the observations of the EARL OF HALSBURY, L.C., in full. In so far as those observations may seem to *B* indicate that the section requires a *de jure* user before an offence can be committed, they must, I think, be read in the light of the matters there in issue. So read, they do not conflict with the interpretation which I venture to think the Act bears. However, whatever their meaning, they give no support to the respondent's contentions in the present *C* case. I would allow the appeal and quash the conviction.

Appeals allowed and convictions set aside.

Solicitors: *Docker, Andrew & Co.* (for the appellants); *Anthony Pickford*, City Solicitor (for the Crown).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

Re A DEBTOR (No. 419 of 1939).

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **June 9, 1939.**]

Bankruptcy—Petition—Service—Substituted service—Debtor proceeding out of jurisdiction and concealing whereabouts—Bankruptcy Rules, 1915, r. 156.

A debtor went to the United States in Apr., 1939, with the intention of proceeding to Canada, having taken a return ticket for the voyage. She owed the petitioning creditors £1,456, and on May 19, 1939, they filed a petition in bankruptcy. As the address of the debtor was not known, application was made to allow substituted service by advertisements in a New York newspaper and a newspaper circulating in Canada. It was not shown that the debtor was still in the United States or in Canada. The registrar held that this was not a case in which such substituted service could be ordered:—

G **HELD:** on the facts of the case, the decision of the registrar was right.

[EDITORIAL NOTE.] The Bankruptcy Rules, 1915, r. 156 provides that where a debtor is keeping out of the way to avoid service, the court may order service to be made by delivery of the petition to some adult male inmate at the last address of the debtor or in such other manner as the court may direct. Having regard to the result of the present proceedings, it would seem that where the debtor has gone out of the jurisdiction and conceals his whereabouts, it is virtually impossible to effect service of the petition.

H AS TO SUBSTITUTED SERVICE OF BANKRUPTCY PETITION, see HALSBURY, *Hailsham Edn.*, Vol. 2, pp. 72, 73, para. 87; and FOR CASES, see DIGEST, Vol. 4, pp. 136-138, Nos. 1259-1275. FOR THE BANKRUPTCY RULES, 1915, r. 156, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 1, p. 744.]

Cases referred to :

- (1) *Re Judgment Debtor* (No. 1539 of 1936), [1937] Ch. 137; Digest Supp.; 106 L.J.Ch. 183; *sub nom.* *Re Judgment Debtor* (No. 1539 of 1936), *Judgment Debtor v. Judgment Creditor*, [1936] 3 All E.R. 767; 156 L.T. 16.
- (2) *Re Urquhart, Ex p. Urquhart* (1890), 24 Q.B.D. 723; 4 Digest 137, 1264; 59 L.J.Q.B. 364.

APPEAL against the refusal of Mr. Registrar PARTON to make an order for substituted service of a bankruptcy petition. The debtor went to the United States in Apr., 1939, with the intention of proceeding to Canada. The petition was filed on May 19, 1939. The petitioning creditors asked that substituted service should be allowed by advertisement in certain London newspapers. This application was refused. The application was then amended by asking that the advertisements should be inserted in the NEW YORK TIMES and in the EVENING CITIZEN, which circulates in Canada. The registrar refused the application on the grounds that such substituted service could not be allowed by reason of the decision in *Re Judgment Debtor* (No. 1539 of 1936) (1), as there was no reason to believe that the advertisements were certain to come to the notice of the debtor. In the absence of a rule dealing with the case where a debtor departs out of the jurisdiction and conceals his whereabouts, a debtor can by so doing evade service. The evidence showed that the debtor had taken a return ticket for the voyage, and it was not shown that the debtor was still in the United States or in Canada.

Cyril Salmon (for the petitioning creditors): The ground on which this application is made is that the debtor has gone out of the jurisdiction in order to evade service. The registrar accepted that view, but held that, by reason of the decision in *Re Judgment Debtor* (No. 1539 of 1936) (1), an order for substituted service could not be made. The registrar overlooked the case of *Re Urquhart, Ex p. Urquhart* (2), which is entirely in favour of the petitioning creditors. The petitioning creditors' debt is for £1,456 for goods supplied. The act of bankruptcy alleged is that the debtor departed out of England with intent to delay or defeat her creditors.

SIR WILFRID GREENE, M.R. : On the facts of this case, the decision of the registrar was the right one. This appeal must be dismissed.

CLAUSON and GODDARD, L.JJ., agreed.

Solicitors : *Trower, Still & Keeling*, agents for *T. M. Sowerby*, Bristol (for the petitioning creditors).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

DOBSON SHIP REPAIRING CO., LTD. v. BURTON.

[HOUSE OF LORDS (Lord Maugham, L.C., Lord Wright and Lord Porter),
May 11, June 27, 1939.]

Workmen's Compensation—Review of compensation—Infant workman—Time within which application must be made—Meaning of "review"—Change in probable earnings at a date later than application but prior to hearing—Workmen's Compensation Act, 1925 (c. 84), s. 11 (2)—Workmen's Compensation Act, 1926 (c. 42), s. 1.

An infant, who was apprenticed under a seven-year contract to the appellant firm of shipbuilders, was injured in an accident on Aug. 31, 1932. A declaration of liability was made by consent. Upon an application for review, heard on Oct. 8, 1937, it was proved that he was earning 30s. per week working for his mother, and, as he had therefore suffered no loss of earning capacity, no order was made. On Dec. 8, 1937, 6 days before the workman attained the age of 21 years and 6 months, his solicitor wrote notifying the appellants of his intention to apply for a further review. At that date, the applicant would still have been under his contract of apprenticeship, had he not been injured, but by Feb. 24, 1938, he would have qualified as a shipwright, and would have been earning about £3 per week. He was at that time earning 35s. per week. It was contended by the employers that the application for review must be bad, on the ground that, at the time it was made, the applicant was earning as much as he would have done had he not been injured, and that, therefore, he had lost nothing:—

HELD: (i) the letter making a definite application for review was sufficient compliance with the statute.

(ii) in the circumstances of the present case, whether the review took place at the time at which the tribunal gave its award or at the time from which that award took effect, the respondent would be enabled to succeed.

Order of Court of Appeal ([1938] 3 All E.R. 410) affirmed.

[EDITORIAL NOTE.] In the Court of Appeal, this case largely rested on the proposition that the date of review was the date at which the change in compensation took effect. Their Lordships have not found it necessary to decide this point, as they hold that the letter written 6 days before the expiration of the statutory period was a sufficient application for review within the Act.

AS TO REVIEW IN CASES OF INFANTS, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 236, 237, para. 559; and FOR CASES, see DIGEST, Vol. 34, pp. 458-460, Nos. 3752-3768. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 339-344.]

Cases referred to:

- (1) *Jones v. Meiros Collieries, Ltd.* (1926), 95 L.J.K.B. 754; 34 Digest 458, 3753; 135 L.T. 469; 19 B.W.C.C. 182.
- (2) *Powell v. Main Colliery Co.*, [1900] A.C. 366; 34 Digest 367, 2971; 69 L.J.Q.B. 758; 83 L.T. 85; 2 W.C.C. 29.
- (3) *Vickers-Armstrong, Ltd. v. Regan*, [1933] 1 K.B. 232; Digest Supp.; 101 L.J.K.B. 657; 147 L.T. 298; 25 B.W.C.C. 211.

APPEAL from an order of the Court of Appeal, dated June 28, 1938, and reported [1938] 3 All E.R. 410, affirming an award made on May 19, 1938, by His Honour JUDGE LANGMAN at Great Grimsby County Court, Lincolnshire, in favour of the respondent. The facts and the arguments are set out in the opinion of LORD PORTER.

Rt. Hon. Sir William Jowitt, K.C., and J. Alun Pugh for the appellants.
A. T. Miller, K.C., and W. K. Carter for the respondent.

LORD WRIGHT : My Lords, the opinion which I am about to read is the opinion of my noble and learned friend LORD PORTER. I am authorised by my noble and learned friend LORD MAUGHAM, L.C., to say that he has read and considered that opinion and is in agreement with it. I may say that I also have had the same advantage, and that I also agree with that opinion. A

LORD PORTER [read by LORD WRIGHT] : My Lords, the dispute in this case arises under the Workmen's Compensation Act, 1925, as amended by the Act of 1926. The question to be determined is what steps are required to be taken by a workman injured before he is 21 years of age in order to obtain a revision of the amount of his compensation so as to entitle him to receive an award based, not on the weekly amount which he was receiving at the date of the accident, but on the amount he would probably have been receiving after he attained his majority. C

The point at issue is best approached by considering the changes to be found in the wording of the various Workmen's Compensation Acts, beginning in 1897 and ending in 1926. Under the original Act, the amount which an injured workman could recover was determined once for all, and was either half the difference between his average weekly wages before disablement and those he could earn afterwards or a lump sum. For the purposes of the present case, the lump sum may be ignored. D

When the Act of 1906 was passed, it was apparently felt that the position of workmen who were under 21 at the time of injury required special consideration. Accordingly by Sched. I (1) (b) it was enacted that, in the case of a minor, the whole average weekly wage, subject to a limit of 10s., should be given as compensation if his average weekly wages were less than £1, and by a proviso to Sched. I (16) it was further enacted as follows : E

Provided that where the workman was at the date of the accident under 21 years of age and the review takes place more than 12 months after the accident, the amount of the weekly payment may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding £1 G

This provision remained in force until the Act of 1923 was passed, when by sect. 24 (6) there was substituted for the proviso to Sched. I (16) to the Act of 1906 the following provision :

Provided that, where the workman was at the date of the accident under 21 years of age, and the review takes place more than 6 months after the accident, and before the workman attains the age of 21 years, the amount of the weekly payment may be increased to such an amount as would have been awarded if the workman had at the time of the accident been earning the weekly sum which he would probably have been earning at the date of the review if he had remained uninjured. H

The result of this change was that the infant workman could claim to have

his compensation increased after 6 months had elapsed from the date of the accident, but the review had to take place before he was 21. At the same time, his revised compensation was no longer limited to £1 per week. Except that it is contained in a substantive enactment, and not by way of proviso, the same wording is adopted in sect. 11 (2) of the Act of 1925.

It is idle to speculate as to what induced Parliament in passing the bill to enact that the review must take place before the workman attained 21, but the result was that in *Jones v. Meiros Collieries, Ltd.* (1) the Court of Appeal held that an infant workman who was injured but did not apply for a review until after he had attained 21 was not entitled to any variation in the amount of his compensation. After, and probably as the result of, this decision, the Workmen's Compensation Act, 1926, again altered the wording, and sect. 11 (1), (2), of the Act of 1925, as amended by the Act of 1926, is now worded as follows :

(1) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum hereinbefore in sect. 9 provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act.

(2) Where the workman was at the date of the accident under 21 years of age and the review takes place more than 6 months after the accident and the application for the review so made before or within 6 months after the workman attains the age of 21 years, the amount of the weekly payment may be increased to such an amount as would have been awarded if the workman had at the time of accident been earning the weekly sum which he would probably have been earning at the date of the review if he had remained uninjured.

In the case under consideration, the facts proved were as follow.

(1) Feb. 23, 1931. The respondent, who was born on June 12, 1916, entered upon a seven-year apprenticeship as shipwright with the appellants. (2) Aug. 31, 1932. The respondent met with an accident causing the loss of his right eye, and 4s. 11d. per week was paid as compensation until Jan. 23, 1933. (3) Jan. 23, 1933. The respondent returned to work. (4) Feb. 10, 1933. The respondent met with a second accident, which caused only slight injuries but induced him to give up his apprenticeship and work as a baker's roundsman for his mother. (5) Oct. 13, 1933. The respondent filed an application for arbitration. (6) Nov. 7, 1933. In the consequent proceedings, the respondent was awarded a declaration of liability only, as he was earning in the employment of his mother as much as, or more than, he would have been earning as a shipwright's apprentice. (7) June 14, 1937. The respondent reached 21 years of age. (8) Aug. 26, 1937. The respondent, thinking that his apprenticeship ended at the age of 21, applied to the county court for a review of his weekly payment. This application was dismissed, without prejudice to the right of the applicant to make a further application for compensation, declaration of liability or otherwise, on the ground that the respondent's wages from his mother amounted to 35s. per week, whereas his wages in his last year as shipwright's apprentice would have been 30s. only. The county court judge accordingly found that the respondent was not then suffering any loss of wages, but that

there was a probability of loss of earning capacity in the future. (9) Dec. 8, 1937. The respondent's solicitors wrote a letter to the appellants in these terms :

I have been instructed by Mr. Frank Burton of 106, Weelsby Street, Grimsby, formerly in your employ as apprentice shipwright, and in respect of whose accident injuries, sustained on Aug. 31, 1932, an award of the Grimsby County Court was made in the form of a declaration of liability on Nov. 7, 1933. A

My client applies for a review, and asks for a weekly payment in respect of his partial incapacity at 18s. a week.

(10) Dec. 14, 1937. Six months had elapsed after the respondent had attained 21 years of age. (11) Feb. 23, 1938. The seven-year apprenticeship would have expired, had it not been terminated as the result of the respondent's accident. B (12) Apr. 26, 1938. The appellants not having acceded to the application for a review and payment of 18s. per week, the respondent applied to the court for an arbitration with respect to review. (13) May 19, 1938. The arbitration was held, and the county court judge found that the respondent's average weekly wages as a shipwright on the termination of his apprenticeship would have been 60s., whereas his earnings were only 35s. C He accordingly made an award of 12s. 6d. per week, starting as from Feb. 24, 1938.

In this state of facts, the appellants maintained that the respondent had not taken the requisite steps to entitle him to a review of the declaration of liability which he had obtained. D The application to review must, they said, be made within 6 months of the respondent attaining 21 years of age, whereas it was not made until Apr. 26, 1938. The solicitor's letter of Dec. 8, 1937, was not, in their submission, an application for review. E The application required by the section was a formal application to the court, and the letter was merely an intimation of the action intended to be taken. Alternatively, they argued that, even if the letter was an application to review within the meaning of the section, still the increased sum to be awarded was that which the workman would probably have been earning at the date of the review, and the date of the review F was the date of the application—namely, Dec. 8, 1937. At that date, his remuneration as an apprentice would still only have been 30s., whereas from his mother he received 35s., and consequently he was entitled to the declaration of liability, and to no more.

The respondent on his part maintained that the letter of Dec. 8 was G an application for review, and was made within 6 months of his attaining 21 years of age, and that the review took place either at the time as from which the increased payment was directed to begin by the county court judge or at the date at which the county court judge's award was made, and that in either case the difference of 25s. in wages was then H in existence.

The determination of these questions depends, it is clear, upon the true construction of the wording of sect. 11 (2) of the Act of 1925, as now amended. *Prima facie*, the words "application for review" may mean either a request contained in a letter or the formal application

prescribed by the Workmen's Compensation Rules, 1926, Form V, and a workman making either within the prescribed 6 months would have complied in time with the statutory obligations. In considering the true meaning of the phrase, however, it is proper to take into consideration the use of the word "application" in the Act generally, and in particular

- A its use in the other parts of the same section. Not much assistance, however, is to be gained by considering its use in other sections of the Act. Some of them—for example, sects. 19 (2), 22, 23 (7) and 49—refer in terms to the court, the sheriff, or registration, or, as in the case of sect. 12 (3) (ii), to a medical referee. Others, such as sect. 7 (3) and B sect. 13, are not necessarily confined to applications to the court, though no doubt they are primarily intended to refer to such an application.

- It is said, however, that, if subsects. (1) and (2) of sect. 11 be read together, it is apparent that subsect. (1) deals with reviews by agreement and subsect. (2) deals only with reviews by the court, and that, if review C in subsect. (2) means review by the court, the application to review must bear the same meaning and be used only of an application to the court. It is not, I think, necessary, for the purpose of the present case, to determine whether the word "review" in subsect. (2) is confined to a review by the court, since, even if it were, I do not think that it follows D that application to review means application to the court or to such other body as has to arbitrate between employer and workman.

The Act was not meant to effect its result by formal methods. Settlement by agreement was the object primarily aimed at. As the EARL of HALSBURY, L.C., said in *Powell v. Main Colliery Co.* (2), at pp. 371, 372:

- E It appears to me that the statute deliberately and designedly avoided anything like technology. I should judge from the language and the mode in which the statute has been enacted that it contemplated what would be a horror to the mind of a lawyer, namely, that there should not be any lawyers employed at all, and that the man who was injured should be able to go himself and say, "I claim so much," and that then he should go to the county court judge and say, "Now please to hear this case, because my employer will not give me what I have claimed." It appears F to me that that is the meaning and construction of the whole statute, and that is what the legislature intended, and that is the reason why it avoided any technical phrases. It strikes one at once that, if anything which to a lawyer's mind would be in the nature of a technical application or a technical commencement of the litigation was intended, the legislature was competent, and had sufficient knowledge to say what it meant.

- G It is true that that case was a decision on the use of the word "claim," and "claim," as may be seen by reference to sects. 2 (3), 6 and 14 of the Act, is used for informal as well as for formal claims, but the case is an authority for the wider proposition that the steps directed by the Act to be taken include applications to the parties as well as formal H applications to the court, and it sets out the principles to be followed where the rights conferred by the Workmen's Compensation Acts have to be considered. What is required is notice to the employer, not an arbitration, and a letter making a definite application for review is, I think, sufficient. Had application to the court been required, it would have been easy to express such a requirement in clear words, as indeed

has been done in the form prescribed (the Workmen's Compensation Rules, 1926, Form V), which speaks of an "application for an arbitration with respect to a review," and not of an "application to review."

The view which I have expressed was that taken by the Court of Appeal in *Vickers-Armstrong, Ltd. v. Regan* (3), a decision which they followed in the present case, and from which the present petition to Your Lordships' house is in substance an appeal. For the reasons I have given, that decision is, I think, right in its conclusion, and in the grounds on which that conclusion is based. A

The second point may, I think, be treated very shortly. Even if the word "review" were used alone, I should not have thought a review had taken place until the award had been pronounced. Where, however, as in sect. 11 as amended, one finds the words "application to review" and "review" used side by side, those expressions are apparently intended to bear different meanings, and it seems impossible to say that each takes place at the same time. The application to review, whether it be formally or informally made, is one thing. The review itself is another. For the purpose of the present case, it is unnecessary to decide whether the review takes place at the time at which the tribunal gives its award or at the time from which that award takes effect. It must be one or the other, and either meaning would enable the respondent to succeed in the present case. I would dismiss the appeal, and by their undertaking the appellants must in any case bear the costs of this appeal. B
C
D

Appeal dismissed with costs.

Solicitors : *Carpenters*, agents for *F. G. & H. E. Smith*, Bradford (for the appellants); *Smith & Hudson*, agents for *Walter West*, Grimsby (for the respondent). E

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

PRATT v. PRATT.

turn of LORD MACMILLAN, at
438, not applied. CHURCH v.
URCH. [1952] 2 All E.R. 441.

ADS (Lord Thankerton, Lord Macmillan, Lord Wright,
Lord Romer and Lord Porter), **May 18, June 29, 1939.**]

- A** *Divorce—Desertion—Letter by deserting spouse asking for meeting to discuss resumption of cohabitation—No reply by other spouse—Whether period of desertion interrupted—Matrimonial Causes Act, 1937 (c. 57), ss. 2, 4.*

A wife had admittedly deserted her husband in 1934. In 1936, the wife wrote asking the husband to meet her and discuss the future, but the husband refused to see her. In 1938, the husband petitioned for divorce on the ground of desertion for a period of more than 3 years immediately preceding the presentation of the petition:—

- B** **HELD:** by refusing to meet his wife when she requested him to do so, the husband caused the desertion to continue, or prevented the possibility of its termination. In the circumstances, therefore, he had failed to discharge the burden imposed upon him by proving desertion without cause for the statutory period.

- C** *Order of Court of Appeal ([1939] 1 All E.R. 503) affirmed.*

[EDITORIAL NOTE. The spouse who claims to have been deserted is not justified in refusing a *bona fide* offer by the other spouse to return to cohabitation. The present case goes a step further, and shows that, where such an offer is made, its terms must be considered and an opportunity given for the matter to be discussed between the parties, unless it is perfectly clear that it is not made in good faith.

- D** **AS TO OFFER TO RETURN,** see HALSBURY, Hailsham Edn., Vol. 10, pp. 657, 658, para. 967; and **FOR CASES,** see DIGEST, Vol. 27, pp. 312-315, Nos. 2901-2929.]

Cases referred to:

- (1) *Macaskill v. Macaskill*, [1939] S.C. 187.
E (2) *Thomas v. Thomas*, [1924] P. 194; 27 Digest 315, 2925; 93 L.J.P. 61; 130 L.T. 716.

APPEAL from an order of the Court of Appeal (SCOTT, MACKINNON and DU PARCQ, L.JJ.), dated Dec. 15, 1938, and reported [1939] 1 All E.R. 503, affirming an order of FINLAY, J., dated July 13, 1938, by which the appellant's petition for divorce on the ground of desertion was dismissed. The facts are fully set out in the opinion of LORD ROMER.

- F** *Noel Middleton, K.C.*, and *J. T. Molony* for the petitioner.
The respondent did not appear and was not represented.

- G** **LORD MACMILLAN:** My Lords, I am authorised by my noble and learned friend Lord THANKERTON to say that he concurs in the opinion which I am about to read, and also in that of my noble and learned friend LORD ROMER, which will be subsequently read.

My Lords, in his printed case the appellant states that:

- H** The respondent deserted the appellant on Aug. 11, 1934, and the question for decision in this appeal is whether that desertion was terminated by the respondent writing two letters dated Sept. 23, 1936, and September 25, 1936, to the appellant suggesting a meeting between the appellant and the respondent.

I take exception to this way of stating the question which your Lordships have to decide.

By the Matrimonial Causes Act, 1937, s. 2, it is enacted that a petition for divorce may be presented on the ground that the respondent :

... has deserted the petitioner without cause for a period of at least 3 years immediately preceding the presentation of the petition.

By sect. 4 it is provided that :

... on a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged ... if the court is satisfied on the evidence that the case for the petition has been proved ... the court shall pronounce a decree of divorce.

The question for decision accordingly is whether the appellant has proved to the satisfaction of the House that for at least 3 years the respondent has without cause deserted him. The fact that the petition is unopposed in no way absolves the appellant from the obligation of discharging the burden of proof imposed on him, or this House from the duty of satisfying itself that the case has been proved.

In my opinion, what is required of a petitioner for divorce on the ground of desertion is proof that throughout the whole course of the 3 years the respondent has without cause been in desertion. The deserting spouse must be shown to have persisted in the intention to desert throughout the whole period. In fulfilling its duty of determining whether, on the evidence, a case of desertion without cause has been proved, the court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. If, on the facts, it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion. In Scotland, where desertion has been a ground for divorce since 1573, the pursuer has always been required to satisfy the court that throughout the period of desertion he or she was ready and willing to receive back the erring spouse. The recent Divorce (Scotland) Act, 1938, in amending the law, has enacted that the court may grant a decree of divorce on the ground :

... that the defender (a) has wilfully and without reasonable cause deserted the pursuer and persisted in such desertion for a period of not less than 3 years ...

The language of the Scottish Act is rather more expanded than that of the English Act, but the two statutes are substantially equivalent. In a case decided by the Second Division of the Court of Session this year, it has been held that the law still requires, as it has always required in the past, that regard should be had to the attitude of mind of the spouse who is seeking the remedy : *Macaskill v. Macaskill* (1). I quote the following passage from the opinion of LORD JUSTICE-CLERK AITCHISON, at p. 193 :

The essential character of desertion remains unchanged. It must be a separation against the will of the spouse seeking the remedy of divorce. Separation of consent, whether express consent or implied from facts and circumstances, is not desertion. The judge therefore must be satisfied that the aggrieved spouse has been willing to fulfil the duties of the marriage throughout the whole statutory period, so that,

if the offending spouse had returned, he or she would have been willing to resume the normal relationships of marriage and continue to adhere, always provided that it was a *bona fide* return, and not merely a device to interrupt the currency of the desertion. The pursuer's state of mind is an essential feature of the inquiry. But when it is said, as it frequently has been said in these cases, that the pursuer must desire the return of the offender, it is not to be taken in too literal a sense as signifying the requirement of a subjective state of mind, a desire in the emotional sense. It is obvious that in a great many cases of desertion, the conduct of the deserting spouse must have been of a kind to destroy affection, and that it would be a mockery for the innocent spouse to pretend that there was or had been a desire for the resumption of the married life. It is enough that a pursuer should be able honestly to say that he or she was all along willing to fulfil the duties of the marriage, and that the desertion was against his or her will, and continued throughout the statutory period without his or her consent.

- A** In quoting these words, I am not to be taken as laying down that the law as to divorce for desertion is in all respects the same in England as it is in Scotland. I quote them rather as expounding an element which, in my view, is inherent in the conception of marital desertion—namely, that the desertion must be persisted in without the consent, and against the wishes, of the deserted spouse.

C In the present case, the respondent undoubtedly deserted the appellant on Aug. 11, 1934. Within the statutory 3 years, however, the respondent wrote to the appellant, on Sept. 23, 1936, proposing a meeting. The appellant replied on the following day that he did not think an interview would serve any useful purpose. In a further letter to the appellant, dated Sept. 25, 1936, the respondent urged the appellant to agree to meet her. In this letter, she wrote as follows :

E I am feeling that, as we are still married, it will be best if we can come together, as it is undoubtedly the only course. My idea in coming to see you was to discuss this, and I suggest that we should meet occasionally and go out together—in short, make a new start, with a view to making a home together in the future.

To this the appellant once more replied that he “did not consider an interview would serve any useful purpose.” Your Lordships have no reason to regard the respondent's letters as insincere. They certainly cannot have been written as a device to interrupt the running of the statutory 3 years, for in Oct., 1936, the Matrimonial Causes Act had not been passed, and the law of England did not then permit of divorce for desertion. In my opinion, FINLAY, J., and the Court of Appeal were right in holding that a husband who had point blank repelled such overtures on the part of his erring wife had failed to prove that she had been in desertion without cause for the statutory period. By the attitude which the appellant took up, he himself caused the desertion to continue, or at least prevented the possibility of its termination. I accordingly concur in the motion that this appeal be dismissed.

H

LORD WRIGHT: My Lords, the opinion which I am about to read is that of my noble and learned friend LORD ROMER. I have considered that opinion in print, and I agree with it. I am also authorised by my noble and learned friend LORD PORTER to say that he too agrees with the opinion of LORD ROMER.

LORD ROMER [read by LORD WRIGHT]: My Lords, on Jan. 1, 1938, the appellant filed a petition for the dissolution of his marriage with his wife, the respondent, alleging that she had deserted him for a period of 3 years and upwards immediately preceding the date of the petition. The only question to be determined upon this appeal is whether that allegation has been proved to be true. A

The facts relevant to the consideration of this question are as follow. The marriage between the appellant and the respondent took place on Sept. 14, 1933. The parties thereafter resided together at Lloyds Bank House, Blandford, until Aug. 11, 1934. On that day the respondent left the matrimonial home, and has never since returned to it. She has never suggested that the appellant has been guilty of any matrimonial offence, and her desertion of him at that time was without any cause which the law can regard as being just or reasonable. During the remainder of 1934, correspondence took place between the parties and between their respective solicitors with a view to bringing about a reconciliation, but the respondent was only prepared to return to the matrimonial home upon conditions that the appellant was justified in rejecting as being unreasonable. The correspondence was renewed by the respondent in June, 1935, when she suggested that the appellant should furnish her with evidence on which she could obtain a divorce: B
C
D

Will you do this gentlemanly thing and give me my freedom, i.e., cause to divorce you?

This grossly improper suggestion on her part was immediately and very rightly rejected by the appellant. From that time until Sept., 1936, no further advance was made by the respondent, and it is plain that between Aug. 11, 1934, and that date, she had been continuously deserting the appellant without cause. In Sept., 1936, however, the respondent began a further correspondence with the appellant, and this correspondence has such a vital bearing upon the question before your Lordships' House that two of the letters must be set out in full. The first of these is dated Sept. 23, and is in the following terms: E
F

Dear Frank,

You will, no doubt, be very surprised to hear from me. I am, however, writing to say I should like to see you, and am thinking about coming over one day next week. Which day suits you best? I suppose Wednesday? Do not imagine I am coming in a hostile spirit. I wish to meet you perfectly agreeably, and trust you will do the same. I wish to have a talk with you, but I am anxious for it to be a perfectly pleasant one. I have had every intention of coming in for some time, but when passing have always been with friends. G

Will you let me know what day suits you, any day bar Tuesday suits me, or if you prefer to meet me anywhere outside, I am perfectly willing.

I am,

Your wife,
Eileen. H

P.S.—I have a nice house here and lovely garden, and you are always quite welcome if you care to come. E.

The only response vouchsafed by the appellant to this friendly overture was a curt note, dated Sept. 24, in which, after acknowledging its receipt, and referring to a letter she had written to him in July, 1935, he stated

that he did not think an interview would serve any useful purpose. On Sept. 25, 1936, however, the respondent made yet one more attempt to bring about a meeting with the appellant. She wrote as follows :

Dear Frank,

A Your letter received. I suppose the letter to which you refer was the one I wrote offering you your freedom, feeling at the time that it was the only way out of an anomalous position. You preferred to remain tied. But a good deal of time has passed since then, and I am feeling that, as we are still married, it will be best if we can come together, as it is undoubtedly the only course. My idea in coming to see you was to discuss this, and I suggest that we should meet occasionally and go out together—in short, make a new start, with a view to making a home together in the future.

B I should like you to come and see me, and have no risk for further hostilities or bitterness which do neither of us any good. Therefore I am sure you will see that it is essential we meet and that the future shall be arranged between us as agreeably as possible. Anything you have to say as regards this, or suggestions you may make I shall be pleased to consider. As I wrote, any day or time, bar Tuesday, will suit me next week. Please let me know.

Eileen.

C This letter was no more successful than the former one. The appellant wrote to his wife that her letter " of the 25th inst." was " to hand " and that he could only repeat what he had said in his letter " of the 24th inst." that he did not consider an interview would serve any useful purpose. I ought, perhaps, to have stated that the appellant is a bank
D manager.

Her husband's very businesslike replies to her two friendly letters seem to have produced in the respondent a not altogether unpardonable feeling of irritation. She referred to them in a letter of Oct. 1, 1936, as his two absurd little notes, and expressed her sorrow that he should have
E no decent feelings :

I was willing to do my part, it was up to you to do yours.

That was the last letter that passed between them. The respondent made no further attempt to bring about a reconciliation or a resumption
F of conjugal relations, and on Jan. 1, as I have already stated, the appellant filed his petition for divorce. The respondent entered an appearance, but filed no answer, and on July 13, 1938, the case came on for hearing before FINLAY, J., as he then was, at the Winchester Assizes as an undefended cause. The appellant was the only witness. He narrated
G the circumstances leading up to the departure of the respondent from the matrimonial home on Aug. 11, 1934, and stated that he had not seen her since that date. With reference to the respondent's letters of Sept. 23, 1936, and Sept. 25, 1936, he said that he had formed the view that she was not honest in the desire which she expressed of wanting to come back
H to him. This was not, however, the view which was taken of the letters by FINLAY, J. He thought that it was impossible to say after these letters that she was still guilty of the matrimonial offence of desertion. He accordingly dismissed the petition.

The appellant thereupon took the matter to the Court of Appeal, where it was heard on Dec. 15, 1938, by SCOTT, MACKINNON and DU

PARCQ, L.JJ. SCOTT, L.J., in whose judgment the other Lords Justices concurred, after reading the letters of Sept., 1936, said, at p. 504 :

We have considered the cases cited, and we do not think that they establish any legal principle applicable to the question which we have to decide—namely, whether or not the husband can say that the wife still deserted him without cause after he had refused even to see her and discuss their relations. In my opinion, it is impossible to say that FINLAY, J., decided the matter wrongly.

When husband and wife are living apart in circumstances constituting desertion of the one by the other, and when the deserting spouse writes to the other and asks for an interview to discuss the position, it is the duty of the party receiving that request at least to meet the deserting spouse, and give him or her an opportunity of saying what he or she wishes. In my opinion, the judge was right. . . .

The appeal was accordingly dismissed. The appellant, however, managed to obtain leave from the court to bring the matter before this House, and the present appeal is the result.

My Lords, it is plain from this narrative of the facts that, if the letters of Sept. 23, 1936, and Sept. 25, 1936, had never been written, the appellant would have been entitled to the decree which he sought, for he himself would have been under no legal obligation to take any steps to induce the respondent to return. Can it be said, however, in view of those letters, that the respondent thereafter was continuing to desert her husband? For the purpose of assisting your Lordships in answering this question, counsel for the appellant called your Lordships' attention to several reported cases in which the subject of desertion by one of the spouses of the matrimonial home has been considered by the courts. These were, no doubt, the authorities which had been cited to the Court of Appeal and were referred to by SCOTT, L.J., in the passage in his judgment to which I have already referred. I agree with him in thinking that they do not lay down any principle of law applicable to the question which we have to decide, for, as was pointed out by WARRINGTON, L.J., in *Thomas v. Thomas* (2), at p. 200, approving a statement made in the Divisional Court :

. . . the question whether desertion continues is one of fact to be determined in view of the circumstances of the particular case . . .

That was a case where a husband shortly after committing the matrimonial offence of desertion had written to his wife offering to resume cohabitation. The court, however, came to the conclusion that the husband's offer was not a genuine one. His desertion was accordingly treated as continuing, notwithstanding the offer.

My Lords, in the present case, I can find nothing which even remotely suggests that the offer of the respondent contained in the two September letters was other than genuine. The appellant, indeed, concedes that the writing of the letters was a spontaneous act on the part of the respondent, and not one done upon the advice or at the instigation of her legal advisers. Nor does he suggest that the letters were written for the purpose of being used by her in any legal proceedings. All that he could say about the letters, when giving his evidence, was that he took the view at the time that the respondent was not "honest in her desire to come back." By this, I think, he must have meant that she only desired to come back

on conditions to which he could not be expected to submit. However, there is no word in either letter to justify any such suspicion on his part. Nor should I have expected there to be, for she had tried to impose such conditions in the correspondence in 1934. Her effort had failed at that time, and there was no reason to suppose that a similar effort would
A succeed in 1936. The letters, in my opinion, indicate a genuine and honest desire to see and discuss matters with her husband, in the hope that this would result in their "coming together," in their making "a new start," and "a home together in the future." It is idle to suggest that she had it in her mind to impose conditions which she knew would
B effectually prevent any of these results being attained.

It was indeed at one time contended by counsel for the petitioner that mere letters, however sincere, could never put an end to the respondent's desertion. Nothing, he argued, short of an actual return to the matrimonial home, could have this effect. My Lords, I find myself wholly
C unable to accede to this contention. It would, in my opinion, be quite unreasonable to hold that the respondent, guilty though she was of the serious matrimonial offence of desertion, should be expected to present herself at her husband's door without any knowledge of how she would be received, and therefore at the risk of being subjected to the indignity
D of having admission refused her by her husband or by one of his servants. It is, moreover, to be remembered that by Sept., 1936, the respondent had been living away from her husband for over 2 years. In such circumstances, there would necessarily be, apart altogether from other matters, many arrangements of a domestic character to be made and discussed
E before they could take up their married life at the point at which it had been broken off. It is plain, therefore, that before the respondent could return there would have to be some sort of discussion between her husband and herself in person or by letter. It could not be expected that she should suddenly make an unheralded entry into his house.
F Even so, it was argued, however, that it was necessary, in order to put an end to her desertion, for the respondent to take some active step towards returning to the matrimonial home. This, no doubt, is true, but in writing the letters of Sept., 1936, she did take such a step, and the only one which she could reasonably be expected to take, in the circumstances.
G Whether the meeting for which she asked would have brought about a reconciliation between the two is a question which must ever remain unanswered. The respondent never in fact returned to her husband. In view of his refusal to allow a meeting to take place, however, her continued absence thereafter cannot without an utter misuse of language be
H called a desertion. I am of opinion that the decisions of FINLAY, J., and the Court of Appeal were right, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors : Peacock & Goddard, agents for Traill, Castleman-Smith & Wilson, Blandford (for the petitioner).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

444 [JULY 8, 1939] ALL ENGLAND LAW REPORTS ANNOTATED [Vol. 3
**REARDON SMITH LINES, LTD. v. BLACK SEA AND BALTIC
 GENERAL INSURANCE CO., LTD.
 THE INDIAN CITY.**

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright and Lord Porter), **May 1, 2, 4, June 29, 1939.**]

Insurance—Marine insurance—Shipping—Claim for general average—Charter-party—Ship proceeding from Poti to Istanbul—Voyage via Constantza—Deviation—Whether evidence of trade custom admissible—Absence of ambiguity in terms of charterparty.

A vessel was chartered "to proceed . . . to Poti and there load and being so loaded with all convenient speed proceed to Istanbul and thence to a trans-Atlantic port to be named." Owing to facilities for obtaining oil cheaply at Constantza, the voyage to Istanbul was made *via* that port. While entering that port, the vessel was stranded, and a part of the cargo had to be jettisoned. Evidence was given that about a quarter of the oil-burning vessels proceeding from Black Sea ports to the Bosphorus bunkered at Constantza :—

HELD : evidence as to a trade custom of calling at Constantza was admissible, not only on general principles, but also in order to ascertain and explain what the parties meant by their contract as applied to the facts of the case, and, as, in the circumstances, the vessel was pursuing a usual and reasonable commercial route, there was no deviation from the contract voyage.

Order of Court of Appeal ([1938] 2 All E.R. 706) reversed.

[EDITORIAL NOTE. However wide the language used in the deviation clause may be, it cannot confer a power of visiting ports out of the course of the voyage as contemplated by the parties at the time of the contract. The question in this case is, therefore, what was the voyage contemplated by the parties, and, upon this question, the evidence of a trade custom of calling at certain ports is material. A voyage carried out in accordance with a trade custom is one following a usual and reasonable route, and, in choosing his route, the shipowner may be guided by the consideration of the cheapness of bunkers at certain ports.

As to DEVIATION, see HALSBURY, Hailsham Edn., Vol. 18, pp. 257-260, paras. 351, 352 ; and FOR CASES, see DIGEST, Vol. 29, pp. 145-152, Nos. 975-1052.]

Cases referred to :

- (1) *Grant v. Grant* (1870), L.R. 5 C.P. 727 ; 17 Digest 249, 629 ; 39 L.J.C.P. 272 ; 22 L.T. 829.
- (2) *Frenkel v. MacAndrews & Co., Ltd.* (1928), 139 L.T. 327 ; 41 Digest 486, 3177 ; *affd.*, [1929] A.C. 545 ; 98 L.J.K.B. 389 ; 141 L.T. 33.
- (3) *Evans, Sons & Co. v. Cunard S.S. Co., Ltd.* (1902), 18 T.L.R. 374 ; 41 Digest 486, 3175.
- (4) *Glynn v. Margetson & Co.*, [1893] A.C. 351 ; 41 Digest 311, 1715 ; 62 L.J.Q.B. 466 ; 69 L.T. 1 ; *affg.*, [1892] 1 Q.B. 337.
- (5) *Leduc v. Ward* (1888), 20 Q.B.D. 475 ; 41 Digest 485, 3172 ; 57 L.J.Q.B. 379 ; 58 L.T. 908.
- (6) *Morrison (James) & Co., Ltd. v. Shaw, Savill & Albion Co., Ltd.*, [1916] 2 K.B. 783 ; 41 Digest 486, 3176 ; 86 L.J.K.B. 97 ; 115 L.T. 508.
- (7) *Hain S.S. Co., Ltd. v. Tate & Lyle, Ltd.*, [1936] 2 All E.R. 597 ; Digest Supp. ; 155 L.T. 177.

APPEAL by the respondents in the Court of Appeal, the defendants in the court of first instance, from an order of the Court of Appeal (SLESSER and CLAUSON, L.J.J., GREER, L.J., dissenting), dated Apr. 12,

1938, and reported [1938] 2 All E.R. 706, reversing a judgment of GODDARD, J., dated Mar. 22, 1937. The facts and the arguments are set out in the opinions of LORD WRIGHT and LORD PORTER.

A. T. Miller, K.C., and Cyril T. Miller for the appellants.

G. St. C. Pilcher, K.C., and H. G. Willmer, K.C., for the respondents.

A

LORD ATKIN : My Lords, I have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend LORD WRIGHT. I entirely agree with it, and for the reasons which he has given I find myself unable to agree with the decision of the Court of Appeal. I move that this appeal be allowed.

B

LORD MACMILLAN : My Lords, I also have had the advantage of reading in print the views about to be expressed by my noble and learned friend LORD WRIGHT, as also those embodied in the opinion of my noble and learned friend LORD PORTER, which will shortly be laid before the House. With the views there expressed I find myself in entire concurrence.

C

LORD WRIGHT : My Lords, this appeal raises an important question in the law of carriage of goods by sea which has given rise to difference of judicial opinion. GODDARD, J., decided in favour of the appellants, but his decision was reversed by a majority of the Court of Appeal, consisting of SLESSER and CLAUSON, L.JJ. GREER, L.J., who dissented, agreed with GODDARD, J. The substantial question is whether the appellants' vessel, the *Indian City*, had deviated in calling for bunkers at Constantza while on a voyage from Poti to Sparrow's Point, in the United States of America. The vessel grounded at Constantza, and sustained considerable damage, besides incurring salvage, general average and other expenses.

D

E

The appellant company at the material time owned 28 vessels, of which 19, including the *Indian City*, were capable of being readily converted into either oil or coal burners. In 1930, cheap fuel oil for bunkers became available at Constantza, in Roumania. Constantza thereupon became largely used as a bunkering port, in particular for vessels bound from the Black Sea on long ocean voyages. In 1932 and 1933, 114 oil-burning vessels called at Constantza for bunkering only. This figure shows the importance of the port as a bunkering port. It is not necessary to analyse closely what proportion of oil-burning vessels sailing through the Bosphorus on ocean voyages bunkered at Constantza. It is sufficient for the purposes of this case to record what has been accepted on both sides—namely, that 25 per cent. of the whole number called and bunkered at Constantza in the 3½ years before the casualty which overtook the *Indian City*. I emphasise these facts, because the position of Constantza as a usual and recognised bunkering port in the Black Sea seems to me to be a key point in the case.

F

G

H

The charterparty in respect of which the dispute arose was dated Sept. 1, 1933. It was between the appellant as shipowner and the Manganexport G.m.b.H. as charterer, and was for 3 vessels to be nominated by the appellant. The vessels were to be of 8,300 tons minimum and 9,000 tons maximum capacity, and were to proceed with all convenient speed to Nicolaieff or Poti, as ordered on arrival at Istanbul, A and there load ore and proceed with all convenient speed to one of a range of ports in the United States of America at charterer's option. The vessels were to be addressed for custom house business to charterer's agents at the port of loading, and were to apply there to Soyusmetimport for cargo. It was also stipulated that the vessels were to be consigned B to Sovflot Nicolaieff or Sovflot Poti for loading and custom house business. The contract provided that the owners were not to be called upon to take bunkers from charterers, and it was stated that the vessels would be burning oil. The contract gave the steamers liberty, *inter alia*, to call at any port or ports in any order or places to bunker and for other C purposes, and to deviate for saving life or property. The contract was for one steamer monthly in October, November, December, 1933. The Indian City was the third steamer nominated.

This charterparty was the eighteenth charter entered into between the appellant company and the charterer in this trade. Before the voyage D of the Indian City, the appellant made 28 voyages in the trade, 19 for the same charterer, which was a Russian state trading corporation, and nine for other Russian state trading corporations. Except the first of these voyages—that performed in July, 1930, by the Orient City, which bunkered at Constantza on her way to Poti to load—all the appellant's E vessels bunkered at Constantza on their voyage. In each case, some departure from the shortest sea route from the loading port to the Bosphorus was involved. The extra distance steamed in these cases was considerably greater where the loading ports were situated in the eastern part of the Black Sea, as were Poti, Batoum or Novorossiisk. F The extra distance amounted approximately to 120 miles in the case of Novorossiisk, and to 193 miles in the case of Poti. Where the port of loading was in Ukrainia, the extra distance to be steamed in order to bunker at Constantza was 14 miles or 21 miles, according to the port of loading. When the loading port was in the Crimea or Sea of Azov, G the extra distance might be about 80 miles.

The master of the Indian City was instructed by his owner to fuel at Constantza after loading his cargo. On arrival at Poti, Backal, who at that port was manager of Sovflot, a Russian state corporation which was acting as charterer's agents, came on board and said he was acting H as the ship's agent. He was the only person there who spoke English. The master arranged all the ship's business with him, and in particular told him that he was bunkering at Constantza and gave him a cable for transmission to the oil suppliers at Constantza, ordering oil bunkers for the steamer at that port. A similar procedure had been followed in the

case of the other two vessels nominated under this charterparty, and also in the case of other vessels on voyages from the Black Sea to distant ports under similar charters between the appellant and the same charterer.

- The respondent in this appeal is an insurance company which was
- A sued under the guarantee which it gave to the appellant at the request of the charterer to pay any contribution in general average, salvage or special charges due in respect of the cargo and to admit a loss of freight in general average, and also to be responsible for a balance of freight withheld, so far as the same might be held to be properly due and payable by the charterer. This agreement was in consideration of the
- B appellant agreeing to release its lien, which it did when the cargo was eventually delivered at Rotterdam on the termination of the voyage to that port, which was substituted by agreement for the contract voyage in consequence of the damage sustained at Constantza. It is not now
- C disputed that the liability of the respondent under this guarantee is the same as the liability of the charterer under the freight contract. That liability depends on whether the Indian City had deviated from the contract voyage by calling for bunkers at Constantza so as to have lost the right to claim, in respect of the damage, expense and losses consequent on the grounding at Constantza, the protection of the exception
- D clauses which were contained in the charterparty, and which were in the usual form including perils of the seas and negligence. As the property in the cargo remained throughout at all material times in the charterer, the charterparty provisions are the contractual terms which
- E govern the position.

- The appellant does not rely on the liberty to call for bunkers which is expressed in the charterparty. That liberty, accordingly, need not be further considered. Its case is that what was done in calling for bunkers at Constantza was not a deviation or departure from the contract voyage,
- F but was within the contract voyage, because the vessel was pursuing a usual and reasonable commercial route for carrying out that particular adventure. Its contention was that the charterparty words "shall with all convenient speed proceed to . . . Sparrow's Point" imported by necessary intendment that the vessel should proceed by a usual and
- G reasonable route and that the ascertainment or identification of what was a usual and reasonable route depended on evidence, since the court, not being possessed by itself of expert navigational or mercantile knowledge, must, if need be, call in aid such evidence. This is not because the contract is ambiguous, but simply because it does not write out in
- H full what the parties are assumed to know or to be able to ascertain. It is only an instance of the familiar rule that evidence is admissible, not of the parties' intention, but of the surrounding circumstances, in order to identify what the parties were contracting about and to identify the subject-matter of the contract. Such evidence must not contradict any express term of the contract. For example, if it had been stipulated

that the vessel should not call at Constantza, the evidence would have been inadmissible. Where, however, as here, there is no such inconsistency between the evidence and the document, the evidence is not merely competent, but may be necessary if the court is to give effect to the contract. The general rule is that stated by BLACKBURN, J., in *Grant v. Grant* (1), at p. 728 :

The general rule seems to be, that all facts are admissible which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected.

The question here is what sense is to be attributed to the words "proceed with all convenient speed from Poti to . . . Sparrow's Point"—that is, proceed from the one terminus to the other. The contract voyage has to be identified. It must refer to some route or other. It cannot be said as a matter of law that the meaning is necessarily by the direct sea-track. In *Frenkel v. MacAndrews & Co., Ltd.* (2), at p. 557, VISCOUNT DUNEDIN quotes from WILLS, J., in *Evans, Sons & Co. v. Cunard S.S. Co., Ltd.* (3), the statement that the expression "the voyage from Bari to Liverpool" must be understood in a business sense, which were the words used by LORD HERSCHELL, L.C., in *Glynn v. Margetson & Co.* (4). VISCOUNT DUNEDIN then proceeds as follows, at p. 557 :

That case [*Evans' case* (3)] puts an end to the idea of the geographical route being the only route. It lets in the evidence of what the route under the circumstances of the ship really was. Many cases may be figured where there is more than one route which might be used by a ship. It might be a choice between the Suez Canal, the Panama Canal or round Cape Horn. In such a case even if the port of starting and of destination were stated, it would be necessary to make inquiry to find out what was the usual route.

Again in *Frenkel's case* (2), at p. 561, VISCOUNT SUMNER to the same effect said that evidence in that case was needed to prove what the voyage was, and, being admitted, showed what was a usual commercial route, which in his Lordship's opinion was reasonable in the circumstances. VISCOUNT SUMNER, after referring to opinions of LORD ESHER, M.R. and LORD HERSCHELL, L.C., in *Glynn's case* (4), goes on as follows, at p. 563 :

The mention of other matters, all of them depending on facts relating to the circumstances of trade and navigation and varying somewhat as time goes on and progress takes place, really shows how clearly these great authorities desired to guard themselves in view of the fact, that on many grounds deviation from the sea-track might still not be beyond the ordinary route. . . . Such things must be matters of degree and may not always be equally important for all classes of ships, all kinds of cargo, or all periods of trade.

In *Frenkel's case* (2), certain earlier decisions were discussed and distinguished. Thus, *Leduc v. Ward* (5) was a case where goods were shipped on a general ship for carriage from Fiume to Dunkirk. The vessel, instead of proceeding direct to Dunkirk, sailed for Glasgow, and was lost with her cargo at the mouth of the Clyde. It was not suggested that she was pursuing a usual route in any sense. A plea that the shippers knew and agreed that the vessel was intended to proceed *via*

Glasgow was irrelevant, because the plaintiffs were indorsees of the bill of lading, and were entitled to enforce the bill of lading according to its terms. The only other plea, which was a plea based on the deviation clause, failed because the liberty to call at any ports in any order meant ports which were substantially ports which would be passed on the named voyage. There was no question, as VISCOUNT DUNEDIN pointed out, in *Leduc's* case (5) of alternative routes, or a customary route which might displace the geographical route. On that footing, LORD ESHER, M.R., spoke of the voyage being one on the ordinary sea-track from Fiume to Dunkirk, but added that an exact line is not meant, B for he said, at p. 481 :

... it would necessarily vary somewhat according to circumstances ; the ordinary track for sailing vessels would vary according to the wind ; the ordinary track for a steamer, again, might be different from that for a sailing vessel ; I mean the ordinary track of such a voyage according to a reasonable construction of the term.

C Obviously in proper cases this would let in evidence of what the voyage was. In *Glynn v. Margetson & Co.* (4), the steamer was a general ship. Oranges were to be carried from Malaga to Liverpool. The vessel, after loading the oranges, proceeded from Malaga up the east coast of Spain, and then returned to Malaga, before proceeding to Liverpool. There was D no claim that such a voyage was a usual or reasonable course, or was, in a business sense, within the voyage described in the contract. The defence was based on the deviation clause, which gave a very wide liberty to call at ports. The House held that, however wide the words were, the liberty was limited to ports "in the course of the voyage." E LORD HERSCHELL, L.C., said that he was using these words in a business sense, and added, at pp. 355, 356 :

It may be said that no port is directly in the course of the voyage . . . inasmuch as in merely entering a port or approaching it nearly you deviate from the direct course between the port of shipment and the ultimate port of destination. That is perfectly true ; but in a business sense it would be perfectly well understood to say that there were certain ports on the way between Malaga and Liverpool, and those are the ports at which I think the right to touch and stay is given. F

I quote these observations because, though in a slightly different connection, they recognise the necessity of ascertaining what is the understanding of business men on the matter, presumably by appropriate G evidence. In *Frenkel's* case (2), the authorities last cited were distinguished. I disregard a subsidiary point which was raised in that case on the form of the bills of lading. The real distinction drawn was that there was evidence showing that the contractual voyage was not the direct or ordinary sea-route. In fact, the vessel, after loading the barrels of H olive oil at Malaga with destination for Liverpool, went up the Spanish coast in the Mediterranean to various ports and to Palamos, close to the French frontier, before she proceeded towards England. The shipowners did not rely on the deviation clause. They contended that the steamer was on the contract voyage, and had not departed from it when the oil was damaged in a storm between Malaga and Cartagena. In support

of their contention, they relied on the evidence, which showed that the route taken was a usual commercial route for the vessel to follow in the circumstances, and was the route which had been advertised for her for the voyage some time beforehand, and was (as VISCOUNT SUMNER in fact held) reasonable in the circumstances. VISCOUNT SUMNER added, at p. 561 :

I cannot see that it is the less a reasonable and usual commercial route, though the evidence referred only to the ships of the respondents' own line.

This shows how remote such evidence is from evidence which would be required to prove a strict custom. VISCOUNT SUMNER also treated the fact that the course of business was well known to those of the plaintiff's employees to whom he confided this part of his business as strongly confirming the usual and reasonable character of such a voyage, since no objection was taken, though no estoppel or collateral agreement arose. I may also here quote certain observations from *Morrison (James) & Co., Ltd. v. Shaw, Savill & Albion Co., Ltd.* (6). The vessel in that case was one of a regular line trading between New Zealand and Europe. The plaintiffs' parcel was shipped in New Zealand for London. The vessel made for Havre to discharge a parcel of meat. This was during the War. The vessel was torpedoed and sunk while near Havre. Evidence was given that the usual and well-known route for steamers of this line on the voyage from New Zealand to London, which was always substantially followed, was by Cape Horn to Montevideo or another named port, then to Teneriffe or Madeira, and thence direct to London. The outward voyage was by the Cape of Good Hope. PHILLIMORE, L.J., referring to the route as the usual route, said that it needed no liberties or permissions to justify it. He added that the call at the coaling port, which might be Teneriffe or Madeira, did not need the liberty to call at intermediate ports, and added, at p. 797 :

This call is one of the incidents of the voyage and is no departure. There are many similar instances, such as calling at weather stations to inquire about ice, or going to some state for a government pass through territorial waters, or to pick up a pilot, or calling at a preliminary port to lighten the ship in order that she may finish the voyage with a less draught. These are not, in my view, departures from the usual and customary course of the voyage.

That case illustrated the serious consequences of a deviation, because the shipowners were held not to be entitled to rely even on the exception of the King's enemies to which carriers are generally entitled even in the absence of a special contract. The effect of even an accidental deviation, if not justified, is illustrated in *Hain S.S. Co., Ltd. v. Tate & Lyle, Ltd.* (7), where the deviation was due to an error in transmitting orders to the master. No one would seek to minimise the importance of the rule that a vessel must not deviate without justification from the contract voyage, but that makes it also essential to ascertain correctly what the contract voyage is.

The cases cited above were cases of liners or general traders, and it may be said that the same principles do not apply in the same sense to

a chartered vessel, carrying a single cargo for a single shipper or consignee. Even in such cases, however, it is obvious that there will be in general various considerations, commercial or navigational, which determine what sea-route is usual and reasonable. Thus, in the old sailing-ship days, routes were chosen in order to make use of trade winds, and varied from season to season. Thus, between the same termini there might be several usual routes. In modern times, in all long ocean voyages, the need to replenish bunkers (coal or oil) has to be considered. The doctrine of stages of the voyage, which enables a shipowner to start with bunkers sufficient for the stage, so long as he fills up his bunkers at the next bunkering port, necessarily involves calling at that port, and perhaps later ports, in order to fulfil the recurring obligation to keep the vessel seaworthy in regard to bunkers. Thus, to call at such ports has become an ordinary incident of the voyage. The need to do so may help to determine the general route—for instance, whether it is to be by the Cape of Good Hope or by the Suez Canal. A shipowner is entitled, within certain limits determined by what is reasonable, to be guided in his choice of bunkering ports by considerations of cheapness and convenience. Thus, evidence was given in this case that it is usual for a coal-burning ship bound to Australia by the Cape of Good Hope to bunker at Durban, where coal is cheaper, instead of at Cape Town, though Durban is farther off the route. Other similar instances were given in evidence. In the voyages here in question, various choices are open to the shipowner when his ship is burning oil. He may fill up his bunkers for the whole voyage at Constantza on his way to the loading port. That course may be objected to by the charterer because it may reduce the quantity of cargo his ship can load, and for the same reason may be disadvantageous to the shipowner. He may decide to fill up his bunkers, after sailing from the port of loading, at some convenient port. He may decide to do this at Constantza, or at Istanbul, or at Algiers, or at Oran, or at Ceuta (all of which are available bunkering ports), starting from the loading port with sufficient bunkers to take the ship to the next bunkering port which he decides to use. In this way he selects the stage for bunkering. The vessel must be seaworthy for that stage, but it is the shipowner's province to fix the stage—that is, to determine where he will bunker—so long as his decision is reasonable and usual. In the present case, as in the other voyages during the relevant period, the appellant selected Constantza as the bunkering port. Its case is that it has done so a great many times without objection, and, save in this one case, without mishap. It relied on all the evidence to which I have briefly referred to support its claim that the route by Constantza is a usual route. The position, therefore, is that to call at some port for bunkers is no deviation, and the only question is whether Constantza is a usual and reasonable port of call for this purpose.

I agree with GREER, L.J., that the evidence that 25 per cent. of oil-burning vessels sailing from the Black Sea on ocean voyages call at

Constantza for bunkers is sufficient to show a usual route. The shipowner is not here attempting to prove a custom. To prove a custom, he would have to show that it was uniform and universal in the trade, but that is not what is in question here. Nor need he show that other routes were not available—that is, that there were not alternative ports of call at which he might bunker. There are no doubt other available ports of call for this purpose, some, and perhaps all, of which would involve much less extra steaming. I think the shipowner is entitled to balance the cost to him of extra steaming against the cheapness or convenience of Constantza, so long as to do so is not unreasonable in regard to the interests of the charterer or any other persons who might be concerned. It is obvious that to put in to any port to bunker involves, not merely extra steaming, either more or less, but also the entry into and departure from an extra port, which in itself is a separate risk, however close it may be to the direct ocean route. Again, it is said that the habit of bunkering at Constantza sprang up suddenly in 1930, and ceased as suddenly in 1935—at least, so far as concerned the practice of the appellant. I think, however, that a commercial habit or practice like the one claimed may come into existence in a short time and cease as rapidly. In modern business, things are constantly changing, and commercial habits may change as rapidly. That the practice of calling at Constantza for bunkers was not unreasonable is also, I think, supported by the evidence that it was well known to responsible officials who represented the charterers on the spot, and that they never objected. I refuse to believe that, if the charterer's interests had been prejudiced, they would not have objected. I refuse to believe, in view of all the evidence, that the practice was not well-known. I do not treat this evidence as evidence of a waiver, or an agreement to vary the contract, which might raise questions of authority to vary a written contract. I merely regard it, as VISCOUNT SUMNER did in *Frenkel's* case (2), at p. 561, as confirming the usual and reasonable character of such a voyage, which is fairly inferred from the fact that no objection was taken.

As the necessity of using ports of call for bunkering is so obvious, I think that less evidence is needed to justify that it is usual and reasonable to use a port like Constantza for that purpose than if the ship had gone there for purposes of trade. However, I do not think it necessary to lay down any specific measure of departure from the direct sea-route which may be held to be reasonable. If I am asked how far I go, I say that I go as far as this case requires. The test of what is usual and reasonable in a commercial sense may arise in very different circumstances, and must be decided whenever it arises by the application of sound business considerations, and by determining what is fair and reasonable in the interests of all concerned.

I have found myself unable to concur in the reasons which led SLESSER and CLAUSON, L.JJ., to reverse the decision of GODDARD, J.

- SLESSER, L.J., seems to start from the assumption that the contract stipulates for one voyage only—namely, from the port of destination to the port of discharge, being a voyage by the ordinary track by sea. I think he bases that on a view of what was meant by LORD ESHER, M.R. in *Leduc v. Ward* (5). However, as VISCOUNT DUNEDIN and VISCOUNT
- A SUMNER pointed out in *Frenkel's* case (2), LORD ESHER was not dealing with a case where there was any question of there being any usual route or routes other than the ordinary sea-track. SLESSER, L.J., next holds that, the contract being clear, evidence was not admissible to vary it, unless it went to prove a custom in the strict sense. It is true that, if
- B a contract is clear, it cannot be varied by evidence of a custom, or even a trade usage, inconsistent with its clear terms, but, in my opinion, for reasons which I have explained, the evidence is admissible here, not only on general principles, but on the particular rulings in *Frenkel's* case (2), in order to ascertain and explain what the parties meant by their
- C contract as applied to the facts of the case. Again, I do not agree with SLESSER, L.J., that there is any question here of a custom in the strict sense. The evidence, however, to prove a commercial usage is in any event not the same as that necessary to prove a custom, say, in matters of land law, and, as appears from the authorities I have quoted, the
- D question here is simply what is a usual and reasonable mode of performing the necessary operation of calling for bunkers. I observe that SLESSER, L.J., adds that, if the evidence were admissible, it might well be that it would prove a usual commercial route. CLAUSON, L.J., seems to have treated the contract as being for a voyage Poti-Istanbul,
- E and on that basis to have held that it was unambiguous and that there was no possibility of treating the case as a case of alternative routes, Poti-Istanbul or Poti-Constantza-Istanbul. He said that the termini of the voyage were fixed, and that there were no navigational alternatives such as were contemplated by VISCOUNT DUNEDIN in *Frenkel's* case (2).
- F With great respect, I cannot agree with the view that the charterparty does not admit of explanatory evidence. CLAUSON, L.J., himself admits that some owners may prefer to go direct and not call at Constantza, preferring the shorter sea-route to the convenience of cheaper bunkers. Perhaps CLAUSON, L.J., may have been influenced in the view he arrived
- G at by treating the voyage as one from Poti to Istanbul. There was no such voyage. The voyage was to Sparrow's Point, in the United States of America, which was a vitally different voyage, because it involved the necessity of providing the bunker supply for the whole voyage in appropriate stages at the shipowner's reasonable discretion. It is this
- H which was the essence of the whole problem, and led to what were called the navigational alternatives. For the reasons I have explained, I agree with the judgments of GODDARD, J., and GREER, L.J. I think that the appeal should be allowed and the judgment of GODDARD, J., restored, and that the respondent should pay the appellant's costs in this House and in the court below.

LORD ATKIN: My Lords, I am asked by my noble and learned friend LORD THANKERTON to say that he agrees with the opinion which has just been delivered.

LORD PORTER, [read by LORD ATKIN]: My Lords, in this appeal your Lordships are asked to reverse the decision of the Court of Appeal, who by a majority reversed the decision of GODDARD, J. The appellants are owners of a line of steamers which mostly operate under charter on ocean voyages. At the material date, they owned 28 vessels, of which 19 were steamships capable of burning either coal or oil fuel and of being rapidly converted for the use of one or the other. The ship with which the present appeal is concerned is one of these 19, and is named the *Indian City*. By a charterparty dated Sept. 1, 1933, the appellants undertook to provide 3 vessels to be nominated by them to proceed to Nicolaieff or Poti in the Black Sea as ordered by the Trade Delegation of the U.S.S.R. at Istanbul and there take a full cargo of between 8,300 tons and 9,000 tons of ore for carriage to a port on the east coast of the United States of America.

Amongst the provisions of the charterparty are to be found the following:

(2) The said ship . . . shall . . . proceed with all convenient speed to Nicolaieff or Poti as ordered and there load . . . a full and complete cargo of ore, 8,300 tons minimum not exceeding 9,000 tons maximum quantity in owners' option . . . and being loaded shall with all convenient speed proceed to . . . Baltimore (including Sparrow's Point) . . .

(12) The steamer is to be addressed for the custom house business to charterers or their agents at ports of loading. . . .

(19) Ship to apply to Soyusmetimport at loading port for cargo, and wire on leaving last port of discharge "*Soymangan Berlin*" and "*Sovflot Istanbul*" and "*Soyusmetimport Moscow*."

(20) . . . stranding . . . and all and every other damages and accidents of the seas . . . of whatever nature and kind whatsoever, before and during the said voyage always excepted. Steamer has liberty to call at any port or ports in any order or places, to bunker.

(28) At Nicolaieff or Poti, steamer to be consigned to the Odessa Freight Office or their agents, telegraphic "*Sovflot, Nicolaieff*" or "*Sovflot Poti*" for loading and custom house business.

(41) Owners not to be called upon to take bunkers from charterers. Vessels will be burning oil.

(43) General average shall be payable according to York/Antwerp Rules, 1924, and shall be adjusted in London in accordance with English law and custom. Guarantee for cargo's liability for general average contribution and/or salvage charges shall be given by Messrs. Black Sea and Baltic General Insurance Co., Ltd., 106, Fenchurch Street, London, E.C.3. . . .

The *Indian City* was the third vessel to be nominated by the appellants under this charterparty. She was ordered, upon calling at Istanbul, to proceed to Poti, where she arrived on Dec. 10, 1933, and loaded a cargo of 8,430 tons of ore for Sparrow's Point, Baltimore. After loading, she sailed on Dec. 31, 1933, for Constantza, on the west coast of the Black Sea, for bunkers. In entering that port on Jan. 3, 1934, she ran aground. Considerable damage was done to the ship, and cargo to the value of £1,061 14s. 4d. had to be jettisoned. Temporary repairs were completed by Mar. 6, 1934, and she set sail for her destination. In the Mediterranean, however, she began to leak again, and was obliged to put into

- Malta. There it was agreed by all the parties interested that her destination should be changed to Rotterdam, at which port she arrived on Apr. 20, 1934. As a result of the casualty, the appellants incurred by way of general average sacrifice an expenditure of £6,986 5s. 5d., and claimed from the charterers their proportion of this sum. The charterers repudiated liability for any general average, and withheld the sum of £1,061 14s. 4d. from the freight in respect of the cargo undelivered. The appellants thereupon refused to deliver the cargo without some security for payment of these two sums if a legal right to their recovery could be established, and, in order to surmount this difficulty, the respondents entered into a bond, dated Jan. 15, 1934, guaranteeing to the appellants the payment of any contributions of general average which might thereafter be ascertained to be properly due in respect of the cargo, and, by a later instrument, dated Mar. 5, 1934, agreed to treat the loss of freight as if it were general average.
- The respondents maintained that in going to Constantza the ship had deviated from her contractual route, and it is admitted that, if they are right in so contending, they are not liable, either for the general average claim or for the freight withheld. The question which your Lordships have to decide, therefore, is whether or not, in proceeding to Constantza to bunker, the *Indian City* deviated. On behalf of the respondents, it was said that the appellants were under a duty to proceed from Poti to Sparrow's Point by the direct route through Istanbul. Indeed, in their submission, the terms of the charterparty were plain, and no evidence could be given in order to establish the right of the appellants to proceed by any other route. The appellants, on the other hand, maintained that in every case it was permissible to adduce evidence in order to establish what was the usual route, and that in the present case they had established by evidence the existence of an alternative route *via* Constantza for bunkers.
- The facts proved in evidence were as follow. Up to 1930, no oil fuel was obtainable at the port of Constantza, but in that year cheap oil fuel became available there, and in that year the appellants began to charter their vessels to various of the Russian state trading corporations upon ocean voyages from the Black Sea with cargoes of ore, grain and salt. Between July, 1930, when the first of the appellants' vessels to engage in this trade loaded a cargo of ore at Poti, and the sailing of the *Indian City* from that port in Dec., 1933, the appellants' vessels had made 28 voyages in this trade, on 19 of which the ships were under charter to the same charterers as was the *Indian City*, and upon the remaining 9 voyages the ships were under charter to other of the Russian state trading corporations. On each of the 28 voyages except the first, the ships had taken fuel bunker oil for the chartered voyage at Constantza after loading their cargoes, and on many occasions the charterers' representatives at the various loading ports had been informed by the captains of the appellants' vessels of their intention to bunker at Constantza after

leaving the loading port, and no objection to the adoption of this route had been raised by any of the charterers until the casualty to the Indian City. During this period, oil fuel was much cheaper at Constantza than at other ports such as Istanbul, Algiers and Ceuta, and the appellants entered into the charters by reason of the fact that oil could be obtained at Constantza at the cheaper price. The charterparty of A Sept. 1 was the eighteenth charterparty into which the appellants had entered with Messrs. Manganexport in this trade.

At the trial before GODDARD, J., the appellants (i) gave evidence as to the number of vessels bunkering at Constantza during 1932 and 1933, (ii) gave evidence as to the route followed by all the appellants' B vessels which had loaded at Black Sea ports in 1930, 1931, 1932 and 1933, and (iii) furnished a list of the various vessels sailing from Poti in 1931, 1932 and 1933, showing whether or not they called at Constantza to bunker. The result of that evidence was as follows. In 1932 and 1933, prior to the voyage of the Indian City, 114 oil-burning vessels called at C Constantza for bunker purposes only. In 9 cases it was not possible to tell where the vessels loaded their cargoes, but, of the remaining 105, in 83 instances the vessels bunkered at Constantza after loading their cargoes elsewhere at Black Sea or Danube ports, or, if Danube ports be excluded, the vessels called at Constantza to fuel after loading their D cargoes in 45 out of 65 instances. If, on the other hand, eastern Black Sea ports alone be considered—namely, Novorossiisk, Tuapse, Poti and Batum—of a total of 33 vessels which called at Constantza, 18 bunkered after loading, and, of those from Poti itself, out of 22 oil-burning vessels, 9 bunkered at Constantza after loading their cargoes. These 9, however, E included the Indian City and 2 vessels which proceeded to Novorossiisk before calling at Constantza.

As against this evidence, the respondents adduced two lists of vessels sailing from Poti and Novorossiisk in 1932 and 1933 from which it appeared that, out of 19 oil-burners sailing from Poti, 6 called at Con- F stantza after loading, and, of these 6, 5 belonged to the appellants. These figures exclude the Indian City and the 2 vessels which sailed *via* Novorossiisk. From Novorossiisk the numbers were 36 oil-burners, of which 8 called at Constantza after loading, and 4 belonged to the appellants. It was also proved that, in the case of chartered vessels other G than those belonging to the appellants, the representative of the charterers, whether those charterers were Messrs. Manganexport or other Russian state trading corporations, were in a number of instances informed that the vessel intended to call at Constantza for bunkers after loading, and that no objection to this course was taken. Moreover, in the case H of the 3 ships nominated under the charterparty of Sept. 1, 1933, the first, the Atlantic City, loaded at Poti, and her captain not only informed the manager of Sovflot at that port, who was acting as agent for the charterers as well as the ship, that he intended to bunker at Constantza, but before sailing handed to that agent for transmission to Constantza

a cable to the suppliers of oil at that port concerning the expected arrival of the Atlantic City. The second vessel, the Jersey City, was ordered to Nicolaieff, and a procedure similar to that which had taken place at Poti was adopted. In the case of the third vessel, the Indian City, similar information was given and a similar telegram sent.

- A In this state of affairs, the appellants maintained that to proceed to Sparrow's Point *via* Constantza for bunkers was to proceed by a usual route, and that they were entitled to adduce the facts proved in evidence in support of their contention. The law upon the matter is, I think, reasonably plain, though its application may from time to time give rise to difficulties. It is the duty of a ship—at any rate, when sailing upon an ocean voyage from one port to another—to take the usual route between those two ports. If no evidence be given, that route is presumed to be the direct geographical route, but it may be modified in many cases, for navigational or other reasons, and evidence may always
- C be given to show what the usual route is, unless a specific route be prescribed by the charterparty or bill of lading. In each case, therefore, when a ship is chartered to sail, or when a parcel is shipped upon a liner sailing from one port to another, it is necessary to inquire what the usual route is. In some cases, there may be more than one usual route. It —
- D would be difficult to say that a ship sailing from New Zealand to this country had deviated from her course whether she sailed by the Suez Canal, the Panama Canal, round the Cape of Good Hope or through the Straits of Magellan. Each would, I think, be a usual route. Similarly, the exigencies of bunkering may require the vessel to depart from the direct route, or, at any rate, compel her to touch at ports at which, if she were proceeding under sail, it would be unnecessary for her to call. It is not the geographical route but the usual route which has to be followed, though in many cases the one may be the same as the other. The inquiry must always be, however, what is the usual route, and a
- F route may become a usual route in the case of a particular line though that line is accustomed to follow a course which is not that adopted by the vessels belonging to other lines or to other individuals. It is sufficient if there is a well-known practice of that line to call at a particular port.

- G These principles have been set out in at least two cases, one of which was decided in your Lordships' House. The first is *Evans, Sons & Co. v. Cunard S.S. Co., Ltd.* (3), and the second is *Frenkel v. MacAndrews & Co., Ltd.* (2). Each case, it is true, was concerned with a parcel of goods shipped on board a liner, and to that extent it may be said that there was a particular defined route, or several defined routes, known to be
- H followed by the vessels of that line, but I do not think that the decisions turn solely upon that fact. The observations of VISCOUNT DUNEDIN and VISCOUNT SUMNER in *Frenkel's* case (2) are of more general application. As VISCOUNT DUNEDIN said, at p. 557 :

There may be . . . either alternative routes or a customary route which in either case might displace the geographical route.

Then at p. 557 he quotes from *Evans, Sons & Co. v. Cunard S.S. Co., Ltd.* (3), the words of WILLS, J., at p. 375 :

"The description of the particular voyage agreed upon must be the keynote to which the bill of lading must conform. What then is meant by 'the voyage from Bari to Liverpool' ? LORD HERSCHELL says the expression must be understood in a business sense. In *Glynn v. Margetson & Co.* (4), there was no evidence as there is in this case that the only practicable way to get a cargo from Bari to Liverpool is by a more or less uncertain route *via* the Adriatic round by Levantine or Black Sea ports. . . ." That case puts an end to the idea of the geographical route being the only route. It lets in the evidence of what the route under the circumstances of the ship really was.

In the same case, VISCOUNT SUMNER, says, at p. 561 :

Evidence was needed to prove what that voyage was and that evidence was tendered and was admitted without objection. Its effect was that the ship, having shipped the oil at Malaga, was to proceed "via Levante" calling at various ports as far eastward and north-eastward as Palamos, and, returning thence, calling at other ports, until, having passed Malaga without calling again, she proceeded "directo" for the United Kingdom. No question arises here as to the precise meaning of "via Levante" or as to the ports to be called at and the order of the calls, which that expression may connote. This was shown to be a usual commercial route for the Cervantes to follow under the circumstances and to be the route which had been advertised for her for this voyage some time beforehand, and it was one which I think was reasonable under the circumstances. I cannot see that it is the less a reasonable and commercial route, though the evidence referred only to the ships of the respondent's own line. Their prominent position in this trade, the number of ships they run, and the length of time that this kind of practice has been followed by them all go to prove this conclusion. The evidence further shows that these facts were well-known to those of his employees, to whom the plaintiff confided this part of his business, and the usual and reasonable commercial character of such a voyage was thereby strongly confirmed, since no objection was taken.

It was said, however, on behalf of the respondents, that the main ground of the decision in *Frenkel's* case (2) was that neither the port of departure nor the port of destination was set out in the bill of lading, and that, for that reason, only evidence to ascertain the ports of departure and arrival and the course to be followed between them, was admissible. The opinions in your Lordships' House undoubtedly took the omission into consideration in reaching the conclusion at which they arrived, but I do not read the observations as confined to that ground, or necessarily dépendent upon it. I think that both your Lordships' House and the Court of Appeal took the wider view that in every case evidence is admissible to show what is the usual, or a usual, route, and that, if the evidence adduced is sufficient to establish a practice to follow a particular route, proceeding by that route would not be a deviation. Such a conclusion in no way weakens the authority of, or contradicts the principles laid down in *Leduc v. Ward* (5) and *Glynn v. Margetson & Co.* (4). In those cases, the question was not what was the route prescribed by the bill of lading, whether by custom or otherwise, as that to be followed, but whether it was permissible, when once that route was ascertained, to deviate from it.

In the present case, no question of deviation from the contractual route arises. It is conceded that, if the appellants were not entitled to proceed to Constantza as part of their ordinary route, the deviation

- clause will not avail them. Any doubt which I have felt in the present case has not been as to the principles applicable, but as to whether the evidence was sufficient to establish the voyage *via* Constantza as a usual route for the appellants' vessels from Black Sea ports to America and other ports to be reached by ocean voyages. Upon consideration, however,
- A I think there was enough to enable the judge rightly to find that a customary route was followed, and I see no necessity for differing from the view expressed by him and by GREER, L.J. In saying this, however, I must not be taken to desire in any way to weaken the obligation of a shipowner to proceed by a usual course. The obligation remains,
- B but, as was recognised in *Frenkel's* case (2), evidence may always be adduced to show what the usual course is. It is in this, I think, that the majority of the Court of Appeal have erred. In their view, evidence was not permissible. In my view, unless a specific route is laid down in the charterparty or bill of lading, it is always permissible, and may be
- C essential. No doubt *prima facie* the route direct from Poti to Sparrow's Point through Istanbul would be the ordinary course, but I think that in this case we have evidence sufficient to show that the route had been varied, and that the practice of proceeding to Constantza to bunker after loading had become a usual one. It is true that a considerable
- D number of vessels proceeding from Black Sea ports do not call at Constantza for bunkers, and that, if one is to take particulars of Poti and Novorossiisk alone, only about one-quarter of the ships proceeding on ocean voyages call at Constantza after loading. It is true also that the journey to Constantza lengthens the voyage by some 200 miles, and that
- E shortly after the accident to the *Indian City* the cost of oil at Constantza increased, and the appellants thereafter have taken their bunkers from Algiers, instead of Constantza. All these are matters to be considered, but a short usage, particularly where the obtaining of bunkers is concerned, may still be a sufficient usage to create a usual route.
- F I do not, for myself, place much reliance upon the argument that the representative of the respondents heard of, and forwarded instructions as to, the intention of bunkering at Constantza. He neither had power to, nor did he purport to, vary the prescribed route. Nevertheless, it is, I think, an element to be considered, not as altering the contract, but as
- G showing the usual reasonable and commercial character of such a voyage. In coming to this conclusion, I find myself in agreement with GODDARD, J., and GREER, L.J., and reach a conclusion which might have been that of SLESSER, L.J., had he not thought that no evidence as to the route to be followed was admissible. Nor do I find myself in dis-
- H agreement with CLAUSON, L.J., when he says that a ship sailing from Poti to Istanbul would not pursue a usual course if she proceeded *via* Constantza. It might be difficult to prove that such a voyage was other than a deviation. The transit with which we are concerned, however, is one, not to Istanbul, but to Sparrow's Point, and for such a voyage the increase in distance may be of little or no importance. It is not necessary

to prove a custom in the strict sense, and the evidence given is, as I think, admissible, and sufficient to establish the voyage *via* Constantza as a usual route. I would allow the appeal and restore the judgment of the judge.

Appeal allowed with costs.

Solicitors: *Botterell & Roche* (for the appellants); *Thomas Cooper & Co.* (for the respondents).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

MOSS' EMPIRES, LTD. v. OLYMPIA (LIVERPOOL), LTD., AND ANOTHER.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright and Lord Porter), **April 25, 27, June 29, 1939.**]

Landlord and Tenant—Repairs—Covenant by lessees to spend £500 per annum on repairs or pay difference between £500 and sum actually spent—Whether failure to pay gives rise to action on covenant or for breach of covenant—Damage to reversion—Landlord and Tenant Act, 1927 (c. 36), s. 18 (1).

Certain premises were leased by the plaintiffs to the defendant company's assignors. The lessees covenanted to expend £500 per annum on repairs and decoration or to pay the lessors the difference between £500 and the amount actually expended. It was found as a fact that from 1933 to 1935 the lessees did not spend the stipulated sum. This action was brought by the lessors claiming damages for breach of covenant, or, alternatively, for money due on the covenant:—

HELD: (i) the covenant was legal, as the amount payable thereunder was not payable as "damages for breach of a covenant to repair" within the meaning of the Landlord and Tenant Act, 1927, s. 18 (1), but was payable as debt, being in respect of each year the difference between £500 and the amount in fact expended in performing the repairing covenants.

(ii) as the covenant ran with the land, this was not a bare obligation to pay money which did not touch the thing demised, but was binding upon the assignees.

(iii) as the sum was payable whether or not there were breaches of the covenant, it was not a penalty.

Order of Court of Appeal ([1938] 3 All E.R. 166) *reversed*.

[EDITORIAL NOTE.] The point at issue here is the legality, since the passing of the Landlord and Tenant Act, 1927, s. 18 (1), of a covenant in a lease to spend in each year a stated sum upon repairs, or, in default, to pay to the lessor the difference between that sum and the sum actually spent. The legality of such a covenant turns upon the question whether an action brought upon it will be an action for debt or an action for breach of covenant. The Court of Appeal decided by a majority that such an action was founded on breach of covenant, but the House of Lords have reversed this decision, and it is now settled that the action is one for debt, and the covenant is a legal one. In fact, the matter is not in any way governed by the Landlord and Tenant Act, 1927, s. 18 (1)

AS TO REPAIR COVENANTS, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 208, 209, para. 228; and FOR CASES, see DIGEST, Vol. 31, pp. 319, 320, Nos. 4609-4620.]

Case referred to:

(1) *Spencer's Case* (1583), 5 Co. Rep. 16a; 31 Digest 144, 2798.

APPEAL from an order of the Court of Appeal (GREER, SLESSER and MACKINNON, L.JJ.), dated June 2, 1938, and reported [1938] 3 All E.R. 166, reversing by a majority (GREER, L.J., dissenting) a judgment of HILBERY, J., dated Jan. 25, 1938, in an action in which the appellants were plaintiffs and the respondents were defendants. The facts and the arguments and the relevant clauses of the lease are set out in the opinions of LORD ATKIN and LORD PORTER.

Cyril Radcliffe, K.C., and *P. B. Morle* for the appellants (the plaintiffs).

C. E. Harman, K.C., and *Hon. B. L. Bathurst* for the first respondents (the first defendants).

J. V. Nesbitt for the second respondent (the second defendant).

LORD ATKIN: My Lords, this is an appeal from a decision of the Court of Appeal (SLESSER and MACKINNON, L.JJ.), who (GREER, L.J., dissenting) reversed the judgment of HILBERY, J., in favour of the plaintiffs, the present appellants. The action was brought to recover money said to be due under the covenants of a lease, and it is necessary to refer to the relevant documents. By a lease dated Oct. 16, 1924, the appellants demised to E. A. Abrahams, Ltd., the lessees, the premises known as the Olympia Theatre, Ltd., together with certain fixtures and effects for a term of 24 years from Mar. 22, 1925, determinable at the expiration of the third, seventh, fourteenth, or twenty-first year of the term at the rents therein mentioned, and in consideration of the covenants therein contained, reference to which must be made later. Mr. Abraham Emanuel Abrahams, the second respondent, was a party to the lease as a guarantor. He guaranteed that the lessees would perform all the covenants on the part of the lessees. By a supplemental indenture, dated Dec. 17, 1934, between the same parties, a further covenant by the lessors was given, which was recited to have been omitted by inadvertence from the original lease, that, subject to the conditions there mentioned, the lessors would on notice effect any necessary structural repairs to the premises. On July 1, 1925, by an indenture made between the same parties, the lessors granted to the lessees licence to assign the lease to Olympia (Liverpool), Ltd., and Mr. A. E. Abrahams guaranteed that the licensees should perform all the covenants and conditions by them to be performed.

Accordingly, by indenture dated Sept. 3, 1925, and made between the original lessees, Mr. A. E. Abrahams and Olympia (Liverpool), Ltd., the original lessees duly assigned the lease to Olympia (Liverpool), Ltd., and Mr. Abrahams as guarantor under the original lease concurred in the assignment. Thereupon Olympia (Liverpool), Ltd., held under the assignment until in the course of these proceedings they terminated the lease at the expiration of the fourteenth year of the term. The claim in this action by the lessors is based on subcl. (vii) of the lease. Up to the end of the year ending Mar. 22, 1928, no question had arisen. For the 4 years from Mar., 1928, to Mar., 1932, there was a surplus over the

£500 per annum mentioned in subcl. (vii) of £205 7s. 11d., resulting in a credit to the lessees of that amount under the second proviso in subcl. (vii). For the 3 years ending in 1933, 1934, and 1935, the defendants expended in each year less than £500, leaving a balance in favour of the plaintiffs of £942 16s. 9d., which, after deducting a credit of £205 7s. 11d., leaves a final balance of £737 8s. 10d., for which the judge gave judgment. A The details will be found in his judgment, and need not be restated.

The defences raised are as follows. 1. The defendants say that to allow the plaintiffs to recover this sum is to violate the provisions of the Landlord and Tenant Act, 1927, s. 18 (1), which provides as follows :

Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid. . . . B

The amount claimed is, they say, damages for breach of a covenant to keep in repair, and no diminution in the value of the reversion was or could be proved. 2. If this sum is not recovered as damages for breach of a covenant to repair, the covenant to pay the sum claimed was a bare covenant to pay money not touching the thing demised, did not therefore run with the land, and did not bind the assignees. 3. If this was a covenant to pay money, it was to pay money by way of penalty, and no damages are proved. 4. Before the £500 became due to be spent each year, the proportion to be expended on repairs to the structure had to be determined by the lessors' surveyor. This was a condition precedent to liability, and had not been performed. 5. The guarantor was only sued in respect of the default of the assignees, and, if the covenant did not run with the land, he escaped liability in this action. The Court of Appeal decided in favour of the defendants, on the ground that they were protected by the terms of the Landlord and Tenant Act, 1927. My Lords, I think that the answer is that the defendants are not being sued for damages for breach of covenant to repair. They are being sued in debt on covenant to pay a fixed sum of money. The covenants must no doubt be read together. So read, they form part of a carefully devised and co-ordinated arrangement by which in substance the liability of the tenant for repairs during the term is limited to £500 per annum, which sum he has to pay whether or not repairs are necessary. C D E F G

There were years during the term in which the covenants to paint—namely, subcl. (v) and (vi)—would not be operative at all. In any year, the general covenant to keep in repair might not require the expenditure of £500. Subcl. (vii), therefore, could not be construed to impose an obligation to spend £500 on repairs and decoration in the performance of the covenants to repair where the covenants to repair did not themselves require the expenditure of such a sum. In other words, the covenant in subcl. (vii) must be construed as a covenant to spend during each year up to £500 in the performance of the repairing covenants. H

The balance of £500 nevertheless had to be paid to the lessors, and quite plainly, therefore, as it seems to me, that balance is not payable as "damages for breach of a covenant to repair" within the meaning of the Landlord and Tenant Act, 1927. One may suppose three possible conditions in any given year. 1. No repairs at all required by the repairing covenants to be executed on the premises. 2. £300 only required by the repairing covenants to be expended on repairs, and duly expended. 3. £700 required by the covenants to be expended on repairs, and nothing expended. In conditions 1 and 2, neither £500 nor £200 has any relation to damages for non-repair. In the last case, there would be a breach of the repairing covenant, but £500 would be payable, not as damages for breach of the covenants, but as a sum agreed to be paid as a means of satisfying the obligation to repair. I think, therefore, that the sums claimed in this action are not damages, but debt. The amount to be paid is not determined by the amount of damages for breach of repairing covenants, but by the amount in fact expended in performing the repairing covenants. The Landlord and Tenant Act, 1927, has no application, and, if it does not apply in its ordinary and natural construction, I do not understand how there can be said to exist any principle of law which would avoid an agreement not in terms avoided by the statute sought to be applied. The defence of the statute fails.

2. On the other hand this is not a bare obligation to pay money which does not touch the thing demised. On the contrary, the performance of the repairing covenants and the obligations under subcl. (vii) are so inextricably bound together that it would be impossible to sever subcl. (vii) and treat it as a collateral provision to pay money. The relevant clauses read as a whole provide a scheme whereby, if things work smoothly, the obligation of the tenant over the term is limited to £500 per annum, less than one-sixth of the total rent, while the lessor is provided with sums which, if he chooses, he may apply towards meeting the obligation which he has assumed of performing structural repairs. In my opinion, the clause in question closely touches the thing demised, and runs with the land.

3. The exposition of the clauses given above disposes of the contention that this was a penalty. The sum is payable whether or not there are breaches of the covenants, and is not intended as a substitute for damages.

4. The contention that the determination of the lessors' surveyor as to the amount to be spent on structural repairs is a condition precedent to the payment of £500 cannot, in my opinion, be supported. It would give the covenant a construction which it would be quite impracticable to fulfil in the ordinary conduct of the lessees' business, and is quite inconsistent with the view expressed above that the £500 may be due though nothing needed to be expended under any obligation to repair.

5. As the assignees are held liable for payment, this defence does not arise, and the guarantor is liable under his guarantee of performance by the assignees.

For these reasons, which merely restate the reasons given by HILBERY, J., and GREER, L.J., I think that the appeal should be allowed, with costs here and in the court below, and that the judgment of HILBERY, J., in favour of the plaintiffs should be restored. My Lords, I am asked by my noble and learned friend LORD THANKERTON to say that he agrees with the opinion which I have just read.

LORD MACMILLAN: My Lords, it certainly cannot be said that the covenants contained in the lease of Oct. 16, 1924, and the relative supplementary deed of Dec. 17, 1924, with which this appeal is concerned, were entered into with any idea of defeating or evading the Landlord and Tenant Act, 1927, s. 18 (1), for they antedate the statute by 3 years. However, they may nevertheless be affected by this supervenient legislation, if it applies to them. When a statute purports to interfere with subsisting contracts, it is, in my opinion, incumbent on the party who claims that it has released him from his obligations to show clearly that it covers his case. In the present instance, in order to secure the benefit of the statute, the respondents have to satisfy your Lordships that the appellants are seeking in these proceedings to recover, in the words of sect. 18 (1):

Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease. . . .

Your Lordships will hear from my noble and learned friend LORD PORTER a detailed analysis of the covenants in question which I have had the advantage of reading in advance and with which I agree. In view of that analysis, the present action cannot, in my opinion, properly be characterised as an action for damages for breach of a covenant to repair. It is difficult to see how the action could be so characterised, inasmuch as it would be no defence to it to aver and prove that at the date of the summons the premises were in perfect repair. The contract in suit was entered into between business people, obviously competently advised, and, so far from being within the mischief of the Act, appears to me to embody a sensible and convenient arrangement for obviating all questions about the repair of the premises let. If the covenants are not, as in my opinion they are not, covenants to keep or put premises in repair within the meaning of the statute of 1927, then there is nothing to prevent the appellants from enforcing them according to their terms, and, as I agree with your Lordships that, by their nature, they run with the land, they are enforceable against the respondent company as assigns of the lease, and also against the individual respondent as guarantor. The appeal should, in my opinion, be allowed, and the judgment of HILBERY, J., should be restored.

LORD WRIGHT: My Lords, I agree with the opinions which have been delivered by my noble and learned friends LORD ATKIN and LORD MACMILLAN. I also agree with the opinion of my noble and learned friend LORD PORTER, which he has asked me to read on his behalf.

LORD PORTER [read by LORD WRIGHT] : My Lords, by a lease dated Oct. 16, 1924, and made between the appellants, A. E. Abrahams, Ltd. (the lessees), and A. E. Abrahams (the guarantor), the appellants demised to the lessees the premises known as the Olympia Theatre (Liverpool), Ltd., for a period of 24 years (subject to certain rights of earlier determination) from Mar. 22, 1925, at the yearly rent specified. The lease included certain articles or effects required for the purpose of carrying on performances, and contained a number of covenants for repair and decoration. Those covenants may be described as (i) a general covenant for repair, cl. 2 (iv), (ii) a covenant for outside painting, cl. 2 (v), (iii) a covenant for inside painting and decoration, cl. 2 (vi), (iv) a covenant to repair, and, if necessary, to replace, the effects, cl. 2 (viii).

Cl. 2 (vii), upon which the decision of the case largely turns, must be set out in full. It is as follows :

In the performance of the covenants in subell. (iv), (v), (vi) and (viii) herein contained to expend during each year of the said term on such repairs and decoration a sum of £500 and at the end of each year of the said term to produce to the lessors evidence of such expenditure or to pay to them at the end of each such year a sum equal to the difference between the amount so expended and £500 provided that the whole of the said sum shall not be expended on decorations alone but a proper proportion thereof shall be expended on necessary repairs to the structure of the said premises such proportion to be determined by the surveyor of the lessors provided nevertheless that the expenditure and payment by the lessees of such sum of £500 per annum shall be accepted by the lessors as full satisfaction of the covenants (iv), (v), (vi) and (viii) so that if in any one year a larger sum than £500 shall with the consent in writing of the lessors be expended by the lessees for the like purpose the amount of such expenditure in excess of £500 shall be taken in or towards satisfaction of the lessees' future liability under this subclause.

Clause 2 (xxi) contained the covenant to yield up the premises and effects in good repair, and continued as follows :

... but so that these provisions shall as regards the demised premises and the said effects be deemed by the lessors to have been satisfied by the expenditure at the rate of £500 per annum as hereinbefore provided.

It appears that, when the deed was drafted or engrossed, one of the terms agreed upon was omitted by mistake. As a result, a supplemental agreement of Dec. 17, 1924, was entered into between the same parties, providing as follows :

... subject to the expenditure by the lessees provided by the principal indenture the lessors will at their own expense in any year in which the lessees shall have expended not less than the sum of £500 referred to in the principal indenture upon notice of any defects being given to the lessors by the lessees effect any structural or other repairs which may be necessary for the proper maintenance and support of the demised premises.

By an indenture of July 1, 1925, the appellants granted the lessees liberty to assign the premises and effects to Olympia (Liverpool), Ltd., the first respondents. The guarantor was also a party to this agreement, and guaranteed the payment of the rent and performance of the covenants in the lease by the assigns, as he had previously guaranteed the payment and performance by the original lessees. In pursuance of the permission so granted, A. E. Abrahams, Ltd., with the concurrence of A. E. Abrahams, did, by indenture of Sept. 3, 1925, assign the lease of the

premises and effects to the first respondents. The first respondents went into possession of the premises and admittedly paid all the rent due.

It is accepted by the appellants that at first the assignees also substantially performed the covenants of the lease. Indeed, it is conceded that at Mar. 22, 1933, the first respondents were entitled under cl. 2 (vii) to a credit of £205 7s. 11d., because they had in previous years expended, with the consent in writing of the lessors, sums exceeding £500. The appellants asserted that in each year after that date the first respondents had broken the covenants of the lease by failing to pay the difference between what they had spent on the premises and £500. The duty of the first respondents was, they said, either to spend £500 on repairs in each year, and produce evidence that they had done so, or, if so much was not required in any year, or if they did not expend so much, whether required or not, to pay the difference between what they did spend and £500. The respondents denied that this was the true construction of the lease or its legal effect.

The appellants thereupon issued a writ, dated Jan. 26, 1937, claiming £1,078 8s. against the first respondents for their failure to perform the covenants of the lease and against the second respondent under his guarantee. This sum was arrived at by adding together the amounts by which the first respondents' expenditure on the premises was alleged to have fallen short of £500 in each of the years ending Mar. 22 from 1933 to 1936. At the trial, the judge, by his judgment delivered on Jan. 25, 1938, found the first respondents liable under the covenants of the lease and the second respondent liable under his guarantee, but he did not accept the figures put forward. He found that the respondents were entitled to a credit of £205 7s. 11d. on Mar. 22, 1933. He found also that the first respondents had failed to spend and prove that they had spent more than £268 1s. for 1932-33, £168 2s. 3d. for 1933-34, and £121 for 1934-35. The full sum at least had been spent in 1935-36. These figures left a total shortage, after allowing for the credit of £205 7s. 11d., of £737 8s. 10d., a sum for which the judge gave judgment against both respondents. From this judgment the respondents appealed to the Court of Appeal, who, by a majority, allowed the appeal and ordered judgment to be entered for the respondents.

In both courts, the main contest turned upon the question whether the respondents were protected from liability under the Landlord and Tenant Act, 1927, s. 18 (1), which runs as follows :

Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid ; and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement.

- Each party relied upon the terms of cl. 2 (vii) of the lease, the respondents affirming and the appellants denying that failure to comply with that subclause was a breach of a covenant to repair. It was common ground that, if the section applied, the appellants had given no evidence from which the amount by which the value of the reversion had diminished
- A** could be ascertained, and therefore they could recover nothing in the present action. It follows that it is essential to determine in the first place the exact meaning of that subclause. The respondents construed it as imposing an obligation to spend £500 on repairs in each year. If that sum was not spent on repairs, whether those repairs were required
- B** or not, there was, they said, a breach of covenant to repair. The damage thereby caused was no doubt quantified and limited to the difference between £500 and the sum actually spent, but it still remained damages for breach of a covenant to repair. I do not so read the covenant. To do so is, I think, to neglect the opening words "In the performance of
- C** the covenants in subcll. (iv), (v), (vi) and (viii)" and to give no effect to the words "or to pay . . . a sum equal to the difference between the amount so expended and £500." The obligation is to expend on such repairs the sum of £500 or pay the required difference, and *such* repairs must mean the repairs and decoration necessary to perform the covenants
- D** contained in subcll. (iv), (v), (vi) and (viii). If that sum is not required for those purposes, the contract cannot be fulfilled if it is to be construed as the respondents contend. If the appellants' construction be accepted, however, it will be fulfilled by spending what is required on the necessary repairs and paying in addition a sum sufficient to make up £500 in all.
- E** I should read the subclause as meaning: "The lessees shall spend £500 each year on repairs so far as the covenants to repair require it. If, however, so much is not required, or if the lessees do not in fact spend, and prove they have spent, so much, then they may fulfil their obligation by paying a sum which, with what they have spent, will amount to
- F** £500." They have not, in my view, broken their contract by failing to spend £500. They are given what I think is a true alternative—namely, a right to fulfil their contract either by spending £500 or by spending a less sum and paying the difference between what they have spent and £500. If they have spent nothing, that difference would be £500. If
- G** they have spent less than £500, it would be the difference between the sum spent and £500. Not to pay that sum is not a breach of a covenant to repair, but a failure to pay the amount by which the expenditure falls short of the stipulated sum. It is not expenditure which is required alone. Expenditure and payment, or even payment without expenditure,
- H** are also a performance of the contract.

Such a construction is, I think, more consistent with the second proviso than that contended for by the respondents. Moreover, it does not compel the adoption of a construction which would impose upon the respondents an obligation either to spend £500 on repairs, whether required or not, or in default to be held guilty of breaking their contract

by failing to do repairs which might not be required. I do not think that non-compliance with cl. 2 (vii) is necessarily a breach of covenant to repair. No doubt an action could be framed upon that clause for such a breach, but, if the claim be for failure to pay the difference between the sum expended and proved and £500, in my view the claim is for a sum of money, and not for breach of repairing covenants. **A**

However, the respondents, even if they are held to be wrong in the contention that they are freed from liability under sect. 18 of the Act, maintain that the stipulation that they shall pay the sum by which their expenditure falls short of £500 is a penalty, and not a liquidated sum as damages. I doubt if it is either. It is, I think, a sum payable as an alternative to spending £500 per annum, not a penalty for failing to do so, or liquidated damages for that failure. If it were not for the provisions of cl. 2 (vii), the lessees would be obliged to spend in each year any sum, however large, required to keep the premises in repair in accordance with the terms of cl. 2 (iv), (v), (vi) and (viii). The amount might exceed £500 per annum, and at any rate would be an unknown quantity. **B**

Clause 2 (vii), whilst it imposes a minimum payment, also provides a limit beyond which the lessees shall not be liable. Moreover, so far as structural repairs, at any rate, are concerned, the supplemental agreement imposes upon the lessors any excess beyond that which is required of the lessees. **C**

It is true that, by reason of the first proviso contained in cl. 2 (vii), the lessees have to expend what the lessors' surveyor considers a reasonable proportion of the sum to be provided by them in structural repairs, but, even when that obligation is fulfilled, a considerable expense may still fall upon the lessees. Moreover, by providing a yearly sum of £500, the lessees not only escape further liability for current repairs but also, under cl. 2 (xxi), avoid paying what might be a large sum in fulfilling their obligation to leave the premises in good repair. The scheme seems to be to limit the lessees' liability to £500 per annum unless in any one year they think it necessary to spend more than £500 for the purposes of their business and cannot obtain the consent of the lessors to their doing so. **E**

If these facts are borne in mind, the terms of cl. 2 (vii), as I think, lack every element which would constitute a penalty. They constitute a provision for the mutual advantage of lessors and lessees under which one or the other stands to gain according as more or less repairs are found to be required, and, so far as the lessees are concerned, they put a limit upon their obligations. **F**

In the event of failure to succeed upon the matters already considered, the respondents asserted that, being only assignees, they were not liable for non-payment of the sum claimed. The appellants were, they said, in a dilemma. Either the action was for breach of a covenant to repair which ran with the land or it was for payment of a sum of money which did not run with the land, but was merely collateral, and bound only the original lessees. I think your Lordships are all of opinion that this argument **G**

should not succeed. In the first place, the original lease provides that the term lessees "shall when the contract admits include permitted assigns," and, though this is by no means determinative where the covenant is merely collateral, it is an element to be considered. In the second place, the covenants in the present case are not merely collateral. They directly

A touch and concern the thing demised, and so come within the first rule in *Spencer's Case* (1).

This is not a bare or mere covenant to pay £500, or even to pay the difference between the sum spent and proved and £500. It is part of a number of covenants whereby the mutual obligations of landlord and

B tenant in repairing and redecorating the premises are fulfilled, and is inextricably bound up with them. In my opinion, it runs with the land.

This view makes it unnecessary to determine whether, even if the obligations of the lessees did not pass to the assignees, the guarantor would still be liable upon his guarantee contained in the original lease, though

C he would escape liability under the licence to assign in which he guaranteed the assignees only, and was, therefore, under no liability in a case where the assignees were not liable, because the covenant on which they were sued did not run with the land. The point is a pleading point, and turns upon whether the word "guarantee" in para. 9 of the statement of

D claim refers to both guarantees or only to that contained in the licence to assign. No question of principle is involved, and to discuss the question would be merely academic. I would allow the appeal and restore the judgment given by the judge in the court of first instance.

Appeal allowed with costs.

E Solicitors: *Burton & Ramsden* (for the appellants); *H. S. Wright & Webb* (for the respondents).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

F TRIBUNE PRESS, LAHORE (TRUSTEES) v. INCOME TAX COMMISSIONER, PUNJAB, LAHORE.

[PRIVY COUNCIL (Lord Thankerton, Sir George Rankin and Mr. M. R. Jayakar), **May 11, 12, June 13, 1939.**]

G *Privy Council—India—Income Tax—Charity—Object of general public utility—Policy of newspaper—Duty of commissioner—Indian Income Tax Act, 1922 (No. 11 of 1922), s. 4 (3) (i).*

Sardar Dayal Singh, a Sikh inhabitant of the Punjab, died in 1898, having by his will created 3 separate trusts to be administered by 3 independent "committees of trustees." Two of the trusts were for the establishment and maintenance of (i) an arts college, and (ii) a public library, which are not material to this case. By the third trust, the testator directed "that my property in the stock and goodwill of the Tribune Press and newspaper in Anarkali Lahore shall vest permanently in a committee of trustees . . . that it shall be the duty of the said committee of trustees to maintain the said press and newspaper in an efficient condition keeping up the liberal policy of the said newspaper and devoting the surplus income of the said press and newspaper after

H

defraying all current expenses in improving the said newspaper and placing it on a footing of permanency." Since the death of Sardar Dayal Singh in 1898, the trust in respect of the Tribune Press had been carried out, and the newspaper of that name continued to be published, the profits of the press and newspaper being assessed to income tax since 1918. A claim to exemption was first made by the appellants in respect of the year 1932-33 in the proceedings out of which this appeal was brought, the question for decision being whether the property was held under trust wholly for the advancement of an object of general public utility, and, as such, exempt from tax under the Indian Income Tax Act, 1922, s. 4 (3) (i). The respondent contended that the Tribune newspaper, as its founder intended it to be carried on, would contain matter in the nature of political propaganda, and would be devoted to the advocacy of particular legislative measures considered by its founder to be measures of reform, the political character of such views or measures preventing the trust from being held to be an object of general public utility :—

HELD : (i) the question whether a particular object was of general public utility was a question of law, though doubtless it was for the commissioner to find and state any facts bearing thereon.

(ii) the object of the paper might fairly be described as that of supplying the province with an organ of educated public opinion, and it should *prima facie* be held to be an object of general public utility. As such, it was not outside the ambit of the exemption in the Indian Income Tax Act, 1922, s. 4 (3) (i).

[EDITORIAL NOTE.] The question whether the promulgation of a particular principle will or may benefit the public is to be decided by the court upon all the evidence. As the trust in the present case was created by will and was to keep up the liberal policy of a newspaper, it was immaterial to consider what had been done under the trust since its creation. It was only material to consider the policy of the newspaper in the testator's life, when determining whether it was an object of general public utility.

AS TO GENERAL PUBLIC UTILITY, see HALSBURY, Hailsham Edn., Vol. 4, pp. 125-127, paras. 166, 167; and FOR CASES, see DIGEST, Vol. 8, pp. 259, 260, Nos. 209-217.]

Cases referred to :

(1) *Brighton College v. Marriott*, [1926] A.C. 192; 28 Digest 24, 127; 134 L.T. 417.

(2) *Re Macduff, Macduff v. Macduff*, [1896] 2 Ch. 451; 8 Digest 296, 731; 65 L.J.Ch. 700; 74 L.T. 706.

(3) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 28 Digest 10, 51; 61 L.J.Q.B. 265; 65 L.T. 621; 3 Tax Cas. 53; *affg.* S.C. *sub nom.* *R. v. Income Tax Comrs.* (1888), 22 Q.B.D. 296.

(4) *Inland Revenue Comrs. v. Temperance Council of Christian Churches of England & Wales* (1926), 136 L.T. 27; Digest Supp.; 10 Tax Cas. 748.

(5) *Re Foveaux, Cross v. London Anti-Vivisection Society*, [1895] 2 Ch. 501; 8 Digest 259, 206; 64 L.J.Ch. 856; 73 L.T. 202.

(6) *Re Hummeltenberg, Beatty v. London Spiritualistic Alliance*, [1923] 1 Ch. 237; Digest Supp.; 92 L.J.Ch. 326; 129 L.T. 124.

(7) *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L.R. 6 P.C. 381; 8 Digest 261, 237.

(8) *Fatmabibi v. Advocate-General* (1881), I.L.R. 6 Bom. 42.

(9) *R. v. Income Tax Special Comrs., Ex p. University College of North Wales* (1909), 78 L.J.K.B. 576; 28 Digest 11, 53; 100 L.T. 585; 5 Tax Cas. 408.

(10) *Bowman v. Secular Society, Ltd.*, [1917] A.C. 406; 8 Digest 265, 270; 86 L.J.Ch. 568; 117 L.T. 161.

- (11) *A.-G. v. National Provincial & Union Bank of England*, [1924] A.C. 262; Digest Supp.; *sub nom. Re Tetley, A.-G. v. National Provincial & Union Bank of England*, 93 L.J.Ch. 231; 131 L.T. 34; *affg. S.C. sub nom. Re Tetley, National Provincial & Union Bank of England, Ltd. v. Tetley*, [1923] 1 Ch. 258.
- (12) *Re Scowcroft, Ormrod v. Wilkinson*, [1898] 2 Ch. 638; 8 Digest 247, 68; 67 L.J.Ch. 697; 79 L.T. 342.
- (13) *Re Hood, Public Trustees v. Hood*, [1931] 1 Ch. 240; Digest Supp.; 100 L.J.Ch. 115; 143 L.T. 691.
- (14) *Bonar Law Memorial Trust v. Inland Revenue Comrs.* (1933), 49 T.L.R. 220; Digest Supp.; 17 Tax Cas. 508.

A

B

C

APPEAL from a judgment of the Full Bench of the High Court at Lahore (SIR DOUGLAS YOUNG, C.J., and ADDISON, J., TEK CHAND, J., dissenting), dated June 4, 1935, upon a reference by a Division Bench (JAI LAL and SKEMP, JJ.), dated Dec. 13, 1934, before whom the matter had come on a reference made by the income tax commissioner, Punjab, North West Frontier and Delhi Provinces, Lahore, dated Jan. 26, 1934. The judgment of their Lordships was delivered by SIR GEORGE RANKIN.

A. M. Latter, K.C., and *H. W. Williams* for the appellants.

J. Millard Tucker, K.C., and *E. L. Norton* for the respondent.

D

SIR GEORGE RANKIN: The trustees of the Tribune Press, Lahore, appeal from the decision given on June 4, 1935, by the majority of the judges composing a Full Bench of the High Court at Lahore upon a reference made to that court under the Indian Income Tax Act, 1922, s. 66 (2).

E

On Jan. 31, 1933, the income tax officer, Lahore, for the year of assessment 1932-33, assessed the appellants to tax upon an income of Rs. 61,629, calculated upon the figures for the previous year. No question now arises as to the amount of the assessment or the computation of the tax. The sole question is whether or not the income of the appellants is exempt from tax under sect. 4 (3) (i) of the Act, which provides as follows:

F

(3) This Act shall not apply to the following classes of income: (i) any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application thereto. In this subsection "charitable purpose" includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility.

G

H

Sardar Dayal Singh, a Sikh inhabitant of the Punjab, died in 1898, having by his will, dated June 15, 1895, created 3 separate trusts to be administered by 3 independent "committees of trustees." Two of the trusts were for the establishment and maintenance of (i) an arts college, and (ii) a public library. The third trust was declared by cl. 20 and 21 of the will in the following terms:

20. That my property in the stock and goodwill of the Tribune Press and newspaper in Anarkali, Lahore, shall vest permanently in a committee of trustees consisting of the following members viz.: 1. Babu Jogendra Chandra Bose, M.A., B.L., Pleader, Chief Court, Lahore. 2. Mr. Charles Golak Nath, B.A., LL.B., Barrister-at-Law. 3. Mr. Harkishen Lal, B.A., Barrister-at-Law, Lahore.

21. That it shall be the duty of the said committee of trustees to maintain the

said press and newspaper in an efficient condition keeping up the liberal policy of the said newspaper and devoting the surplus income of the said press and newspaper after defraying all current expenses in improving the said newspaper and placing it on a footing of permanency.

By a deed of compromise, dated Dec. 1, 1906, whereby certain litigation as to the validity of the will was brought to an end, it was agreed between the parties thereto that "in case the Tribune newspaper should cease to exist or be impossible to exist" the property belonging to the Tribune Press should become the property of the arts college trust.

Since the death of Sardar Dayal Singh in 1898, the trust in respect of the Tribune Press has been carried out, and the newspaper of that name has continued to be published. The profits of the press and newspaper have been assessed to income tax since 1918. The claim to exemption was first made by the appellants in respect of the year 1932-33—that is, in the proceedings out of which this appeal arises. The claim was made for the first time before the assistant commissioner, and, on his rejecting the appellants' contention, they applied to the commissioner praying that on this point (and on another point which is not now in controversy) he would either accept their contentions or make a reference to the High Court. On Jan. 20, 1934, the commissioner referred to the High Court two questions framed in the following terms:

(1) Is the income of the Tribune trust liable to be assessed in the hands of the trustees under the provisions of the Income Tax Act?

(2) If so, is it not exempt under sect. 4 (3) (i) of the Act?

Upon the second question, which alone need now be referred to, the commissioner, having set out cl. 20 and 21 of the will, gave his opinion as follows:

It will be very difficult to say whether the running of a newspaper is an object of general public utility, but the mere fact that income is used for the improvement of the paper is not enough to take it out of the category of a business concern.

The judges of the Division Bench before whom the reference was first heard were of different opinions, JAI LAL, J., holding that the appellants' income was exempt from tax, and SKEMP, J., holding that it was not. The question was referred to a Full Bench, with the result that SIR DOUGLAS YOUNG, C.J., and ADDISON, J., held that the income in question was not exempt, TEK CHAND, J., dissenting. From this decision of June 4, 1935, the present appeal to His Majesty was brought, and at the first hearing—on July 22, 23, 1937—it was considered by the Board to be desirable that the powers conferred by sect. 66 (4) of the Act should be employed to obtain further information. Accordingly, by an order in council dated July 29, 1937, it was directed in accordance with the advice tendered by the Board:

... (2) that the case ought to be remitted to the High Court of Judicature at Lahore with a direction that the said High Court shall refer the case back to the said commissioner under the Indian Income Tax Act, 1932, s. 66 (4), first for the addition of such facts during the life time of the testator Sardar Dayal Singh as may bear upon the proper interpretation of the expression "keeping up the liberal policy of the said newspaper" in cl. 21 of the will of the said testator dated June 15, 1895, and secondly for the addition of such facts as to a compromise dated Dec. 1,

1906, as may show whether the said compromise is binding on all parties interested in the estate of the said testator.

There is now before their Lordships a supplementary statement made by the present commissioner, Mr. K. C. Basak, who has carefully assembled considerable material explanatory of the direction given by the testator in the phrase "keeping up the liberal policy of the said newspaper," and showing, as their Lordships think very fairly, the nature and purpose of the trust. The first issue of the paper was dated Feb. 2, 1881, and contained an article entitled *Ourselves*, which was a statement of the paper's aims and objects. Two years later, on Feb. 3, 1883, a further article of the same character was published, headed *Our Second Anniversary*. Extracts from issues of the paper between 1881 and 1898 have been selected by the commissioner and by the appellants to throw light on the character and policy of the paper in the lifetime of its founder. The sole use which their Lordships are concerned to make of these materials is to arrive at a true construction of the trust, the testator having expressed his intentions by reference to a newspaper which had been published in his lifetime and to a policy the character and purpose of which must necessarily be collected from its previous issues. It is not necessary or relevant to inquire as to the manner in which the trust has been, or is being, carried out since the date of the testator's death. The question is as to the true nature and character of the trust.

No question here arises such as was dealt with in *Brighton College v. Marriott* (1), where it was held that the English Act as it then stood provided no exemption for profits of a trade carried on by a charity, even if the carrying on of the trade was the sole and only purpose of the charity. In the letter of reference, there is no suggestion that the income under assessment is not derived from property held under the trust declared in cll. 20 and 21 of the will.

Their Lordships are not prepared to hold that the property referred to in these clauses of the will is held for the purpose of "education" in the sense of that word as it appears in sect. 4 of the Act. *Prima facie*, therefore, the only question for decision is whether that property is held under trust wholly for the advancement of an object of general public utility. This was the view taken in the High Court by TEK CHAND, J., who contrasted the wide terms of the exempting clause in the Indian Income Tax Act with the observations of LORD LINDLEY in *Re Macduff, Macduff v. Macduff* (2), at p. 467, where, after referring to a well-known passage in the opinion of LORD MACNAGHTEN in *Income Tax Special Purposes Comrs. v. Pemsel* (3), at p. 583, LORD LINDLEY held that in English law there might be some purposes of general utility which might be charitable and some which might not, the true test being the spirit or intention of the statute of Elizabeth (43 Eliz. c. 4). Counsel for the respondent in the present case, while not apparently conceding that, under the Indian statute, the sole test to be applied to the object of a trust was that of general public utility, was willing that this should

be assumed in the present case. He suggested that the question whether an object was of general public utility was a question of fact to be found and stated by the commissioner, and not a question of law for the court. Their Lordships, while unwilling to pronounce upon any matter which has not been argued before them, consider that the courts in India might be misled if the Board appeared to cast doubt upon the view that the admissibility of a claim to exemption from income tax must be determined by the language of the special provision made by the Act in that behalf. They are also of opinion that the question whether a particular object is of general public utility, like the question whether a particular trust is charitable, is a question of law, though doubtless it is for the commissioner to find and state any facts bearing thereon: *Inland Revenue Comrs. v. Temperance Council of Christian Churches of England & Wales* (4), at p. 772. In the present case, the commissioner properly stated it as a question of law under sect. 66, and answered it as such. Indeed, he put the point as being "whether the trust can be deemed to be a charitable trust." The importance of applying correct principles in such a matter is manifest by reason of the rule against perpetuity laid down as to wills in the Indian Succession Act, 1925, s. 114, and as to transfers *inter vivos* by the Transfer of Property Act, 1882, s. 14. As to the latter, by sect. 18 exception is made for transfer of property :

... for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

By a long course of judicial decisions following English authority, an exemption for charitable trusts has been implied or read into the Succession Act, 1925, s. 114, and by sect. 118 restrictions are imposed upon bequests for "religious or charitable uses." Moreover, the Charitable Endowments Act, 1890, s. 2, contains the same definition of charitable purpose as is given by the Income Tax Act, but with the addition of words excluding religious purposes.

It was considered by JAI LAL and TEK CHAND, JJ., that, on the question whether a particular object or purpose was of general public utility, the true test is, not what the court considers to be beneficial to the public, but what the testator considered to be so. In so holding, they were following what was said by CHITTY, J., in *Re Foveaux, Cross v. London Anti-Vivisection Society* (5). That case was on this point dissented from by RUSSELL, J., in *Re Hummeltenberg, Beatty v. London Spiritualistic Alliance* (6), where it was held that, though the personal or private opinion of the judge is immaterial, nevertheless, for a charitable gift to be valid, it must be shown (i) that the gift will or may be operative for the public benefit, and (ii) that the trust is one the administration of which the court itself could, if necessary, undertake and control. RUSSELL, J., added, at p. 242 :

If a testator by stating or indicating his view that a trust is beneficial to the public can establish that fact beyond question, trusts might be established in perpetuity for the promotion of all kinds of fantastic (though not unlawful) objects...

Their Lordships are in agreement with this view, and see nothing in the Indian Income Tax Act to discharge the court of its responsibility in coming to a finding as to the character of the object of a trust—a matter which bears directly upon its validity. It is to be observed, moreover, that, under the Income Tax Act, the test of general public utility is applicable, not only to trusts in the English sense, but also to property held under trust “or other legal obligation”—a phrase which would include Moslem *wakfs* and Hindu endowments. The true approach to such questions in cases which arise in countries to which English ideas, let alone English technicalities, may be inapplicable, was considered by the Board in *Yeap Cheah Neo v. Ong Cheng Neo* (7), and it was well said by SIR RAYMOND WEST in an Indian case, *Fatmabibi v. Advocate-General* (8), at p. 50 :

But useful and beneficial in what sense ? The courts have to pronounce whether any particular object of a bounty falls within the definition ; but they must in general apply the standard of customary law and common opinion amongst the community to which the parties interested belong.

In the High Court, stress was laid by SIR DOUGLAS YOUNG, C.J., and by ADDISON, J., on the fact that the Tribune newspaper charges its readers and advertisers at ordinary commercial rates for the advantages which it affords. As against this, the evidence or findings do not disclose that any profit was made by the newspaper or press before 1918, and it is at least certain that neither was founded for private profit, whether to the testator or to any other person. By the terms of the trust, it is not to be carried on for profit to any individual. It cannot, in their Lordships’ opinion, be regarded as an element necessarily present in any purpose of general public utility that it should provide something for nothing, or for less than it costs, or for less than the ordinary price. An eleemosynary element is not essential, even in the strict English view of charitable uses : *R. v. Income Tax Special Comrs., Ex p. University College of North Wales* (9), at p. 414. There seems to be no solid distinction to be taken under the phrase “general public utility” between a school founded by a testator but charging fees to its pupils and a paper founded by a testator and sold to its readers. The purpose of providing the poor or the community in general with some useful thing without price, or at a low price, may doubtless be in itself a purpose of general public utility, but, if another object be independently in itself of general public utility, the circumstance that the testator’s bounty was only in respect of the initial capital assets, or had only to meet a working loss temporarily, and not permanently, will not, necessarily at least, alter the character of the object.

The main objection now taken to the appellants’ claim for exemption is on the ground that the Tribune newspaper, as its founder intended it to be carried on, would contain matter in the nature of political propaganda, and would be devoted to the advocacy of particular legislative measures considered by its founder to be measures of reform. It is not

suggested that the views or measures to be advocated were in any way unlawful, but, even so, the political character, it is said, prevents the trust from being held to be for an object of general public utility. LORD PARKER said, in *Bowman v. Secular Society, Ltd.* (10), at p. 442 :

... a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift. A

Moreover, in *Re Tetley, National Provincial & Union Bank of England, Ltd. v. Tetley* (11), where the gift was for "patriotic" and charitable objects, RUSSELL, J., said, at p. 262 :

But must every application of the fund for a patriotic purpose be beneficial to the community and therefore charitable ? It seems to me that it is impossible to hold that. What is or is not patriotic is in many cases mere matter of opinion. Subsidising a newspaper for the promotion of particular political or fiscal opinions would be a patriotic purpose in the eyes of those who considered that the triumph of those opinions would be beneficial to the community. It would not be an application of funds for a charitable purpose. B

Again, in *Inland Revenue Comrs. v. Temperance Council of Christian Churches of England & Wales* (4), ROWLATT, J., finding that the first purpose of the assessee was legislative temperance reform, though the work was to be of a strictly non-party character, observed, at p. 752 :

Any purpose of influencing legislation is a political purpose in this connection. Under these circumstances, this is mainly a trust to secure a certain line of legislation, and if that is so, I do not understand it to be disputed that that would not be a charitable trust. I think the authorities are clear upon it and I am not going to say anything more about it. C

On the other hand, it is to be observed that in that case ROWLATT, J., rejected, but only upon the facts, the argument that the purpose of the council was temperance and that legislation came in in a subsidiary way. Moreover, in *Re Scowcroft, Ormrod v. Wilkinson* (12), the devise of a building known as the Conservative Club and Village Reading Room in a certain parish to be maintained "for the furtherance of Conservative principles and religious and mental improvement, etc.," was held to be a gift for religious and mental improvement. STIRLING, J., said, at pp. 641, 642 :

It is, therefore, a gift in one form or another for religious and mental improvement, no doubt in combination with the advancement of Conservative principles ; but that limitation, it appears to me, is not sufficient to prevent it from being a perfectly good charitable gift, as undoubtedly it would be if it were a gift for the furtherance of religious and mental improvement alone. D

In *Re Hood, Public Trustee v. Hood* (13), a testator had bequeathed his residuary estate for the purpose of spreading Christian principles and aiding all active steps to minimise and extinguish the drink traffic. On the view that the former was the dominant purpose and that the latter was subsidiary thereto, the gift was upheld, even on the hypothesis that the latter purpose would not have been charitable in itself. E

In *Bonar Law Memorial Trust v. Inland Revenue Comrs.* (14), FINLAY, J., had to deal with a college founded in connection with the Conservative F

party, and, after reviewing the cases above-cited, held that the question was whether the dominant purpose was a good charitable purpose or not. He added, at p. 517 :

A The fact that the education was entrusted to the Conservative party would not, I think, affect the validity of the trust if in truth it was a trust for education ; but, on the other hand, if the true view is that the trust was a trust for the promotion of Conservative principles . . . and that the education, the lectures and so forth were subsidiary to that which was the main and dominating purpose then the fact that the lectures, and so forth, would be educative would not be sufficient to make the trust a trust for charitable purposes only.

B Holding that the college was in effect an educational centre for the Conservative party, and that this was in accordance with the trust deed, FINLAY, J., decided that the claim for exemption from tax could not be sustained.

C These English decisions are in point only in so far as they illustrate the manner in which political objects, in the wide sense which includes projects for legislation in the interests of particular causes, affect the question whether the court can regard a trust as being one of general public utility. In the original letter of reference, it was not suggested by the commissioner that the newspaper was intended by its founder to be a mere vehicle of political propaganda, and in the case of Sardar D Dayal Singh it seems unreasonable to doubt that his object was to benefit the people of Upper India by providing them with an English newspaper—the dissemination of news and the ventilation of opinion upon all matters of public interest. While not perhaps impossible, it is difficult for a newspaper to avoid having or acquiring a particular political complexion, unless indeed it avoids all reference to the activities of governments or legislatures, or treats of them in an eclectic or inconsistent manner. The circumstances of Upper India in the last decade of the nineteenth century would doubtless make any paper published for Indian readers sympathetic to various movements for social and political reform. E Their Lordships, however, having before them material which shows the character of the newspaper as it was in fact conducted in the testator's lifetime, have arrived at the conclusion that questions of politics and legislation were discussed only as many other matters were in this paper discussed, and that it is not made out that a political purpose was the dominant purpose of the trust. They think that the object of the paper G may fairly be described as “ the object of supplying the province with an organ of educated public opinion,” and that it should *prima facie* be held to be an object of general public utility. Having regard to the particular circumstances of the time, the directions of the testator and the evidence H as to the contents of the paper before 1898, their Lordships think that the present case is nearer on its facts to *Re Scowcroft, Ormrod v. Wilkinson* (12) than it is to *Bonar Law Memorial Trust v. Inland Revenue Comrs.* (14) or to the case put by RUSSELL, J., in *Re Tetley, National Provincial & Union Bank of England, Ltd. v. Tetley* (11) of a newspaper subsidised for the promotion of particular political or fiscal opinions. They do not think

that, in these circumstances, the case can be regarded as outside the ambit of the exemption clause of the Indian Act. It is not necessary to consider what the position would be if the trust declared by the will were for any reason to fail in the future. For the reasons given, their Lordships are of opinion that this appeal should be allowed, and that the second of the two questions referred to the court by the commissioner's letter of reference, dated Jan. 26, 1934, should be answered in the affirmative. They will humbly advise His Majesty accordingly. The respondent will pay the appellants' costs of the reference in the High Court and of this appeal.

Appeal allowed with costs.

Solicitors: *Nehra & Co.* (for the appellants); *The Solicitor, India Office* (for the respondent).

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

ALDHAM v. UNITED DAIRIES (LONDON), LTD.

[KING'S BENCH DIVISION (Humphreys, J.), **June 15, 16, 26, 1939.**]

Animals—Liability of owner—Negligence—Ordinary consequences of negligence—Scienter—Horse left unattended attacking passer-by.

The plaintiff was attacked and injured by the defendants' horse, which, attached to a milk-cart, had been left unattended for half-an-hour in a main thoroughfare. Evidence was given on behalf of the defendants that the horse was docile and quiet. The jury negatived *scienter* on the part of the defendants, but found them guilty of negligence in leaving the horse unattended, and awarded the plaintiff damages:—

HELD: (i) the question of negligence was one of fact for the jury, and, on the facts of this particular case, it was impossible to say that there was no evidence upon which the jury could find negligence.

(ii) the injury caused to the plaintiff was not an ordinary and natural consequence of the defendants' negligence, and the plaintiff could not recover.

[EDITORIAL NOTE.] The owner of a domestic animal is only liable for injury caused by reason of his negligence where the injury is one which may be reasonably expected to result from that negligence. An attack upon a human being is not the natural result of leaving a horse unattended unless *scienter* be proved in respect of the particular horse. The judgment herein discusses at some length whether negligence is a question of fact or a mixed question of fact and law.

AS TO NEGLIGENCE IN RELATION TO DOMESTIC ANIMALS, see HALSBURY, *Hailsham Edn.*, Vol. 1, p. 542, para. 932; and FOR CASES, see DIGEST, Vol. 2, pp. 229-233, Nos. 201-220.]

Cases referred to:

- (1) *Haynes v. Harwood*, [1935] 1 K.B. 146; Digest Supp.; 104 L.J.K.B. 63; 152 L.T. 121.
- (2) *Hendry v. M'Dougall*, [1923] S.C. 378; 36 Digest 64, case h.
- (3) *M'Ewan v. Cuthill* (1897), 25 R. (Ct. of Sess.) 57; 36 Digest 64, case f.
- (4) *Deen v. Davies*, [1935] 2 K.B. 282; Digest Supp.; 104 L.J.K.B. 540; 153 L.T. 90.
- (5) *Cox v. Burbidge* (1863), 13 C.B.N.S. 430; 2 Digest 233, 218; 32 L.J.O.P. 89.

- (6) *Bradley v. Wallaces, Ltd.*, [1913] 3 K.B. 629; 2 Digest 236, 236; 82 L.J.K.B. 1074; 109 L.T. 281; 6 B.W.C.C. 706.
(7) *Lee v. Riley* (1865), 18 C.B.N.S. 722; 2 Digest 228, 194; 34 L.J.C.P. 212; 12 L.T. 388.
(8) *Ellis v. Loftus Iron Co.* (1874), L.R. 10 C.P. 10; 2 Digest 227, 183; 44 L.J.C.P. 24; 31 L.T. 483.

A ACTION for damages for injuries suffered by the plaintiff when she was bitten by a horse belonging to the defendants. The facts and the arguments are fully set out in the judgment.

Robert Fortune for the plaintiff.

Cyril Salmon for the defendants.

B HUMPHREYS, J. : The plaintiff in this case brings her action against the defendants for damages on the ground that she was injured by a horse belonging to the defendants. She puts her claim in two ways, (i) that the defendants were the owners of the horse, which they knew to be either vicious or likely to attack a person, a human being, and that the horse did so, or, in the alternative, (ii) that the defendants were negligent in leaving the horse unattended, and, as the reasonable natural consequence of that negligence on their part, the horse was enabled to injure the plaintiff.

D The undisputed facts of the case are these. On May 31, 1938, the plaintiff, who was some 55 years of age, was walking up Palace Gate from south to north, and, when she got near to the corner of Palace Gate and Kensington Road, which separates that part from Kensington Gardens, and when she was opposite a very large block of flats called

E Thorney Court, she saw what she had often seen before—namely, one of the defendants' milk-carts drawn by a small horse or pony, the horse having its forefeet on the kerb, or possibly just over the kerb, and on the pavement. It is common ground that she did see, and could have seen, that happening many times before. On this occasion, the plaintiff's

F story was that what happened was this. She got up to the horse, which in fact was facing the same way as she was going, but was necessarily turned more or less to the kerb, with its forefeet on the kerb. She got close to the horse, and for some reason or other it suddenly lunged out, and, as she described it, made a jab at her. She said that it bit her

G cheek. She explained a little later that she did not mean that its teeth met with the cheek in between them, but that with its teeth it grazed her cheek, and she said that she still had the scar of that graze. She said that the horse, being unable to reach her eye, then caught hold with its teeth of the lapel of her coat, and, by holding that, forced her to the

H ground, and then, as she said, "dragged me towards the gutter," and, when she lay on the ground, she said, "it pawed me with its feet." She got up and was helped home by, amongst others, one of the defendants' employees who happened to be passing, but, so far as the evidence goes, he had not seen, or had anything to do with, the accident. There is no doubt at all that the plaintiff, as a result of something which happened

between herself and the horse, did fall to the ground in the way which she has described. The story was a somewhat remarkable one, and there was a good deal of medical evidence about the plaintiff and the state of her nerves and so forth. I thought it right to ask the jury in terms whether they accepted that story. In answer to the first two questions put to them, the jury accepted the whole of the story. Those, A therefore, must be taken to be the facts of the case. I must assume that that is precisely what happened, whether or not I believe it. The other evidence called on behalf of the plaintiff did not assist this part of the case at all. There was no witness of the accident, and the defendants' evidence consisted of evidence to show that in point of fact this B pony was as quiet and docile an animal as it is possible to find. A man named Frith was called who was in charge of the horses of the defendant company, and had been so since 1934, or longer, I think. This particular horse was bought on June 8, 1934, and he bought it. He described it as a perfectly fool-proof "wooden" pony. He said that it was perfectly C docile, and, indeed, peculiarly docile and quiet. Every day since then, the pony has gone the same round, and there has never been any sort of complaint about its conduct from anybody or from any quarter. The man who in fact was in charge of it on this day, or who was supposed to be in charge of it, was a man named Hyde, who had been with the defendant D company for 41 years, and in fact had taken out this pony every day since it had been bought. He described it as docile and quiet. He said that on his round, including Thorney Court, the pony had always made a practice, for some reason or other, when it got to that place, and nowhere else, of putting its forefeet upon the kerb. Why it did so I am E unable to say, and the only person who made any suggestion about it was one of the defendants' witnesses, a man who understands horses. He said that he thought that it was because the pony got some rest by lifting up its feet and putting them on the kerb, which is there substantially higher than the roadway. However that may be, that is what F the pony did, and that is what it had been in the habit of doing. I exaggerated when I said "every day." It was substantially every day—namely, five days a week. It had done that ever since it had been bought. The witness Hyde said that in fact people from Thorney Court used to feed this pony, which may account for its possibly behaving G in that way. Upon these facts, the jury negatived the *scienter*, as they were bound to do. Indeed, there was no evidence at all to suggest that the pony was other than the docile, quiet animal which it was described as being. On the other hand, in answer to a question, the jury found that in the circumstances of the case, the defendants were negligent in H leaving the horse unattended, and they awarded the plaintiff £300 damages.

Counsel for the plaintiff asked for judgment upon those findings, and counsel for the defendants raised some questions of law. The first point which he raised was that there was no evidence of negligence to

go to the jury. In my judgment, there can be no doubt at all that the question of whether or not, if a person in charge of a horse leaves it unattended, he has been guilty of negligence is a pure question of fact, to be decided upon the circumstances of each case. If authority is wanted for that proposition, it is sufficient to quote one of the many cases which were cited to me. There is *Haynes v. Harwood* (1), where GREER, L.J., made these observations, at p. 153 :

Of course it does not follow that in all circumstances it is negligence to leave horses unattended in a highway ; each case with all its circumstances has to be considered ; but the circumstances which make it quite clear that the defendants' servant was guilty of a want of reasonable care in leaving his horses unattended are that this was a crowded street in which many people, including children, were likely to be at the time when the horses were left and before the defendants' servant could get back to them. The defendants' servant had been frequently in the neighbourhood ; he had often delivered goods at Quiney's wharf ; and he must be taken to know something of the character of the neighbourhood, although he denied any knowledge of schools being there. To leave horses unattended, even for such a short time as three minutes, in a place where mischievous children may be about, where something may be done which may result in the horses running away, seems to me to be negligent—having regard to the proved circumstances.

Similar observations were made by ROCHE, L.J., as he then was, and he entirely agreed that it was a question of fact, in each case. I will only refer to one other case, *Hendry v. M'Dougall* (2), a Scottish case, where some observations were made as to the sort of matters which would be rightly considered by a jury in considering whether negligence was proved in any particular case. The Lord Justice-Clerk, LORD ALNESS, observed, at p. 382 :

... the question whether a driver is in fault in leaving his horse unattended is a question of circumstances, and I agree with what the Lord Justice-Clerk said in *M'Ewan v. Cuthill* (3), that "there is no general rule." Much, for example, will depend upon the type of horse, the time during which the driver is absent, the distance to which he goes, and also the character of the locus.

In my opinion, it is quite impossible to say that, on the facts in this case, there was no evidence upon which the jury could find that the leaving of this horse unattended was negligence. The evidence of the defendants themselves was that the man supposed to be in charge of the horse was absent for half-an-hour, and that that was his practice. In my opinion, that fact alone is ample justification for a jury finding, as this jury found, that the defendants were negligent, quite apart from the particular observation made by the jury, which I do not think they intended to imply as being the only evidence of negligence, that, in the circumstances, to leave this horse unattended was negligent, since the defendant knew that the horse had a habit of straying onto the pavement. I think that what the jury meant by that was that that was an indication at least that the horse was getting tired, restive, and restless. Therefore, if this had been a case in which the horse had bolted, as happened in most of the cases which have come before the courts, or if the horse had merely got bored, turned round and walked home, or trotted home, as was the case in *Deen v. Davies* (4), and in the course of its going home had injured somebody, I think that the case would have been unarguable. Counsel

for the defendants, however, has drawn my attention to a much more formidable difficulty in the way of the plaintiff. It is the law in this country that the owner of a domestic animal is not responsible for damage to a person done by that animal unless he has knowledge of some propensity on the part of the animal to behave in that way, and clearly there is no such evidence here. Counsel for the defendants says that, if the plaintiff is going to rely upon ordinary common law negligence, she must show that the injury caused to her was a reasonably natural consequence flowing from the negligence alleged and proved. If that is right, I do not think that there can be any dispute. The matter was concluded by authority as long ago as 1863, in *Cox v. Burbidge* (5). In that case, the law was laid down by ERLE, C.J., in language which has been accepted ever since. The facts of the case were totally different, and they do not assist the matter. The passage which is always referred to as a classic exposition of the law since 1863 is a passage in the judgment of ERLE, C.J., where, after dealing with the question of whether or not there was negligence from the facts of that case, ERLE, C.J., observed, at pp. 436, 437 :

...even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was on the highway, and that, without anything to account for it, he struck out and injured the plaintiff. I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it. Thus, in the case of a dog, if he bites a man or worries sheep, and his owner knows that he is accustomed to bite men or to worry sheep, the owner is responsible ; but the party injured has no remedy unless the *scienter* can be proved. This is a very familiar doctrine ; and it seems to me that there is much stronger reason for applying that rule in respect of the damage done here. The owner of a horse must be taken to know that the animal will stray if not properly secured, and may find its way into his neighbour's corn or pasture. For a trespass of that kind, the owner is of course responsible. But, if the horse does something which is quite contrary to his ordinary nature, something which his owner has no reason to expect he will do, he has the same sort of protection that the owner of a dog has ; and everybody knows that it is not at all the ordinary habit of a horse to kick a child on a highway. I think the ground upon which the plaintiff's counsel rests his case fails. It reduces itself to the question whether the owner of a horse is liable for a sudden act of a fierce and violent nature which is altogether contrary to the usual habits of the horse, without more.

There were views given by other judges to the same effect.

To come to more modern times, there is the authority of *Bradley v. Wallaces, Ltd.* (6), where SIR H. H. COZENS-HARDY, M.R., after referring to *Cox v. Burbidge* (5), and reading part of the passage to which I have just referred, observed, at p. 633 :

The damage in the present case does not naturally flow from the trespass and is not an ordinary consequence of the trespass. It is too remote. Does it make any difference that there was negligence on the part of the owners' man in leaving the horse unattended ? In my opinion it does not. It is impossible to read the judgments in *Cox v. Burbidge* (5) without seeing that the negligence of the owner is not a vital point. The negligence can only render the owner liable for the ordinary and reasonable consequences of the negligence, and not for any damage which cannot fall within those terms. I can see no ground for holding that the man's negligence in leaving the horse unattended in any degree rendered the sudden and unexpected vicious act of kicking more probable. In my opinion there was no evidence to justify the decision of the learned judge [who had held that in giving judgment for the plaintiff], and this appeal must be allowed.

In the same case, KENNEDY, L.J., emphasised the same matter, at p. 637:

In the cases of *Lee v. Riley* (7) and *Ellis v. Loftus Iron Co.* (8), which stand, as it were, on the other side of that which is sometimes a rather narrow border line, the damage done to the owner of the property on which the horse trespassed was held, upon the facts, to be a natural consequence of the trespass. The learned county court judge, if, as I hope, I follow his line of reasoning, seems to have thought that, directly you have a horse in a position which renders his owner constructively a trespasser, every damage done in any way by the horse to any person or to the property of any person is an actionable wrong. I venture to think that such is not, and never was, the law.

I come to the conclusion upon those cases—I have glanced at others to which I have been referred by counsel on each side—that in this case the plaintiff cannot have judgment or the damages which have been awarded to her by the jury unless she can show that there was in that animal something vicious which was known to the owner, or unless she can prove negligence, the reasonable consequence of which was the behaviour of the horse as proved. I feel bound to enter judgment for the defendants in spite of the findings of the jury.

Judgment for the defendants with costs.

Solicitors: *W. T. Iggulden* (for the plaintiff); *Blount, Petre & Co.* (for the defendants).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

MILK MARKETING BOARD v. LAWRENCE.

[KING'S BENCH DIVISION (Asquith, J.), April 20, 24, 25, 26, 27, May 17, 1939.]

Agriculture—Marketing scheme—Milk Marketing Board contract—Provision for stop notices on 7 days' default by purchaser—Subsidiary agreement for non-issue of stop notices on certain conditions—Implied term that stop notices issuable immediately on breach of subsidiary agreement.

The defendant entered into a contract with the plaintiffs for the supply of milk, the contract being in the Milk Marketing Board's standard form and providing (*inter alia*) for the giving of stop notices terminating the agreement in case of default in payment by the purchaser for 7 days thereunder. At the end of Dec., 1936, the defendant owed the plaintiffs over £4,000, and on Jan. 5, 1937, he entered into a subsidiary agreement, whereby the plaintiffs agreed not to sue for arrears or issue stop notices if he complied with three conditions: (i) to pay £200 per month in reduction of the arrears outstanding on Jan. 5, 1937, (ii) to pay for all current monthly supplies of milk by two monthly payments within the month of supply, and (iii) to provide security for his indebtedness either by granting a charge on his property or by finding an acceptable guarantor. The defendant failed within the month of May to pay fully for supplies delivered in that month, and on June 7 the plaintiffs issued stop notices which expired before payment was made. These stop notices were served by hand on June 7, and the defendant contended that they should have been issued a clear 7 days after May 31, and were therefore premature and in breach of the subsidiary agreement:—

HELD: (i) in the circumstances in which the subsidiary agreement was made, it was necessarily an implied term that, in the event of a

breach of any one of the three obligations, the plaintiffs should be remitted to their rights as they stood immediately before the subsidiary agreement was made. The stop notices were issued, not in respect of a failure to pay for May, 1937, supplies within that month, but in respect of a whole mass of defaults which had accumulated before the subsidiary agreement was made. On failure of the defendant to make punctual payment under the subsidiary agreement, the plaintiffs were entitled to revert to the rights which existed before the subsidiary agreement was made. A

(ii) the subsidiary agreement was a promise supported by a consideration and not a mere voluntary forbearance on the part of the plaintiffs.

[EDITORIAL NOTE. In preparing a subsidiary agreement it is usual to insert a clause that, upon breach thereof, the parties shall immediately revert to their position before the agreement and be in a position to enforce all and every remedy then available to them. In the present case, it is held that there is an implied term to this effect in such an agreement, or, at any rate, in the agreement here in question, which does not, however, appear to have any special feature. B

AS TO MARKETING SCHEMES, see HALSBURY, Supp., Agriculture, para. 643; and FOR CASES, see DIGEST, Supp., Food and Drugs, Nos. 476i-476l.] C

Case referred to :

- (1) *Payzu, Ltd. v. Saunders*, [1919] 2 K.B. 581; 39 Digest 571, 1765; 89 L.J.K.B. 17; 121 L.T. 563.

ACTION for the balance of the price of goods sold and delivered under contracts made between the plaintiffs and the defendant and producers of milk during the years 1933 to 1936 inclusive. The defendant's counterclaim sought to set off against the plaintiffs' claim an equivalent amount due from the plaintiffs to the defendant by reason of breaches by them of a subsidiary contract entered into by them and the defendant in or about Jan., 1937. The facts are fully set out in the judgment. By reason of certain admissions made by the defendant, the action proceeded on the defendant's counterclaim. D

B. J. M. MacKenna for the plaintiffs.

R. T. Monier-Williams and *L. B. Schapiro* for the defendant. E

MacKenna : The defendant has failed to prove the existence of a contract. He has proved only a voluntary forbearance on the part of the plaintiffs. If there was a contract, it was subject to two conditions to be performed by the defendant. He was bound to pay for his current supplies twice monthly, and also to pay £200 per month in reduction of his arrears. Time was of the essence of this provision. *Payzu, Ltd. v. Saunders* (1) has no application to the present case. In that case, the parties had not indicated an intention that the time of payment should be of the essence. Here the parties have indicated such an intention. The defendant was also bound to provide a guarantor within a reasonable time. He failed to perform either of these conditions. He was in arrears with his payments when the stop notice was served. There was no waiver of the requirement that payments should be made punctually. There is no plea of waiver. The defendant also failed to provide a guarantor. At the date when the stop notices were served, a reasonable F

G

H

time for providing a guarantor had elapsed. It was then impossible for the defendant to find a guarantor. He had broken the conditions of his manufacturing licence, and the plaintiffs were about to cancel that licence. That would have brought the defendant's business to an end. In the circumstances, no guarantor would have guaranteed the

A defendant's account.

Monier-Williams: The defendant contends that the plaintiffs, by reason of entering into the agreement with him and accepting from him the sums of money paid by him between Jan. 7, 1937, and June 7, 1937, were estopped from contending that he was at any time during
B this period in default with his payments under any of the standard contracts. Time was not of the essence of this contract. The plaintiffs had permitted the defendant to fall into arrears over a period of time. The defendant paid off the arrears from time to time as far as his business profits permitted. The subsidiary agreement entered into by the parties
C in Jan., 1937, was the only basis upon which the defendant could save a business which, before the Milk Marketing Board's scheme came into operation in Oct., 1933, showed a handsome profit, and which was capable of expansion to meet the demands of consumers. In May, when the defendant had got behind with his payments under the subsidiary
D agreement, he was making successful efforts to raise money on mortgage for the purpose of paying off some of his indebtedness. He actually raised £1,100, which he offered to the plaintiffs, but they refused to accept it. This showed that the defendant was not intending to repudiate the subsidiary agreement, and, unless the plaintiffs could prove such
E repudiation, they had no right to have recourse to stop notices. All they were entitled to do was to sue the defendant for instalments overdue: *Payzu, Ltd. v. Saunders* (1).

ASQUITH, J.: In this action, the Milk Marketing Board claim from
F the defendant a sum of over £6,000, with interest, as the balance of purchase price of milk sold and delivered by the board to the defendant. The defendant concedes that, subject to his counterclaim, the sum claimed, or something approximating closely to it, is due. The only dispute as to the claim relates to its exact quantum in respect of a single month—
G namely, Dec., 1936. In these circumstances, the onus was substantially on the defendant, whose counsel accordingly opened his counterclaim and called his evidence first. At the end of the defendant's case, counsel for the plaintiffs submitted that, accepting the whole of the evidence called for the defendant as true, yet, in law, no case was made out in support of
H the counterclaim, and this submission I felt bound to accept.

The defendant is a dairyman, and had for some years before these proceedings conducted on an increasing scale a business of manufacturing dairy products—principally cheese, butter and cream—under the style of the Somerset Dairies, at Fishponds, in Somersetshire. The Milk Marketing Scheme came into force in the latter part of 1933, and from

then on until 1937, when the material events happened, the defendant purchased milk from the Milk Marketing Board and the producers subject to the provisions of the scheme. The defendant purchased the great bulk of this milk for manufacturing purposes, and received the rebates provided for by the scheme in the case of milk destined for those uses, but he occasionally bought minor quantities for sale for liquid A consumption. It is unnecessary to refer at length to the provisions of the Milk Marketing Scheme. Some reference should be made to the contracts under which the defendant bought milk from the board. So far as is relevant to this case, each of these contracts provides by cl. 1 that the vendor agrees with the board and the purchaser to sell; and the B purchaser agrees with the vendor and the board to buy, during the period covered by the contract the quantities of milk therein specified. By cl. 3, it is provided that the purchaser shall monthly on or before the due date pay the regional price for such milk, and that the due date in relation to any calendar month's deliveries of milk means the tenth day of the C next month. Finally, by cl. 7, it is provided as follows :

If the purchaser shall at any time have failed to pay any sum due (whether under this agreement or otherwise) from him to the board on or before the seventh day after the due date then and in that case the board may (without prejudice to any other available remedies) give to the purchaser written notice (hereinafter called a stop notice) of the board's intention to determine this and such other registered D agreements to which the purchaser is a party as the board may think fit on a date or dates . . . to be specified in the stop notice in relation to each agreement. Unless the purchaser shall on or before the fourth day after the sending of the stop notice pay the amount due the said registered agreements shall be deemed to determine at midnight on the stop date or dates.

Thus, for milk delivered in January, the "due date" for payment would E be Feb. 10. If no payment had been made by Feb. 18, a stop notice would then be issued notifying the purchaser that this agreement and other registered agreements would be determined within a named period unless payment were made within 4 days of the service of the notice. It is conceded, as I have said, that at the end of 1936 there was a very F considerable sum of arrears owing by the defendant to the plaintiffs. These arrears amounted by agreement to some £4,000 at the end of November, and to more at the end of December, though the precise amount of the additional indebtedness for that month is not agreed. Again, it is conceded that, at the end of 1936, the board were entitled to G sue for the arrears, and also that they could lawfully have issued stop notices depriving the defendant of all further supplies of milk, thus bringing his business to an end. On Jan. 5, 1937, however, there was a meeting between the defendant and Mr. Wynne Owen, the board's regional officer at Worcester, to discuss the position. The result of the discussion H was a subsidiary agreement, of which, for the present purpose, I am accepting the defendant's version. According to this version, the effect of the agreement was that the board would not sue for arrears or stop supplies of milk by stop notices if and so long as the defendant complied with 3 conditions which I will indicate. The defendant's counterclaim

alleges in effect that he did comply with these conditions, but that the plaintiffs nevertheless, in breach of the subsidiary agreement, on June 7, 1937, issued stop notices, the effect of which was to cut off his supplies of milk, bring his business to a standstill, and, in effect, ruin him completely. He counterclaims for damages for this alleged breach. The

A 3 conditions laid down in this subsidiary agreement, subject to which the board were not to cut off supplies or sue for arrears, were (i) that the defendant should pay £200 per month in reduction of the arrears outstanding on Jan. 5, (ii) that he should pay for all current monthly supplies of milk by two monthly payments to be made within the month of supply, and not later, and (iii) that he should provide security for his indebtedness, either by granting a charge on his property or business or by finding a guarantor acceptable to the board. It seems to me that this last obligation, for which no time was assigned, was impliedly to be performed within a reasonable time.

C I hold that, in the circumstances in which this subsidiary agreement was made, it was necessarily an implied term thereof that, in the event of a breach of any of the three obligations I have indicated, the board should be remitted to their rights as they stood immediately before the subsidiary agreement was made. These rights included, *inter alia*,
D the right to issue stop notices by reason of the defaults which had occurred before and up to Jan. 5. I also hold that the agreement was made with a contracting mind—that is, with the intention of creating legal relations between the parties—and that it was not a mere voluntary forbearance or a mere statement by the board of an intention, which the board was
E free to change or revoke, to forbear from certain action so long as certain conditions were satisfied. It was, I think, a promise supported by a consideration, the consideration moving from the defendant being an undertaking to pay for monthly supplies of milk earlier than under the original contracts, and also to provide security.

F Finally, I hold that, as to the obligation to pay £200 per month against arrears, and to pay for monthly supplies within the month, time was of the essence of the contract. It is true that there is a statutory presumption against time of payment being of the essence of a contract for sale of goods. Cases such as *Payzu, Ltd. v. Saunders* (1) illustrate the
G operation of this presumption. The circumstances of this case, however, are in my view amply sufficient to displace it. What importance the board had all along attached to time of payment appears in nothing more clearly than it does in the provisions relating to that matter in the original contracts. Under those contracts, the board are expressly
H given the right, if any payment is not made under any of the contracts within 7 days after the due date, to issue notices, the effect of which (subject to 4 days' grace) is to terminate entirely, not only the contract defaulted on, but also all similar contracts. Time of payment was, therefore, clearly of the essence of those contracts, and not a matter sounding only in damages. Was it likely that the board would set less

store on the time factor so far as time limits were imposed for payment under the subsidiary agreement, seeing that the very reason for making that agreement was that the defendant had been so behindhand with his payments under the original contracts, and that the object of the subsidiary agreement was to accelerate and stiffen the time-table for the future? Nor do I think that this condition was waived or that the board is estopped from relying on it. It is true that, under the original contracts, late payment was repeatedly not followed by the issue of a stop notice when it could have been, and that, under the subsidiary agreement, a payment made on May 10 was accepted and allocated by the board to the month of April, in which month it ought to have been made. Nevertheless, there is no plea of waiver or estoppel or variation of either of the original contracts or the subsidiary agreement in the defence or counterclaim, nor was leave asked to amend. A B

It is indisputable, and is conceded by the defendant, that on May 31, 1937, the defendant had failed within the month of May to pay fully for supplies of milk delivered in that month. The extent of the deficiency is disputable. If a sum of £850 paid by the defendant on Jan. 7 is to be regarded as a payment under the subsidiary agreement, the deficiency at the end of May was £978. If that £850 ought properly to be allocated to the period before the subsidiary agreement was made, then the deficiency at the end of May would be increased by £850. On any view, however, there was at midnight on May 31-June 1 a deficiency of at least £978 below the sum which should have been paid in that month for current supplies of milk and the £200 payable against arrears. The effect of this was, in my view, to entitle the board to revert immediately after May 31 to its rights as they existed before Jan. 5. On June 7, the board issued stop notices which expired before payment was made. In doing so I think they were fully within their rights. The issue of stop notices was not a breach of the subsidiary agreement. No damages can be claimed for that issue, and the counter claim fails. C D E F

The defendant argued, *inter alia*, that the stop notices should have been, but were not, issued a clear 7 days after May 31. They were in fact served by hand on June 7, and were, therefore, it is said, premature and invalid. According to the view which I take, these stop notices were issued, not in respect of a failure to pay for May, 1937, supplies within that month, although this was the occasion of their issue, but in respect of a whole mass of defaults which had accumulated before the subsidiary agreement was concluded. On failure of the defendant to make punctual payment under the subsidiary agreement, the board were entitled to revert to the rights which existed before the subsidiary agreement came into existence. These rights included that of issuing stop notices based on the pre-subsidiary agreement defaults. G H

If my decision on the point considered above is right, no other question arises. If it is wrong, it remains to consider whether or not there was a breach by the defendant of the further condition of the subsidiary

- agreement requiring him to find security for his indebtedness either in the form of a charge on his property or business or in the form of a guarantor acceptable to the board. This obligation must have been an obligation to be performed within a reasonable time from Jan. 5. The defendant contended that all he was asked for was a letter stating
- A his intention to charge his business, and that he sent such a letter in January. It is true that by a letter of Jan. 12 the board asked him for such a letter, and obtained it from him on Jan. 14, but I do not think that this was all they were asking for, or all that they were entitled to ask for. They were, I think, entitled, failing a guarantor, to an
- B actual charge. When pressed, the defendant appears to accept this position. There is a long interchange between the parties about the title deeds to the defendant's property, which he could not induce his solicitors to release. There is the letter, for instance, of Feb. 24 from the board, and the letter of Mar. 9 from the defendant, in which he says :
- C I am sorry I have been dilatory about your security. As soon as I can you shall sight them and register a charge on the deeds, or I will get a suitable guarantee. On Mar. 15, the board were insisting on the production of those title deeds within 30 days "in order that the board may draw up a charge on your business." From that time on, the idea of a charge fades into the
- D background, and the defendant is searching for a suitable guarantor. Messrs. Matthews and Skailes, customers of the defendant, and purchasers of his output, consider the idea of acting as guarantors, but, after investigation, they retreat. This is not altogether surprising, since in 1936 the defendant made a trading loss, and in the first 3 months of
- E 1937 he made a larger trading loss. Down to the middle of April, no security of any kind has been provided. On Apr. 28, one Cooper told the board's representative that he was prepared to guarantee the whole of the defendant's account. This is the defendant's and Cooper's evidence, and I accept it for the purpose of this judgment. The plaintiffs
- F have suggested that a more limited obligation was assumed by Cooper—namely, that he was to guarantee £1,800, and that £1,000 was to be raised by the defendant by a mortgage on his property. However this may be, certain stop notices which had been issued, rightly or wrongly, in March, and which had been extended from time to time, were with-
- G drawn shortly after Mr. Cooper's promise, and in consequence of that promise. On June 7, the final stop notices were served. The plaintiffs claim that by then it was beyond the power of the defendant to provide an acceptable guarantor, and they say this notwithstanding Cooper's alleged promise on Apr. 28. They say it for the reason that in May
- H they had themselves decided, and decided for good reasons, to withdraw the defendant's manufacturing licence, which meant, in substance, that he would go out of business, or at any rate out of the business of manufacturing dairy products. In these circumstances, they say that it would have been dishonest on their part to allow a guarantor to assume liabilities without informing him of the impending dissolution of the business, which

constituted a guarantor's only security, and, if so informed, no guarantor in his senses, no proposing guarantor, would give the necessary guarantee. Mr. Cooper agreed that it would have been madness to do so. I think that the plaintiffs have established, by admissions drawn from the defendant in cross-examination, that he had violated at least one of the conditions indorsed on his manufacturer's licence. He had kept his accounts in a form which understated his disposals of liquid milk, and he admitted in the box that the charge of so doing brought against him in para. 2 of the letter of June 10 was true. I do not think that the evidence establishes fraud on the part of the defendant, nor is a finding of fraud necessary. It is clear, however, that the defendant kept his accounts and records in a form which was a breach of the conditions on which he held his licence, and that the board were entitled in the latter part of May, if they chose, to cancel his licence under the Milk Marketing Scheme, cl. 59A (3) (a). It is true that the plaintiffs, not having given evidence, have not proved what their own evidence alone could prove—namely, a definite decision on their part to cancel the licence—but it is clear on the face of the correspondence that the plaintiffs had taxed the defendant with these alleged irregularities and that the explanations which the defendant offered had left them dissatisfied, incredulous and sceptical of his *bona fides*. They must have been at least seriously contemplating the cancellation of his licence, and, if such a decision were even on the cards, it would be dishonest not to inform a proposing guarantor to that effect, and a proposing guarantor so informed would certainly not have fulfilled his intention.

In these circumstances, I do not think that the defendant, on whom the onus lies, has established that on June 7 he had provided, or was able then or thereafter to provide, an acceptable guarantor. On the contrary, circumstances had arisen which made it impossible for him to do so. On this ground also, although not without hesitation, I think that the counterclaim fails. However, the case seems to me clear on the first ground. There should, therefore, be judgment for the plaintiffs with costs on the claim for a sum to be agreed or referred and interest at the rate of 4 per cent. and judgment for the plaintiffs on the counterclaim, also with costs.

Judgment for the plaintiffs with costs.

Solicitors: *Ellis & Fairbairn* (for the plaintiffs); *C. J. Parker & Sloan*, agents for *Burges, Ware & Scammell*, Bristol (for the defendant).

[Reported by CHARLES NEWTON, Esq., Barrister-at-Law.]

OTHERS v. WESTMINSTER BANK, LTD.,
AND OTHERS.

(*Re ASHTON'S ESTATE, WESTMINSTER BANK, LTD. v. FARLEY.*)

[HOUSE OF LORDS (Lord Atkin, Lord Russell of Killowen and Lord
Romer), **June 29, 30, 1939.**]

A *Charities—Charitable purposes—Gift to vicar and churchwardens for parish
work.*

By her will, a testatrix gave part of her residuary estate to the vicar
and churchwardens of certain churches "for parish work":—

B *HELD*: as the words "for parish work" were too wide to be restricted
to charitable purposes, the bequest was void.

Order of Court of Appeal ([1938] 1 All E.R. 707) *affirmed*.

[EDITORIAL NOTE. Previous authorities have suggested that a gift for the
general purposes of a parish, as distinct from one to the church or the vicar and
churchwardens, might not be charitable, as being wide enough to include purposes
which are not religious purposes. The House of Lords have now confirmed this
C view, and such a gift is, therefore, not charitable.]

AS TO RELIGIOUS PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 118-
122, paras. 155-160; and FOR CASES, see DIGEST, Vol. 8, pp. 248-254, Nos. 74-160.]

Cases referred to:

D (1) *Dunne v. Byrne*, [1912] A.C. 407; 8 Digest 294, 718; 81 L.J.P.C. 202;
106 L.T. 394.

(2) *Baker v. Sutton* (1836), 1 Keen 224; 8 Digest 298, 750; 5 L.J.Ch. 264.

(3) *James v. Allen* (1817), 3 Mer. 17; 8 Digest 293, 708.

E APPEAL from an order of the Court of Appeal, dated Feb. 22, 1938,
and reported [1938] 1 All E.R. 707, affirming an order of LUXMOORE, J.,
dated June 8, 1937, and reported [1937] 3 All E.R. 279. The facts and
the arguments are fully set out in the opinion of LORD ATKIN.

H. B. Vaisey, K.C., and *W. S. Wigglesworth* for the appellants.

C. Harman, K.C., and *R. W. Goff* for the next of kin.

F *The Solicitor-General (Sir Terence O'Connor, K.C.)* and *A. Andrewes*
Uthwatt for the Attorney-General.

G LORD ATKIN: The question which arises in this case is as to whether
or not there was a valid gift by the will of the testatrix, which was made
on Aug. 16, 1933. After giving certain legacies, she made the following
residuary gifts. She directed that her trustees were to stand possessed
of the residue:

H . . . upon trust in equal shares for St. Clements Mission Notting Dale (of which
my uncle Edmund Waller was founder and which he and I have supported) for
their mission work, the Society for the Propagation of the Gospel in Foreign Parts,
to the vicar and churchwardens of St. Columba's Church, Hoxton (for parish
work), and the vicar and churchwardens of St. Cuthbert's Church, Philbeach
Gardens, Kensington (for parish work).

The question is whether the last two gifts are valid or whether they are
not too vague as going beyond what is, within the meaning of the law,
a charitable gift. If they go beyond the legal definition of a charitable
gift, they are too vague. The principle has been expressed perhaps as

well as it could be expressed by LORD MACNAGHTEN in delivering the judgment of the Privy Council in *Dunne v. Byrne* (1), at p. 411. In that case, the gift was expressed in these words :

I will and bequeath . . . that the residue of my estate should be handed to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such archbishop may judge most conducive to the good of religion in this diocese. A

It was held that that was not a good charitable bequest, and was void. I quote the case not because of the terms of that bequest, but because of what was stated in the opinion of LORD MACNAGHTEN at p. 411 :

The language of the bequest (to use LORD LANGDALE's words) would be "open to such latitude of construction as to raise no trust which a court of equity could carry into execution." B

For that, LORD MACNAGHTEN quotes *Baker v. Sutton* (2), and then continues, as follows, at p. 411 :

If the property, as SIR WILLIAM GRANT said in *James v. Allen* (3) "might consistently with the will be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute." C

The question is, what is the meaning of the words "the vicar and churchwardens of St. Columba's Church, Hoxton (for parish work)" ? Counsel for the appellants in the course of a forcible argument said that that is equivalent to a gift to the vicar and churchwardens of St. Columba's Church, Hoxton—it is in fact in Haggerston, but we need not trouble about that—and he says that that would mean a gift to the vicar and churchwardens for the purpose of their spiritual duties as vicar and churchwardens, and that it would be a good charitable bequest—which is perfectly true—if there were no words added. Then he says that the words "(for parish work)" simply mean to express what would be implicit in the words "the vicar and churchwardens" without the addition of those words in brackets ; and, if so, he says, then there is nothing to prevent this gift from being a charitable gift. Alternatively, he says, the words limit their duties in some particular respect which I do not think he found it very easy to define, and which, if he finds it difficult to define, I find it still more difficult to define. In some sense or other, however, he says that the words limit what would be ordinarily understood if one had a gift to the vicar and churchwardens simply. D E F

My Lords, I am entirely unable to accept that construction. I think that the words are quite plainly enlarging words. They are words of definition, it is quite true, but I think that they were used for the very purpose of defining what the testatrix meant as the purpose for which the money was to be applied, and "parish work" seems to me to be of such vague import as to go far beyond the ordinary meaning of charity, in this case in the sense of being a religious purpose. The expression covers the whole of the ordinary activities of the parish, some of which no doubt fall within the definition of religious purposes, and all of which no doubt are religious from the point of view of the person who is responsible for the spiritual care of the parish, in the sense that they are G H

conducive, perhaps, to the moral and spiritual good of his congregation. However, that, I think, quite plainly is not enough, and the words are so wide that I am afraid that on no construction can they be brought within the limited meaning of "charitable" as used in the law. I find myself in entire accord with what was said by SIR WILFRID GREENE, M.R.,
A in the Court of Appeal, at p. 711 :

To my mind, the whole question in this case turns on whether or not the words "for parish work" can in some way be limited, either by their own inherent meaning or by reference to the character and quality of the trustees. I have come to the conclusion, and I do so with regret, that that limitation cannot be imposed upon the words. It seems to me that the words "for parish work" are of a very wide character, and embrace not merely those limited functions in the parish which it is the duty of the vicar to perform, and not merely those limited functions in the parish which it is the duty of the churchwardens to perform. Nor can I limit those words by narrowing them down to religious purposes in the strictly charitable sense. It appears to me that, taking them as words of ordinary English, they cover any activity in the parish, any work in the parish which trustees of that character may be expected to perform, whether that work be strictly a religious purpose or strictly a charitable purpose, or whether it be a work considered to be conducive to the good of religion, or considered to be benevolent, or generally useful to the inhabitants of the parish or the congregation of the church. It seems to me that the words "for parish work" cannot be cut down or limited, either by construing them in isolation or by reference to the character of the trustees.
B
C

My Lords, it seems to me that that is quite sufficient to dispose of this case. I find myself quite unable to disagree with the views taken by
D LUXMOORE, J., by SIR WILFRID GREENE, M.R., and by FARWELL, J. I am sorry not to be able to accept the view taken by CLAUSON, L.J., but I think that it would be too narrow a view, upon these words. I share the regret which has been expressed by all the judges in coming to this conclusion. I think that this case is a warning to those persons
E who desire to make wills with a benevolent intention, giving legacies for charitable purposes in the broad sense of the words, that they should make it clear that their objects are within the legal definition of charity, and are certain. Nevertheless, the law has been the law now for a very great number of years, and it is quite plain to my mind that words
F of such general import as these suggest an uncertainty of purpose which it is quite impossible to bring within the purview of the law of trusts. I am of opinion, therefore, that this appeal should be dismissed. It is a case which has given rise to judicial doubt, and which, I think, it was very proper for the persons representing these parishes to bring
G for decision in this House. I notice that there was a condition made, on giving leave to appeal, that there should be no opposition offered to a suggestion that the costs should come out of the two bequests which fail. Of course, we are not bound by that condition, but it appears to me to be one which it would be quite proper to make, and, in those cir-
H cumstances, I propose to your Lordships that the appeal should be dismissed, and that the costs should come out of the two funds in question.

LORD RUSSELL OF KILLOWEN : My Lords, I agree. CLAUSON, L.J., found himself able to construe this gift as a gift to the vicar and churchwardens, the purposes for which the money was to be applied being

restricted by the words in brackets to the furtherance of work which it was the duty of the vicar and churchwardens to perform. That is to say, the application of the money was restricted to what I may call the religious purposes of the parish in the strict sense. For myself, I am unable to put so narrow a construction upon the words used by the testatrix. In my opinion, upon the true construction of this will, the words in brackets mean that the gift is not a gift for ecclesiastical or religious purposes in the strict sense, but that it is a gift for the assistance and furtherance of those various activities connected with the parish church which are to be found, I believe, in every parish, but which, unfortunately for the donees here, include many objects which are not in any way charitable in the legal sense of that word. A B

I find myself in complete agreement with the judgments delivered by SIR WILFRID GREENE, M.R., and by FARWELL, J., and I would accordingly dismiss this appeal, but with the provision as to costs which has been referred to by LORD ATKIN. C

LORD ROMER : My Lords, I too agree. Notwithstanding the excellent argument which we have heard from counsel for the appellants, I find myself quite unable to extract from the will or the surrounding circumstances, to which we can refer, any justification for giving to these words “(for parish work)” any other than their ordinary meaning, and it is, I think, without question that their ordinary meaning includes objects which are not charitable in the legal sense of the term. Great reliance was placed by counsel for the appellants upon the fact that the trustees who are to administer these two funds are the vicar and churchwardens of these respective parishes, but I find myself in complete agreement with what was said by FARWELL, J., in the Court of Appeal, at p. 716 : D E

It is only, in my judgment, in a case where the trust itself is not specified that the character of the trustees may be sufficient to indicate the purpose of the trust. F

In the present case, the trust itself is specified quite clearly. My Lords, I agree with the motion which has been proposed.

Appeal dismissed.

Solicitors : *Thomas Eggar & Son* (for the appellants); *Ravenscroft, Woodward & Co.* (for the next of kin); *Treasury Solicitor* (for the Attorney-General). G

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

DAPONTE v. SCHUBERT AND ANOTHER.

[CHANCERY DIVISION (Morton, J.), May 24, 25, June 28, 1939.]

Mortgage—Charging order of judgment creditors—Remedy—Foreclosure—Sale—Judgments Act, 1838 (c. 110), s. 14.

A The plaintiff had obtained a charging order against the second defendant in respect of certain shares. The order having remained unsatisfied, the plaintiff, by originating summons, claimed an order for foreclosure, or, alternatively, "that the said charging order be enforced in such other way as the court shall think fit." The question arose whether the court had jurisdiction to make an order for foreclosure upon a charging order, or whether the power of the court was confined to the making of an order for sale:—

B HELD: (i) the court had no jurisdiction to make an order for foreclosure.

(ii) the appropriate order was an order for sale.

[EDITORIAL NOTE. The only question here is whether there is jurisdiction to make an order for foreclosure or merely an order for sale upon an application to enforce a charging order upon shares in a limited company. The authorities upon the point are not quite consistent, but, the decision in *D'Auvergne v. Cooper* (1) having been followed in an unreported case in 1927, the judge has followed that decision, and decided that this is not a case in which an order for foreclosure can be made. The matter is of importance in cases where a sale of the shares at their proper value is not commercially possible.

D AS TO ENFORCEMENT OF CHARGING ORDER UNDER JUDGMENTS ACT, 1838, see HALSBURY, Hailsham Edn., Vol. 23, pp. 458, 459, para. 672; and FOR CASES, see DIGEST, Vol. 35, pp. 551, 552, Nos. 2801-2811.]

Cases referred to:

- E (1) *D'Auvergne v. Cooper*, [1899] W.N. 256; 35 Digest 551, 2805.
 (2) *Hosack v. Robins*, [1917] 1 Ch. 332; 35 Digest 552, 2808; 86 L.J.Ch. 282; 115 L.T. 879.
 (3) *Attwood v. Gibbons* (1927), Unreported.
 (4) *Ford v. Wastell* (1848), 2 Ph. 591; 35 Digest 587, 3240; 17 L.J.Ch. 368; 13 L.T.O.S. 461.
 (5) *Footner v. Sturgis* (1852), 5 De G. & Sm. 736; 35 Digest 551, 2804; 21 L.J.Ch. 741; 19 L.T.O.S. 324.
 F (6) *Jones v. Bailey* (1853), 17 Beav. 582; 35 Digest 551, 2806.
 (7) *Kennard v. Putvoye* (1860), 2 Giff. 81; 42 Digest 728, 1494; 29 L.J.Ch. 553; 2 L.T. 30.
 (8) *Messer v. Boyle* (1856), 21 Beav. 559; 35 Digest 552, 2807.
 (9) *Leggott v. Western* (1884), 12 Q.B.D. 287; 21 Digest 658, 2363; 53 L.J.Q.B. 316.
 G

ORIGINATING SUMMONS for an order for foreclosure pursuant to a charging order, or, alternatively, for enforcement of the charging order "in such a way as the court shall think fit." The facts are fully set out in the judgment.

H *E. M. Winterbotham* for the plaintiff.

J. A. Reid for the second defendant, Roy Nominees, Ltd., the nominee and holder of the shares.

The first defendant was not represented.

Winterbotham: There is no market for these shares, and a sale would seriously prejudice their price. The only suitable remedy, therefore, is

an order for foreclosure. The court has power to make such an order. A number of older cases and the Judgments Act, 1838, ss. 13, 14, make it clear that the court has jurisdiction to make an order for foreclosure. Of more recent enactments, there is the Courts (Emergency Powers) Act, 1914, from which it follows that the plaintiff is entitled to exercise all his rights, including that of foreclosure, once he has taken the proper steps of procedure. This is provided for by sect. 1 (1) (b) of the Act. There are a number of recent cases, in particular *Hosack v. Robins* (2), in my favour. LORD COZENS-HARDY, M.R., in that case reviewed the earlier case of *D'Auvergne v. Cooper* (1) and remarked that there was no prohibition against an order for foreclosure in that case. The view that sale should be regarded as the proper remedy, was, in the opinion of LORD COZENS-HARDY, M.R., a rule of practice, and not a question of procedure. Moreover, I rely on the following passage in THE ANNUAL PRACTICE, 1939, p. 849 :

Sale, and not foreclosure, is usually ordered . . . but this is a rule of practice only and *semble* in a proper case foreclosure could be ordered. . .

Attwood v. Gibbons (3) is against the plaintiff, but it is indeed strange that, if it were really regarded as good law, it should not have found its way into THE ANNUAL PRACTICE after 12 years. Relying on *Hosack v. Robins* (2) and the pronouncement in THE ANNUAL PRACTICE, 1939, therefore I ask the court to disregard *Attwood v. Gibbons* (3) and to make an order for foreclosure.

Reid : As I am appearing for the nominee only, I am not interested in this point of law. All I desire is an order of the court, in order to be protected.

MORTON, J. : By a contract in writing, dated Mar. 8, 1937, the plaintiff agreed to sell to the first-named defendant, Sami Wickersham Schubert, 80,000 ordinary shares of 5s. each in a company known as Dufay-Chromex, Ltd., and the defendant agreed to pay to the plaintiff the sum of £20,000 for those shares. The £20,000 was to be paid, as to £10,000 by the defendant's cheque in favour of the plaintiff, and as to the other £10,000 by a bill accepted by the defendant and payable to the plaintiff as therein mentioned. The 80,000 shares were duly delivered to the defendant, and the plaintiff received the defendant's cheque for £10,000 and a bill accepted by the defendant also for £10,000. On the presentation of the cheque, it was returned by the defendant's bankers with the words "Orders not to pay" indorsed thereon. The defendant, however, had dealt with 50,000 of the shares either by sale or charge, and transfers in respect thereof have been registered by the company. I am told by counsel for the second defendant, Roy Nominees, Ltd., that that company were originally nominees for the plaintiff, and that subsequently the plaintiff authorised them to deal with the shares in accordance with the instruction of the first defendant, and that it was in consequence of that that 50,000 of the shares were in fact dealt with.

On June 23, 1937, the plaintiff commenced an action against the first defendant in the King's Bench Division claiming a sum of £10,000, the sum of £10,000 being the amount of the dishonoured cheque, and he also claimed interest thereon. The action came on for trial on July 28, 1937. The facts were investigated, and judgment was given in favour of the plaintiff for £10,065 15s. 1d. and costs to be taxed. Then on Aug. 12, 1937, an order was made whereby, after reciting that the defendant was still indebted to the plaintiff in the sum of £10,065 15s. 1d., and that there were standing in the name of Roy Nominees, Ltd., on behalf of the first defendant, 30,000 ordinary shares of 5s. each (and then the numbers were given), it was ordered that the defendant's interest in these 30,000 shares should stand charged with the payment of the above-mentioned sum of £10,065 15s. 1d. due under the judgment, together with £3 5s. 6d., the costs of that application, such sum of £3 5s. 6d. to be added to the judgment debt. On Nov. 18, 1938, the plaintiff issued a summons to which the defendant in the King's Bench action, Schubert, and Roy Nominees, Ltd., were made defendants, and he asked for an order for foreclosure on all the first-named defendant's interest in the 30,000 shares in question and for delivery up to the plaintiff of the certificate or certificates representing the first-named defendant's title to such shares, together with an executed transfer of such shares in favour of the plaintiff. Alternatively, he asked that :

... the said charging order may be enforced in such other way as the court shall think fit.

In my view, this is most certainly a case in which I ought to give the plaintiff relief by way of foreclosure if I have the jurisdiction to make such an order. The 30,000 shares in question were formerly the property of the plaintiff. He has never been paid for them, and he has been deprived of them in the manner which I have set out in my statement of the facts. However, the question whether or not I have in fact any jurisdiction to make an order for foreclosure is one of some importance, and also, I think, of some difficulty. Counsel for the plaintiff has, most helpfully, referred me to all the authorities which he can find which deal with the matter, and he has also referred me to the terms of the Judgments Act, 1838, ss. 13, 14. I do not propose to review the cases in detail, because this precise point, as I read the report, came before NORTH, J., in *D'Auvergne v. Cooper* (1). In that case, the plaintiff had recovered judgment in an action in the Queen's Bench Division against the defendant John Edmund Cooper. He obtained a charging order under the Judgments Act, 1838, s. 14 (made absolute on Aug. 2, 1898), for the amount of his debt on 6,606 £1 shares in a limited company standing in the name of Edith Cooper, the other defendant, as trustee for the first defendant, her husband. The report of the case states, at p. 256 :

This was an action to enforce the charge, brought in as a short cause, or notice for judgment in default of appearance.

The plaintiff claimed an account and foreclosure on sale.

The report says "on sale," but I think that that is clearly a misprint.

The shares at present were depreciated and if they were sold now the purchase money would be insufficient.

Counsel for the plaintiff asked that there might be foreclosure. NORTH, J., as it is stated at p. 256 :

reviewed the authorities, holding that it was settled law that the remedy of a person having a charge under sect. 14 of the Judgments Act was sale, not foreclosure. He directed an account and sale, with liberty for the plaintiff [to bid] if he did not have the conduct of the sale.

I have inserted the words "to bid," as I think that they clearly ought to appear in the report, but they do not. It is unfortunate that that case is so briefly reported, but, as I read it, it is a decision upon the very point which I have to decide here. It appears from the report that counsel asked for foreclosure and the judge held that it was settled law that the remedy of the person having a charge under this section was sale, and not foreclosure.

In 1916, *Hosack v. Robins* (2) came before ASTBURY, J., and the Court of Appeal. The point for decision there was whether it was necessary for the plaintiff to obtain leave to take certain proceedings under the Courts (Emergency Powers) Act, 1914, s. 1 (1) (b), as amended by the Courts (Emergency Powers) (No. 2) Act, 1916, s. 1 (1) (b). In the course of the case, however, *D'Auvergne v. Cooper* (1) was referred to, and there are observations both in the judgment of ASTBURY, J., and in the judgments of LORD COZENS-HARDY, M.R., and WARRINGTON, L.J., which would seem to indicate that they did not regard the court as having no jurisdiction to make an order for foreclosure in such a case as the present. Those observations were, to my mind, *obiter*. LORD COZENS-HARDY, M.R., in particular, said, at p. 336 :

... I regard the view taken by NORTH, J., long ago in the case of *D'Auvergne v. Cooper* (1) that sale and not foreclosure was the proper remedy of a person having a charge under the Judgments Act, 1838, s. 14, as merely a rule of practice, and not a question of jurisdiction. As a matter of convenience the court says that the charge shall be enforced not by foreclosure but by sale. I guard myself from saying there is any real prohibition which could prevent the court, if it thought fit, from granting either foreclosure or a sale in lieu of foreclosure. If the court did grant foreclosure, it could at once, under the statute referred to, make an order for sale instead of for foreclosure.

The matter does not end there, because in 1927 the case of *Attwood v. Gibbons* (3) came before EVE, J. In that case, the plaintiff had obtained a charging order absolute, dated July 28, 1926, and made in an action in the Probate, Divorce and Admiralty Division, whereby a sum of £144 7s. 6d. consolidated stock standing in the name of the defendant Gibbons in the books of the Wolverhampton Gas Co. stood charged with the payment to the plaintiff of the sum of £1,500 and certain costs. On Feb. 15, 1927, the plaintiff took out a summons to which Gibbons was a defendant asking that the stock might be sold, with the approbation of the judge, or that such further or other order might be made in the

premises as to the court might seem just. It appears clearly from the master's notes in that case that the defendant did not appear, and on Apr. 26 the plaintiff appeared before the master and asked for an order for foreclosure. The master took the view that *Hosack v. Robins* (2) did not overrule the decision of NORTH, J., in *D'Auvergne v. Cooper* (1), but only commented upon it, and that he ought to adjourn the case to the judge. On May 2, 1927, the matter came before EVE, J., and the following passage appears in the master's note :

The judge said that *D'Auvergne v. Cooper* (1) is to be followed notwithstanding the observations of LORD COZENS-HARDY, M.R., in *Hosack v. Robins* (2), which were *obiter*.

It seems to me that that case amounts to the fact that again there was an application by a judgment creditor who had obtained a charging order for foreclosure instead of sale, and EVE, J., declined to make the order and himself followed *D'Auvergne v. Cooper* (1). It is to be regretted that *Attwood's* case (3) was not reported. Certainly the master does not appear to have brought it to the attention of those responsible for THE ANNUAL PRACTICE, because there still appears in THE ANNUAL PRACTICE, 1939, the following note, at p. 849 :

The court has no jurisdiction to order the sale or foreclosure of shares comprised in a charging order, except in a separate proceeding instituted for that purpose. . . . The proceedings must be commenced in the Chancery Division . . . they should be commenced by originating summons under R.S.C., Ord. 55, r. 5A.

Now follows the relevant passage :

Sale, and not foreclosure, is usually ordered (*D'Auvergne v. Cooper* (1)), but this is a rule of practice only, and *semble* in a proper case foreclosure could be ordered (*per* COZENS-HARDY, M.R., in *Hosack v. Robins* (2)).

I do not propose to review in detail the earlier cases referred to by counsel for the plaintiff. The cases to which he referred are, first of all, certain cases on the Judgments Act, 1838, s. 13, which were concerned with real property. The first of these is *Ford v. Wastell* (4). It appears from the report that the order made in *Ford v. Wastell* (4) was a consent order. The next case is *Footner v. Sturgis* (5). Then there was *Jones v. Bailey* (6). The two latter cases are extremely difficult to reconcile with one another. I may add that it would appear from the report of *Kennard v. Futvoye* (7), that the decree as actually drawn up in *Jones v. Bailey* (6) was for sale, and not for foreclosure. That appears in the note at the foot of p. 557 of Vol. 29 of the Law Journal Chancery Reports. The last of the cases on sect. 13 to which counsel for the plaintiff referred was *Messer v. Boyle* (8), in which, without giving any reason, SIR JOHN ROMILLY, M.R., held that the plaintiff was entitled to a decree for foreclosure.

Counsel for the plaintiff also referred me to *Leggott v. Western* (9). That was a case in which the plaintiff had obtained an order charging shares of the defendant in a company with the payment of the judgment debt and interest, and he applied to the court in the same action for an order for sale of the shares. The decision went only to this, that the application for sale could not be made in the same action in which the

order had been made. Counsel for the plaintiff, however, relied upon the judgment of LOPES, J., at p. 289 :

It is admitted that before the Judicature Acts it would have been necessary for him to institute separate proceedings in order to obtain a sale or foreclosure of the shares subject to the charging order . . .

Counsel for the plaintiff also relied upon the judgment of CAVE, J., at p. 289 :

The powers given by the legislature do not extend to enabling the court to order a foreclosure or sale in a case like the present where that relief is not claimed in the action.

Counsel for the plaintiff relied on the fact that in these passages in the judgments the judges bracketed together foreclosure and sale, and he suggested that that was an indication that foreclosure was an alternative remedy.

As I have said, I do not propose to express any view as to the question of jurisdiction beyond saying that, in my view, the point has been considered by NORTH, J., and decided against the plaintiff, and I think that, in the interests of judicial comity, I should follow what I conceive to be a clear decision of NORTH, J., and one which has already been followed by EVE, J., in chambers in *Attwood v. Gibbons* (3), and make an order for sale.

Order for sale, with liberty to apply. Plaintiff to pay the costs of the second defendant and to add them to his security.

Solicitors : *Bischoff, Cox & Co.* (for the plaintiff) ; *Ellis, Peirs & Co.* (for the second defendant).

[Reported by F. HONIG, Esq., Barrister-at-Law.]

EAVES v. EAVES.

[CHANCERY DIVISION (Farwell, J.), June 29, 1939.]

Mistake—Determination of gift on marriage—Marriage annulled on ground of husband's incapacity—Wife waiting 12 years before taking proceedings—Acquiescence—Loss of right to restitution.

Will—Construction—Gift during widowhood—Decree of nullity in respect of second marriage—Whether gift restored.

By his will, the testator, who died in Dec., 1919, gave his wife, *inter alia*, "during her life and widowhood," the use of his house for the unexpired residue of the term for which it was held. In 1923, by agreement between the wife and the testator's son, who were both the trustees of the will and the principal beneficiaries thereunder, the house was sold and the proceeds invested. On Sept. 24, 1925, the widow remarried and the investments were thereupon transferred to the son (the latter being entitled to them under the will upon the determination of the widow's interest), who converted them to his own use. On May 24, 1937, a decree *nisi* of nullity was pronounced of the widow's marriage in 1925 on her own petition alleging the husband's incapacity, and this was duly made absolute. The widow now contended that her life interest in the house had not determined in 1925, and claimed the appropriate relief :—

HELD : (i) the decree of nullity made the marriage void *ab initio* and the widowhood had never determined.

(ii) the widow, although she took no proceedings for nullity for 12 years, must have known the true position of the marriage and, as she took no steps to alter the position in regard to the investments representing the proceeds of sale of the house, she could not after such delay claim to be entitled to the benefit of the life interest given by the will.

Semle : the position might have been different if there was a trust fund still in existence, or if the widow, the plaintiff in this action, had not been a trustee.

[EDITORIAL NOTE.] It appears from the present decision that a decree of nullity will so to speak, restore an interest which has been determined upon the apparent marriage. This, however, does not conclude the matter. It must still be asked whether the position of the parties has been so altered as to make the restoration inequitable, and, further, whether the party seeking such restoration was a trustee consenting to the distribution of the estate.

AS TO EFFECT OF NULLITY DECREE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 640, 641, para. 937; and FOR CASES, see DIGEST, Vol. 27, pp. 265, 266, Nos. 2326-2345.]

Cases referred to :

- (1) *Fowke v. Fowke*, [1938] Ch. 774; [1938] 2 All E.R. 638; Digest Supp.; 107 L.J.Ch. 350; 159 L.T. 8.
- (2) *Re Robinson, McLaren v. Public Trustee*, [1911] 1 Ch. 502; 32 Digest 518, 1761; 80 L.J.Ch. 381; 104 L.T. 331.
- (3) *Re Wombwell's Settlement, Clerke v. Menzies*, [1922] 2 Ch. 298; 27 Digest 457, 4752; 92 L.J.Ch. 18; 127 L.T. 295.
- (4) *Inverclyde (otherwise Tripp) v. Inverclyde*, [1931] P. 29; Digest Supp.; 100 L.J.P. 16; 144 L.T. 212.
- (5) *Dodworth v. Dale*, [1936] 2 K.B. 503; [1936] 2 All E.R. 440; Digest Supp.; 105 L.J.K.B. 586; 155 L.T. 290; 20 Tax Cas. 285.
- (6) *Re Baker, Baker v. Baker*, [1904] 1 Ch. 157; 44 Digest 1232, 10656; 73 L.J.Ch. 172; 89 L.T. 742.
- (7) *Rogers v. Ingham* (1876), 3 Ch.D. 351; 35 Digest 93, 25; 35 L.T. 677.

ACTION for, *inter alia*, a declaration that, on the true construction of the will of the testator, Charles Hobley Eaves, and in the events which happened, and in particular the decree absolute, dated Nov. 15, 1937, pronouncing that an apparent marriage solemnised on Sept. 24, 1925, between the plaintiff and one Charles Powell had been and was absolutely null and void, the life interest of the plaintiff and the proceeds of sale thereof, and the moneys or investments representing the same under such will, in the premises No. 23, Calthorpe Road, Birmingham, was not determined on Sept. 24, 1925, and had since continued, and still continued for the rest of her life unless and until she remarried, and that the plaintiff had been and was entitled to the benefit of such life interest and all income of the proceeds of those premises or the sum of £1,000 War stock or other the investments or moneys representing the same (a) as from Sept. 24, 1925, or (b) in the alternative, as from Nov. 15, 1937. The plaintiff sued as an individual and also as an executor and trustee of the will, and the defendant was sued as an individual and as the other executor and trustee of the will. By his defence, the defendant contended that the marriage of Sept. 24, 1925, was not void, but voidable, and that it was not avoided for all purposes by the decree absolute of Nov. 15,

1937. He denied that the plaintiff remained the widow of the testator, or that such widowhood had continued since the death of the testator. He also relied on the Statute of Limitations, 1623.

C. E. Harman, K.C., and *Gerald R. Upjohn* for the plaintiff.

F. Baden Fuller for the defendant.

Harman, K.C.: The payment of Sept. 24, 1925, by the plaintiff to the defendant was made under a mistake of fact, and not of law, and the defendant is liable for money had and received to his own use. Once the Divorce Court intervenes, it strikes out the whole marriage *ab initio*. Although, knowing the facts, the plaintiff allowed the money to be applied in this way, *non constat* that she is not entitled to her rights. The Statute of Limitations cannot apply, as the cause of action only arose when the decree of nullity was made absolute on Nov. 15, 1937. [Counsel referred to *Re Robinson, McLaren v. Public Trustee* (2), *Re Wombwell's Settlement, Clerke v. Menzies* (3), *Inverclyde (otherwise Tripp) v. Inverclyde* (4), and *Fowke v. Fowke* (1).]

Fuller: The true question is whether or not the plaintiff's interest had determined. It determined on her remarriage. The decree absolute of nullity did not avoid the marriage for all purposes: *Dodworth v. Dale* (5). The plaintiff was a wife in the eyes of the law when she remarried. In the analogous case of a life interest until assignment it has been held that the life interest is determined once and for all on assignment: *Re Baker, Baker v. Baker* (6). On the footing that the marriage was valid, the fund has been distributed, and the matter cannot now be reopened. The plaintiff herself is one of the trustees. [Counsel referred to *Rogers v. Ingham* (7).]

FARWELL, J.: This action raises a very curious point with regard to a sum of money which was in the hands of the plaintiff and the defendant as trustees under the will of Charles Hobley Eaves. The facts which give rise to this question are in a very small compass, and are not in dispute at all between the parties. In 1907, the plaintiff, who is now a widow, married the testator, Charles Hobley Eaves. He was a widower with one son by his first marriage, the defendant in this action. The testator had two children by his second marriage—two daughters—and in Dec., 1919, he died, leaving his widow (the plaintiff) and his son (the defendant) and the two daughters of the second marriage surviving him. He made his will on Jan. 8, 1918, and by that will he appointed the plaintiff and the defendant to be executors, and he appointed his wife during her life, and his son after her decease, to be the guardian of the infant children. Then he gave to his wife a legacy of £500, and continued as follows:

I also give to her during her life and widowhood the use of my house No. 23 Calthorpe Road with the appointments for the unexpired residue of the term subject to her paying the rent and observing and performing the covenants and conditions of the lease and paying all outgoings. . . .

Then he gave her certain chattels, and he gave the whole of his residue

upon trust for sale and conversion in the usual way, and out of the residue to purchase from the government an annuity of £600 per annum, to be paid to the wife for and during her natural life and widowhood, free of duty. Then he gave directions for the purchase of other annuities, and finally he gave the ultimate residue to his son the defendant.

- A The estate in question was a large one, and there has been considerable residue. The will was proved in Mar., 1920, and the executors proceeded to administer the estate, and paid all the debts and expenses and wound up the estate as far as they could. The widow (the plaintiff) received her £500, and the defendant and the plaintiff purchased an annuity for
- B her life, and, therefore, by arrangement, it was a life annuity, and not an annuity which ceased upon her remarriage. With regard to the house, the plaintiff continued to live in it for some time, but in 1923 the plaintiff and the defendant agreed that the house should be sold, and it was sold for the sum of £1,000. In connection with that, there had to be paid
- C certain expenses and some other moneys, which I think were found by the defendant, and ultimately the sum of £1,000 was invested in 5 per cent. War stock in the joint names of the defendant and the plaintiff as trustees of the will, and from that time down to 1925 the plaintiff received the interest on that sum of money.
- D In 1925, the plaintiff was minded to remarry. She knew, of course, that, if she remarried, and if she ceased to be the widow of the testator, her life interest in the house, or in the proceeds of sale representing the house, would come to an end. In fact, she realised that position so clearly that she agreed with the defendant to have the War stock sold
- E and to hand over, or permit the defendant to receive, the proceeds of sale. The defendant did in fact pay to the plaintiff what she would have received by way of actual interest until the date when the ceremony of marriage was solemnised, but as from that date she ceased to receive any part of, or have any interest in, the money so received, and the
- F proceeds of sale were paid to and received by the defendant, who used them for his own purposes and converted them to his own use. There is no doubt about that, and there is no doubt that that arrangement, under which the money got into the hands of the defendant, and was received by him, was a matter of mutual arrangement between the
- G plaintiff and the defendant, both parties, of course, believing that, by the marriage which the lady was contemplating, her interest in that sum would cease entirely. The marriage took place on Sept. 24, 1925, and on May 24, 1937, a decree *nisi* for nullity was granted to the plaintiff on her petition, and that decree *nisi* was made absolute on Nov. 15,
- H 1937. The effect of that decree was that the marriage which had been solemnised on Sept. 24, 1925, was pronounced by the Divorce Court to be, and to have been, absolutely null and void, and the petitioner (the plaintiff) "was and is free from all bond of marriage with the respondent," the ground of it being the incapacity of the husband to consummate the marriage.

In those circumstances, the plaintiff says : " I went through a ceremony of marriage, but in fact I never was married at all. I never ceased to be the widow of the testator, because, by the decree absolute which was made, the so-called marriage was pronounced to have been null and void, and never was a marriage at all. Therefore I never ceased to be the widow of the testator, and, never having ceased to be the widow A
of the testator, I am entitled to a life interest in this fund, and I never have ceased to be entitled to a life interest in this fund of £1,000. The distribution of it, or the handing over of it to the defendant, was done under a common mistake of fact, and therefore I am entitled to have the money replaced, and to be put back in the position in which I should B
have been had I never gone through the ceremony of marriage, a ceremony which in fact resulted in there never having been a marriage at all."

The question as to the effect of a decree of nullity of marriage has been considered in several cases, and was considered by myself in *Fowke v. Fowke* (1), and I think there is no doubt that, if two persons go through C
a ceremony of marriage, and, ultimately, at the suit of one of them, the marriage is declared null and void on the ground of the incapacity of the other party, the position of the parties is that, as from the time when the marriage is solemnised, those two persons are, to all intents and purposes, man and wife. They have the status of married people. D
No one can be heard to say that they are not married people, and it is not open to anyone to challenge the validity of the marriage except one or other of the parties themselves—that is, the party aggrieved—who could, by properly prosecuted proceedings in the Divorce Court, attempt to impeach the validity of the marriage. Until that is done, E
and is successfully done, the parties have, and remain having, the status of married people. They have all the obligations to one another which married people have, and the rights against each other which married people have, and, if no step is taken to have the marriage annulled, then they remain for all intents and purposes, until they are dead, people F
having the status of married people, and the results which flow from that status must necessarily flow during the whole of that period. When the marriage is declared null and void, however, it is not the same as a marriage which is dissolved by the Divorce Court on other grounds, because in the latter case there has been a marriage. There is no question G
about that. The relationship of married people ceases when the decree *nisi* is made absolute, but until that date the parties were married. They were legally married, and they were legally man and wife, and there is no escape from that position. As I pointed out in my judgment in *Fowke v. Fowke* (1), the position differs wholly again from the case of a H
bigamous marriage, because, in such a case as that, there never was a marriage at all, and anybody could give information or take other steps to impeach the marriage.

Having regard to that, the question here is whether or not, as a matter of construction, the plaintiff ceased to be the widow of the testator by

reason of the ceremony of marriage which was subsequently solemnised. If she did, then there is no doubt that this money ceased to be payable to her when she ceased to be entitled to this interest, because it was only payable during her widowhood.

A It is said on behalf of the defendant, that her widowhood came to an end when this ceremony of marriage was performed, and that, although the marriage has since been declared null and void, her widowhood none the less ceased when the ceremony was performed. I am not able to accept that view. It seems to me that, if the so-called marriage is treated by the Divorce Court as having been null and void, that means null and void *ab initio*, and, therefore, although these two people, the so-called husband and wife, for many years lived together, and had all the status of married people, in truth and in fact the widowhood never determined, because the lady never became in law the wife of the second so-called husband. However, that is not, in my view, the conclusion of this matter, because, although the plaintiff did not in fact cease to be the testator's widow, she may yet have ceased to be entitled to this fund, having regard to all the circumstances.

D The position is this. These two people, the plaintiff and the defendant, had this War stock in their joint names. They both were under the belief that the plaintiff was about to enter into a second marriage, which would have the effect of putting an end to her widowhood, and they thereupon agreed that this fund, in which up to that time she had had a life interest, should be distributed or be handed over to the defendant, who was the only other person having an interest in the fund itself.

E That was an arrangement which was entered into by the two parties perfectly lawfully, and by mutual agreement that position was accepted. The plaintiff went through the ceremony of marriage, and for many years lived as his wife with the man with whom she went through the ceremony, and she was for all purposes his wife until the decree absolute was made. During the whole of that period, she took no steps to have her marriage annulled. She went on permitting the defendant to receive the income in question—or, rather, she permitted the defendant to remain in possession of the fund itself—making no attempt to claim it in any way. She must have known the facts with regard to her so-called marriage, but, notwithstanding that, she chose to leave things as they were until ultimately she elected to take the necessary steps in the Divorce Court. In those circumstances, can the lady now say that her widowhood had not ceased, and that the arrangement under which the fund passed into the hands of the defendant was one which she is now entitled to claim was made under a mistake of fact and that she can recover the fund? She says: "There was a mistake of fact." The position is that it is a case of money had and received, and that there is no statute which applies, because it was not until her right of action arose, which was only when the decree absolute was made, that the statute began to run.

In my judgment, having regard to the particular circumstances of this case, I think that the plaintiff has made it impossible for herself to succeed in this action. She has acquiesced in the fund being handed over to her co-trustee. There is now no longer any fund in existence. It has gone, and has gone to her knowledge and with her consent. She took no step, throughout all the years which have elapsed since the ceremony of marriage was solemnised, to make any sort of suggestion, and took no step to have her marriage annulled, or to interfere in the ordinary way with the position to which she herself had been a party, and, in my judgment, it is not right, after all these years, that she should now make this claim against the defendant, who long since may have disposed of the money for his own purposes, and done it in complete innocence and in the perfectly clear belief that he was entitled to the money and that she had acquiesced in his receiving that money. He had no means of ascertaining what the position was as between the so-called husband and wife. He was entitled to treat the matter, and bound to treat the matter, on the footing that they were husband and wife, and, as such, he was entitled to assume, and to act on the assumption, that the plaintiff's widowhood had ceased, and that the consequences resulting from that flowed. In my judgment, it would be most inequitable now to hold that, in all the circumstances, the defendant was bound to recoup this money, which, as I have said, he has received and has dealt with. Had there been a trust fund in his hands which was still available, it might be that the plaintiff could have claimed that—at any rate, as from the decree absolute—she was entitled to the interest on that fund, and, if she had not been herself a trustee, the position might have been different. However, having herself, as trustee, consented and agreed to this fund being dealt with in the way in which it was dealt with, in my judgment it is not now open to her to come to the court and say: “I require the defendant to replace this fund, which I myself permitted him to receive, and of which he has been in possession all these years, notwithstanding that I might, by taking the necessary proceedings in the Divorce Court, have established some claim to recover it.” In all the circumstances, I am not prepared to make any order against the defendant, and the action must be dismissed with costs.

Action dismissed with costs.

Solicitors: *Gisborne & Co.* (for the plaintiff); *Ward, Bowie & Co.*, agents for *Lane, Clutterbuck & Co.*, Birmingham (for the defendant).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

WHITE v. J. & F. STONE, LTD.

[COURT OF APPEAL (MacKinnon and Luxmoore, L.J.J., and Humphreys, J.), June 22, 23, 1939.]

Libel and Slander—Slander—Defamatory statements made to plaintiff and overheard by bystanders—Privileged occasion—Reciprocity of interest.

- A C., a director of the defendant company, said to the plaintiff: "What have you done with the money, White? You are £120 short." These words were overheard by T., a co-employee of the plaintiff, who happened to be in a cellar below the room in which the statement was made. Later, C. said to the plaintiff in the presence of P., another co-employee: "You understand on what conditions I am dismissing you. You find the £120 short and I'll give you your week's money." In an action for slander based on these statements, it was contended that the occasions were privileged:—
- B

HELD: for an occasion to be privileged, there must be an interest or duty to make a statement to the person to whom it is made, and that person must have a corresponding interest or duty to receive it. The words "the person to whom it is made" do not include the plaintiff. No such interest or duty existed in the case of T. and P., and the occasions were not privileged.

- C *Adam v. Ward* (1) followed.
Toogood v. Spyring (2) considered.

EDITORIAL NOTE. In order to be within the privilege, it is necessary that the person who makes the communication has an interest or duty to make it, and the person to whom it is made has a corresponding interest or duty to receive it. In this statement of the law, the words "the person to whom it is made" do not include the plaintiff, and the occasion is not privileged merely because the plaintiff has an interest to receive the statement.

AS TO PRIVILEGED OCCASION, see HALSBURY, Hailsham Edn., Vol. 20, pp.470-479, paras. 573-578; and FOR CASES, see DIGEST, Vol. 32, pp. 117, 118, Nos. 1488-1499.]

Cases referred to:

- (1) *Adam v. Ward*, [1917] A.C. 309; 32 Digest 129, 1608; 86 L.J.K.B. 849; 117 L.T. 34; *affg.* (1915), 31 T.L.R. 299.
- (2) *Toogood v. Spyring* (1834), 1 Cr. M. & R. 181; 32 Digest 117, 1489; 3 L.J.Ex. 347.
- F (3) *Taylor v. Hawkins* (1851), 16 Q.B. 308; 32 Digest 160, 1931; 20 L.J.Q.B. 313; 16 L.T.O.S. 409.
- (4) *Harrison v. Bush* (1856), 5 E. & B. 344; 32 Digest 123, 1550; 25 L.J.Q.B. 25, 99; 25 L.T.O.S. 194; 26 L.T.O.S. 196.
- (5) *Jones v. Thomas* (1885), 53 L.T. 678; 32 Digest 116, 1479.
- G (6) *Hebditch v. MacIlwaine*, [1894] 2 Q.B. 54; 32 Digest 114, 1460; 63 L.J.Q.B. 587; 70 L.T. 826.
- (7) *Tompson v. Dashwood* (1883), 11 Q.B.D. 43; 32 Digest 116, 1478; 52 L.J.Q.B. 425; 48 L.T. 943.
- (8) *Watt v. Longsdon*, [1930] 1 K.B. 130; Digest Supp.; 98 L.J.K.B. 711; 142 L.T. 4.
- H (9) *R. v. Rule*, [1937] 2 K.B. 375; [1937] 2 All E.R. 772; Digest Supp.; 106 L.J.K.B. 807; 157 L.T. 48.
- (10) *Anderson v. Calvert* (1908), 24 T.L.R. 399; 32 Digest 165, 2014.
- (11) *Poliakoff v. News Chronicle, Ltd.*, [1939] 1 All E.R. 390; Digest Supp.
- (12) *Minter v. Priest*, [1930] A.C. 558; Digest Supp.; 99 L.J.K.B. 391; 143 L.T. 57.
- (13) *Hobbs v. Tinning*, *Hobbs v. Nottingham Journal*, [1929] 2 K.B. 1; Digest Supp.; 98 L.J.K.B. 421; 141 L.T. 121.

(14) *Bray v. Ford*, [1896] A.C. 44; 32 Digest 164, 1988; 65 L.J.Q.B. 213; 73 L.T. 609; *revesg.* (1894), 11 T.L.R. 32..

APPEAL by the defendant from a verdict and judgment of MACNAGHTEN, J., and a common jury at the Northampton Assizes, dated Jan. 22, 1939. The facts of the case are fully set out in the judgments.

C. Gallop for the appellants. A

R. C. Vaughan for the respondent.

Gallop: The man in the cellar was a co-employee of the plaintiff, in whose presence Comras would have been entitled to make the remark. All the more was he entitled to make it when the other person was not actually present but happened to overhear it. A privileged occasion must be distinguished from a privileged communication. [Counsel referred to *Toogood v. Spyring* (2).] The judge was wrong in holding that this occasion was not privileged. B

Vaughan: It is clear that this occasion was not privileged. Privilege only begins to operate when there is publication. There must be a reciprocity of obligation in order to have privilege. The persons present must be persons interested: *Taylor v. Hawkins* (3). The statement of the law by PARKE, B., in *Toogood v. Spyring* (2) has not been followed, on this particular point of an interested party, except in one unreported case. Although in old cases the position may have been different, it is now settled that there must be a community of interest before privilege arises, and the court will not follow *Toogood v. Spyring* (2) on that point to-day. In 1856, there was for the first time a clear definition of the law on this point in *Harrison v. Bush* (4), but in 1885 this was not fully applied in *Jones v. Thomas* (5). In *Hebditch v. MacIlwaine* (6), which reversed *Tompson v. Dashwood* (7) (the case which was relied on in *Jones v. Thomas* (5)) it was said that the paragraph headed "*semble*" in the headnote of *Harrison v. Bush* (4) is wrong, and that an honest belief that the person to whom one is speaking is an interested person is not sufficient to establish privilege. [Counsel referred to *Adam v. Ward* (1), *Watt v. Longsdon* (8), *R. v. Rule* (9), *Anderson v. Calvert* (10) and *Poliakoff v. News Chronicle, Ltd.* (11).] C
D
E

Gallop, in reply: It is the person to whom the statement is made who must have a common interest, not a person who happens to overhear. The question is how far *Toogood v. Spyring* (2) has been altered or modified, as the facts there are identical with this case. It is not necessary to have a privileged occasion before one can have publication. All that is meant by a privileged occasion is that in a proper place and on a proper occasion a communication is made to a proper person. The person to whom the publication is made need not be the person to whom the statement is made. In this case, the publication was not to the plaintiff, but to Turnham and Peers. It is a defence to show that the publication occurred when one was saying something to someone to whom one was entitled to say it. It cannot be right to say that one can say words to a plaintiff in the presence of two strangers F
G
H

and a person interested, but not to a plaintiff in the presence of the two strangers. That would be an absurdity. The recipient either means everyone who hears, or means only the person spoken to. It means everyone who hears. Otherwise one cannot support anything in *Toogood v. Spyring* (2). [Counsel referred to *Watt v. Longsdon* (8), *Adam v. Ward* (1), *Minter v. Priest* (12), *Hobbs v. Tinling* (13) and *Bray v. Ford* (14).]

MACKINNON, L.J.: In this case, the plaintiff was, until July 8, 1938, in the employment of the defendant company. Upon that day he had an interview with one Comras, a director of the defendant company, which resulted in his leaving their employment instantaneously. He brought an action claiming damages for wrongful dismissal, but no question now arises about that. He was employed under terms providing that he could be dismissed at a week's notice, and his week's wage of £4 odd was paid into court. At the interview which resulted in his departure, certain words were spoken by Comras, and the plaintiff alleged that they were defamatory and that they were published to two overhearers. First, the plaintiff said, he spoke the words to him, the plaintiff, which were overheard by one Turnham: "What have you done with the money, White? You are £120 short." Then, the plaintiff said, later in the day Comras spoke to him words overheard by one Peers: "You understand on what conditions I am dismissing you. You find the £120 short and I'll give you your week's money." The suggestion was that in both of those statements there was the suggestion that the plaintiff had taken the money, or goods representing that sum of money, that that was charging him with a criminal act, and that it was, therefore, a defamatory statement published to those hearers.

The judge left to the jury the questions (i) whether the words were spoken, (ii) whether they were defamatory, (iii) whether Comras spoke them with malice, and (iv) damages. All those questions the jury answered in favour of the plaintiff, and they awarded him £400 damages. This appeal is brought asking for a new trial on the ground of misdirection.

The first ground alleged in regard to misdirection is that the judge did not sufficiently direct the jury as to what was meant by "malice." The necessity for asking the jury any questions about malice, or giving them any direction as to what constituted malice in law, only arose if the words were spoken on a privileged occasion. The judge intimated that in his view they were not spoken on a privileged occasion, but, in view of the contention that they were, he thought it was desirable to leave the question of malice to the jury, and he did so. If there was an insufficiency or error in his direction to the jury on the point of malice, that is immaterial if the occasion was not privileged.

In view of the course which this appeal has taken, and in view of the fact that, for another reason, we think that we must make an order

directing a new trial, it is desirable, if not necessary, that we should express our view upon this question of whether or not this was a privileged occasion. In my view, it was not. We have had a number of cases cited to us, but I do not think that the definition of a privileged occasion can be put more clearly or accurately than in the words used by LORD ATKINSON in *Adam v. Ward* (1), at p. 334 :

It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

Applying that test to this case, I think the question is whether or not Comras, in making a communication, had an interest or duty, legal, social or moral, to make it to Turnham or Peers, and whether or not Turnham and Peers had a corresponding interest or duty to receive it. The whole essence of liability for libel or slander is the publication of the defamatory statement to some third person, not the use of language of a defamatory kind to the person complaining of it. When LORD ATKINSON speaks of "the person to whom it is made," I think that he means the person to whom the alleged defamatory statement is published. Counsel for the appellants says that the mere words "the person to whom it is made" will include, and ought to be taken to include, the plaintiff to whom a disparaging statement is made, and that it is a privileged occasion if the plaintiff fills the description of a person to whom the speaker has "an interest or a duty, legal, social or moral," to speak, and the plaintiff has an interest or duty to receive the statement. I do not think that that is included in that definition. I think that "the person to whom it is made" in that statement of principle must be the third person, the person other than the plaintiff, to whom the alleged defamatory statement is published. The only reason for suggesting that "the person to whom it is made" can include the plaintiff rests upon the facts of *Toogood v. Spyring* (2). In that case, there was a rather famous statement of the nature of a privileged occasion by PARKE, B., at p. 193, which passage I need not read. That passage has been repeated in many subsequent cases as being a classic exposition of the nature of a privileged occasion. I do not think that it has ever been pointed out, as counsel for the appellants has pointed out to us here, that in fact, so far as one can see, the persons to whom the statement was published in that case were not persons to whom the speaker had a duty to communicate, or persons who had an interest in receiving that communication, and it may be that the only person who had such an interest was the plaintiff who was complaining of the words used. For that reason, it may be—I do not say that it is, because it would need more than this occasion to overrule so famous a case as that—that the general observations and the general statement of the law, which have been approved over and over again in subsequent cases, when applied to the actual facts of that case on the question of privileged occasion, did not, upon those facts, arise. That

does not make the general statement of the principle of law any less accurate or any less deserving than it has been found to be by subsequent quotation and approval. Now that the point is raised, and in view of the frequent repetition of this definition of the nature of a privileged occasion—as I have said, nowhere more clearly than in the statement of LORD

- A ATKINSON in the passage I quoted—I think that the privileged occasion must arise because the publication of the statement in question is made to a person to whom the speaker has a duty or interest to make it, and that hearer has a corresponding duty or interest to receive it. That qualification does not seem to me to have arisen in this case with either
- B Turner or Peers, and I think that this was not a privileged occasion. That being so, the judge was right in the view which he took that he need not leave the question of malice to the jury, though he did leave it to them *ex abundanti cautela*. As it was not necessary for him to leave that question to the jury, the criticism of his summing up in his explanation
- C of what constituted malice becomes immaterial. Therefore, I think that on that ground this motion for a new trial should fail.

Unfortunately, however, there was another matter. The plaintiff sued both for damages for slander and for damages for wrongful dismissal. It being apparent that, on the wrongful dismissal ground, he

- D could get only the £4 5s. which was paid into court, that ground of claim was withdrawn from the jury, and was abandoned at an early stage. In the course of the summing up, having dealt with other matters, the judge came to the question of the damages which the jury should award if they thought the statements were defamatory, and, if they were, on
- E the other questions which he asked them, in favour of the plaintiff. Unfortunately, in that matter the judge used this language :

If you think that he was unjustly dismissed [which was perfectly immaterial on the question of slander]—because he was unjustly dismissed if he was dismissed because Mr. Comras thought he had been dishonest—if that was the reason that he was dismissed, and you may think that was the only reason which could have justified such a dismissal and such a letter and no regret, if you think that was the imputation that those words conveyed, you should give a sum of damages which will make it clear to all the world, or all his world, that there was no ground whatsoever for any such imputation. You should compensate him for the loss of employment, the natural loss that he has suffered. If you think it right, take that into consideration. But the main consideration is this. If you think that those words impute dishonesty . . .

- G In the course of the plaintiff's evidence, he was asked :

And you then went ?—I just went.

As a matter of fact, were you out of work for some time before you could get a new job ?—Six months.

- H It seems to me quite clear that in the above passage in his summing up the judge has invited the jury—the claim for wrongful dismissal having been properly withdrawn from them and settled by the acceptance of the small amount of money paid into court—to give the plaintiff as damages for slander compensation for having lost his employment and having been out of work for 6 months. That is incorrect, and seriously incorrect. I am unable to say, within the terms of R.S.C., Ord. 39,

r. 6, that I think that this did not cause any substantial wrong or miscarriage. I think that in all probability it must have done. That being so, with some regret I am driven to the conclusion that there must be a new trial in this case. That will mean that at the new trial the defendants will be in a position to contend that there was no publication, because—at any rate, in the case of Turnham—it was an unsuspected A overhearing of the words. It might be said that there was no publication at all to him. It will be open to them to contend that the words were not defamatory, and it will be open to them to contend that the damages ought to be very small, if any. In my view, however, they ought not to be allowed to ask the judge to rule that this was a privileged occasion, B and that, therefore, before the plaintiff can succeed, the jury must find that the words were spoken maliciously. I think, therefore, that this appeal should be allowed with costs. There will be an order for a new trial, and, having regard to the peculiar circumstances of this case, I think that the costs of the first trial should be in the discretion of the O judge who conducts the second trial.

LUXMOORE, L.J. : I agree, and do not desire to add anything.

HUMPHREYS, J. : I also agree, and only desire to add this. This action was brought, as appears from para. 4 of the statement of claim, D in respect of a publication of an alleged slander to one Peers, and, as appears from para. 5 of the statement of claim, in respect of an alleged publication of a malicious slander to one Turnham. That being so, when the court is asked to decide whether or not the occasion of the utterance of those defamatory matters was privileged, it seems to me that the court E is bound to treat the occasion which is privileged or without privilege as the occasion of the uttering and publication of those slanders to those persons, and that it is impossible to accept for that reason the argument of counsel for the appellants, which I need not repeat, in regard to the matter. F

I feel the same difficulty as my Lord has expressed with regard to *Toogood v. Spyring* (2), and I have nothing to add to what he has said about it, and I agree with his judgment as a whole.

Appeal allowed with costs. Order for a new trial. Costs of first trial to be in discretion of judge at second trial. G

Solicitors : *Dixons, Ward, Umney & Burdon* (for the appellants) ; *Vizard, Oldham, Crowder & Cash*, agents for *Dennis, Faulkner & Alsop*, Northampton (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

DRAPER v. TRIST AND OTHERS.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), June 23, 26, 27, 28, 1939.]

Trade Marks and Trade Names—Passing off—Damages—Right to substantial damages—Sales to middleman.

Upon an inquiry into damages in a passing-off action, the judge held that, where goods were sold to a middleman and there was no evidence of resale by him, the plaintiff was only entitled to nominal damages. The plaintiff appealed:—

HELD: (i) in a passing-off action, once it is proved that deceptive goods have been put upon the market, the plaintiff is entitled to damages. What those damages are to be must be determined by a jury, or the court, in the light of all the facts of the case, and applying the ordinary knowledge of business which a jury are entitled to use. There is no onus on the plaintiff to show that purchasers are deceived, nor is there an onus on the defendant to show the contrary, but fair weight must be given to all the facts and considerations on each side.

(ii) upon a sale of a large quantity of deceptive goods to a middleman, even if there is no evidence of resale to the public, the plaintiff is entitled to damages in respect of the damage to his business by the presence of those deceptive goods on the market. It is quite unnecessary to show that there has been a fraudulent resale by the middleman.

(iii) upon a sale to a middleman, the loss of profit by the plaintiff is not a relevant consideration in assessing damages. The proper consideration is the damage which is fairly to be attributed to the wrongful act of selling deceptive goods to the middleman.

(iv) *Quære*: whether in a passing-off action it is necessary to establish a fraudulent intent.

[EDITORIAL NOTE. The judgments herein contain a full review of the law of assessment of damages in a passing-off action, with particular reference to the case where there have been considerable sales of deceptive goods to middlemen, but no evidence adduced that those goods have been resold to the public. It is pointed out by GODDARD, L.J., that, upon the question of damages, a passing-off action is similar to an action for libel or for the wrongful dishonour of a cheque of a trader. The law assumes that the presence on the market of a quantity of deceptive goods will have an adverse effect upon the plaintiff's business, and he is, without proof of damage, entitled to damages. It is open to the defendant to show that he has suffered little or no damage in fact, but this can only result in a low assessment of damages in the plaintiff's favour.]

AS TO DAMAGES IN A PASSING-OFF ACTION, see HALSBURY, Hailsham Edn., Vol. 32, pp. 665-667, para. 976; and FOR CASES, see DIGEST, Vol. 43, p. 334, Nos. 1554-1559.]

Cases referred to:

- (1) *Spalding & Brothers v. Gamage (A. W.), Ltd.* (1915), 84 L.J.Ch. 449; 43 Digest 264, 1018.
- (2) *Burgess v. Burgess* (1853), 3 De G.M. & G. 896; 43 Digest 286, 1155; 22 L.J.Ch. 675; 21 L.T.O.S. 53.
- (3) *Reddaway v. Banham*, [1896] A.C. 199; 43 Digest 277, 1098; 65 L.J.Q.B. 381; 74 L.T. 289.
- (4) *Rodgers v. Nowill* (1847), 5 C.B. 109; 43 Digest 264, 1017; 17 L.J.C.P. 52; 10 L.T.O.S. 88.
- (5) *Lever v. Goodwin* (1887), 36 Ch.D. 1; 43 Digest 334, 1562; 57 L.T. 583.
- (6) *Marzetti v. Williams* (1830), 1 B. & Ad. 415; 17 Digest 81, 21; 9 L.J.O.S.K.B. 42.

- (7) *Rolin v. Steward* (1854), 14 C.B. 595; 17 Digest 122, 306; 23 L.J.C.P. 148; *sub nom. Rollin v. Steward*, 23 L.T.O.S. 114.
- (8) *Leather Cloth Co. v. Hirschfield* (1865), L.R. 1 Eq. 299; 43 Digest 237, 825; 13 L.T. 427.
- (9) "*Singer*" *Machine Manufacturers v. Wilson* (1877), 3 App. Cas. 376; 43 Digest 272, 1070; 47 L.J.Ch. 481; 38 L.T. 303.
- (10) *Ledger, Sons & Co. v. Munro (James) & Son, Ltd.* (1916), 33 R.P.C. 53. A
- (11) *Alexander & Co. v. Henry & Co., Mitchell Henry & Waller & Co.* (1895), 12 R.P.C. 360; 43 Digest 237, 826.
- (12) *Davenport v. Rylands* (1865), L.R. 1 Eq. 302; 43 Digest 237, 829; 35 L.J.Ch. 204; 14 L.T. 53.

APPEAL by the plaintiff from an order of LUXMOORE, L.J., sitting as an additional judge of the Chancery Division, made on May 8, 1939, in an inquiry as to damages in an action for passing off. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

K. E. Shelley, K.C., and *Guy Aldous* for the appellant.

C. E. Harman, K.C., and *W. F. Waite* for the respondents.

Shelley, K.C.: For the purpose of recovering damages in a passing-off action, fraud or intention is utterly irrelevant. It is sufficient to show that the plaintiff's trade was less than it would have been in normal circumstances. The court is asked to infer that the falling off was due to the unfair competition of the defendants. *Lever v. Goodwin* (5) establishes that it is a wrongful act to sell through a middleman, who is not deceived, an article which is calculated to deceive. Purchasers have bought the goods in the belief that they are the goods of the plaintiff, and it is for the defendants to show that there was no passing off. There must be reasonable evidence that the plaintiff has suffered damage, but it is not necessary for him to give absolute proof if, on the facts of the case, it is reasonable to conclude that he has suffered damage. The plaintiff has made a loss which is closely associated with the sales which the defendants have made, and the plaintiff's business has been permanently injured. [Counsel referred to "*Singer*" *Machine Manufacturers v. Wilson* (9), *Spalding & Brothers v. Gamage (A. W.), Ltd.* (1) and *Leather Cloth Co. v. Hirschfield* (8).]

Aldous: If an article is calculated to deceive, it must deceive, unless steps are taken to prevent its doing so. The court has to determine whether or not such articles were sold, and, secondly, whether or not deception took place through those sales.

Harman, K.C.: The true question is as to the inference which the court will draw from the facts. I do not say that the plaintiff has to prove that every person in respect of whom he claims damages has been deceived, but I do say that the defendants have not to prove the opposite. It is a question as to whether or not, on the facts of the case, there has been deception. If, in a passing-off action, a plaintiff elects to claim damages, and not to ask for an account of profits, he must prove his damage. The sales to Mr. Baker, in the present case, were sales to a perfectly independent factor. To recover damages, the plaintiff

must prove the deception of the ultimate purchaser. In *Leather Cloth Co. v. Hirschfield* (8), it was held that the onus was upon the plaintiff to prove some damage or loss of profit. In the present case, there is no evidence from which damage can be inferred.

[GODDARD, L.J., referred to *Rodgers v. Nowill* (4).]

- A *Harman, K.C.* : It would not make much difference if the damages were at large, because, if one considers the whole of the facts, a jury could not come to the conclusion that they could give substantial damages. The first point one has to consider is whether or not the purchaser was confused when he bought the goods, and the second point is whether
- B or not he would have bought the goods of the plaintiff if he had not bought those of the defendants. The plaintiff has not proved any loss. The defendants have, in fact, proved the contrary. The loss of sales to one particular customer accounts for the loss of profit. On no view of the present case has substantial damage been proved. [Counsel referred
- C to *Ledger, Sons & Co. v. Munro (James) & Son, Ltd.* (10), *Alexander & Co. v. Henry & Co.* (11) and *Davenport v. Rylands* (12).]

- Shelley, K.C.*, in reply : The proper way in which to regard this case is to look at it from a jury's point of view. The defendants set up a factory immediately opposite to the plaintiff's factory, and that made
- D it incumbent upon them to see that no confusion arose. The amount of damage should be substantial, having regard to the interests involved. In bringing a case of this kind, the plaintiff must have some regard to realities. He has done all that he reasonably can to collect evidence, and the evidence shows that he has sustained a very serious loss.

E

SIR WILFRID GREENE, M.R. : This is an appeal from an order of LUXMOORE, L.J., sitting as an additional judge of the Chancery Division, made after an inquiry as to damages which had been directed by a consent order of July 12, 1935, by EVE, J. On the inquiry as to damages, two

F matters of complaint fell to be considered, (i) the allegation of improper solicitation by the defendants or their agents of customers of the plaintiff, and (ii) the question of passing off by the defendants. On the first of those two matters, the judge awarded to the plaintiff a sum of £250 by way of damages, and no appeal is brought on either side with regard

G to that branch of the case. Upon the other branch of the case, the judge, after hearing a great deal of evidence, came to the conclusion that the plaintiff had not established the facts necessary to be established before an award of anything but nominal damages could be made. He accordingly awarded damages of 40s. to the plaintiff upon that head,

H and made a special order as to costs in view of an offer which had been made by the defendants but not accepted by the plaintiff.

The claim as originally presented under the head of passing off was a claim to a very large sum by way of damages. That sum, even allowing for the matters to which I shall presently refer, was one which, in my opinion, can fairly be said to have been very greatly exaggerated. I am

not prepared, in arriving at the figure which I consider to be the proper figure of damages, to come anywhere near the sum at which the plaintiff laid it.

Before LUXMOORE, L.J., the plaintiff produced evidence—partly new evidence on the inquiry and partly references to evidence which had been led at the trial before EVE, J.—with a view to establishing, first of all, the number of the sales which the defendants had made of goods which may, for convenience, be described as deceptive goods. He also produced evidence that in certain cases actual deception had taken place. I shall refer a little more fully to the evidence presently. At the moment, I merely want to show the various departments into which the case fell, because before the judge the sales upon which the plaintiff relied were divided into a number of heads. In view of certain findings of fact to the effect that in regard to some of those heads it had been established to the satisfaction of the judge that the purchasers were not misled, the appellant before us did not bring in the sales under those heads as matters to which attention ought to be paid in assessing the damages which the plaintiff had suffered, and the relevant heads were limited to certain heads to which I shall refer more particularly in a moment.

When the action was heard before EVE, J., he had no occasion or opportunity to come to any conclusions of fact, for the simple reason that, after the evidence had been closed, a consent order was made. It is important to look at the terms of that order, because it is upon the basis of certain facts which that order necessarily assumes to be established that the inquiry as to damages fell to be made. In that order, which is dated July 12, 1935, there was, first of all, an undertaking by the defendants not to solicit. Then there was an undertaking that they would refrain from in any manner holding out that they, or either of them, are or is carrying on business in continuation of, or in succession to, the business carried on by the late firm of Hubert H. P. Trist & Co. Then they undertake to change the name of the defendant company to the name Transport Brakes, Ltd., and thereafter to do business under that name, or some other name not containing the word Trist or Tristbestos or any other word calculated to cause confusion between the business of the plaintiff and that of the defendant company. Then they undertake to vacate the trade mark "Tristbestos," and then, after one or two other matters, comes an order directing inquiry. The first inquiry was one which related to solicitation, and I need say no more about that. The second inquiry, the one with which we are concerned, was :

An inquiry what damage has been suffered by the plaintiff by reason of the acts of the defendants mentioned in para. 13 of the statement of claim.

Para. 13 of the statement of claim is as follows :

The defendants have traded and intend to continue to trade in manner as set out in para. 7 hereof in consequence whereof the defendant company's business

and goods are calculated to be passed off as and for the plaintiff's goods and the public are likely to be deceived.

Paragraph 7 contains an allegation of the incorporation of the defendant company at the instance of the defendant Trist, and continues as follows :

A The said defendant company was formed for the purpose of carrying on the business of brake and clutch linings and other articles connected therewith and has carried on business as aforesaid under the name Tristbestos Brake Linings, Ltd., giving special and unnecessary prominence to the name "Hubert H. P. Trist," using and advertising for use a postal address identical with that used by the said partnership and since May 16, 1934, by the plaintiff, advertising their brake and clutch linings as "Tristbestos" linings, and occupying premises in near proximity to those occupied by the said partnership and since May 16, 1934, by the plaintiff and has failed to take any or any sufficient steps to distinguish its business or goods from those of the plaintiff.

B The basis of the order, of course, must be that the acts of the defendants complained of were acts which were calculated to deceive. In the case of the actual goods themselves, they were marked, or the packages containing them were marked, with the offending word "Tristbestos."

C The whole basis of the relief in a passing-off action is that, as a matter of fact, the goods (if it be a case of goods) are calculated to deceive when sold under the description or in the get-up, or whatever it may be—the way in which the defendants sell them—and that they are in effect telling a falsehood about themselves. The matter, therefore, starts upon the

D hypothesis, not that there is a certainty that in every case goods of that description will mislead, but that they are of such a nature that they are calculated to mislead. In *Spalding & Brothers v. Gamage (A. W.), Ltd.* (1) LORD PARKER said, at p. 449, with regard to the passing-off action :

E This principle is stated by TURNER, L.J., in *Burgess v. Burgess* (2), and by LORD HALSBURY, L.C., in *Reddaway v. Banham* (3), in the proposition that nobody has any right to represent his goods as the goods of somebody else. It is also sometimes stated in the proposition that nobody has the right to pass off his goods as the goods of somebody else. I prefer the former statement, for, whatever doubts may be suggested in the earlier authorities, it has long been settled that actual passing off of the defendant's goods for the plaintiff's need not be proved as a condition precedent to relief in equity either by way of an injunction or an inquiry as to profits or damages. . . . Nor need the representation be made fraudulently.

F There is one matter which I can get rid of at once, and that is the suggestion, which was discussed to some extent in argument, that, in a claim for damages based on passing off, it is essential to establish a fraudulent intent—which is the same, of course, as a dishonest intent—on

G the part of the defendant. I should be prepared myself to hold, if it were necessary to do so, that now, both in claiming damages and in claiming purely equitable relief, whether by way of injunction or by way of account of profits, or both, fraud is not a necessary element in the transaction. In the present case, however, the fact that the inquiry

H as to damages was ordered by a consent order does involve, in my opinion, that the elements upon which damages can be awarded are by consent agreed to be sufficiently present by reason of the facts set out in the relevant paragraphs in the statement of claim. I therefore do not discuss that matter any further.

In arriving at his conclusion in the present case, LUXMOORE, L.J., held,

as I have said, that there was not before him evidence upon which he was entitled to find that the plaintiff had suffered anything more than nominal damages. There are two passages in his judgment which bring out that point of view quite clearly. The first one is as follows :

Having elected to take damages instead of profits, the plaintiff must satisfy the court that the sale of the goods complained of has in fact injured him, and he must also satisfy the court as to the extent of such injury. If the immediate purchaser of the goods is a middleman, who was not himself deceived, the plaintiff must satisfy the court that the middleman has in fact resold the goods to subpurchasers who would otherwise have purchased similar goods from the plaintiff, and it is not sufficient, in my judgment, to show that the goods were so got up as to be calculated to deceive, leaving the court to infer that because the goods were so got up every subpurchaser from the middleman was tricked into purchasing those goods instead of the plaintiff's goods. In the absence of evidence of resale by the middleman, there can be no evidence of damage, for the goods may still remain in the hands of the middleman, either because they are unsaleable or for some other reason.

Then later on, in dealing with one of the cases—namely, that of sales to a firm called Bryant & Co., who were middlemen—he says :

In the absence of any other evidence either of deliberate passing off or of resale of the goods purchased, I should not be justified in holding that the plaintiff is entitled to damages in respect of the sales by the defendant company to Bryant, and I decline to do so, for I cannot properly hold that the resale by Bryant in a fraudulent manner of the articles sold by the defendant company is the reasonable and probable result of such sale.

With all respect to LUXMOORE, L.J., I think that in those passages there are matters in respect of which he has erred.

The right which is infringed in a passing-off case is one which was regarded at law as one the mere violation of which led to damage. In other words, it was not regarded at law as a case in which damage was of the gist of the action. It is true that in the old cases at law the element of fraudulent intent was a necessary element in the commission of the tort. I have already referred to that matter, and I propose to say no more about it, but the position was that a jury, properly instructed, were entitled to award damages as for the violation of a right, and that at the least the plaintiff would be entitled to nominal damages, as he would always be entitled to nominal damages on the violation of a right.

The practical question which presents itself in a matter of this kind—and it is convenient to consider it from a practical point of view, at any rate for the moment—is this. The defendant in a passing-off action has in the normal case, the simple case, sold a quantity of deceptive goods. He may have sold those goods direct to the public, the ultimate purchaser, or he may have sold them to a middleman who is himself going to sell them to members of the public or perhaps to some other trader, who, in his turn, deals directly with the public. The defendant, therefore, has put upon the market, and sent in to the market, a quantity of goods which, on the face of them, and *ex hypothesi*, are saying something about themselves which is calculated to mislead. That is the very gist of the conception of passing off. It is manifest that, if the plaintiff, before he could recover damages, had to show that, in the case of each sale, the purchaser was deceived—because it is on the assumption that

purchasers are deceived that the plaintiff's damages are based—then his task, save in very exceptional circumstances, would be a quite impossible one. On the other hand, it is equally true to say that to impose upon a defendant the task of showing that the purchasers were not deceived would be an equally impossible one. It is, in my opinion, misleading

- A to consider too much the question of onus of proof in a case of this kind. The real problem is, when all the facts are considered and all the considerations on either side are given fair weight, the proper sum at which to estimate the plaintiff's damage. That a jury would be entitled, if it were shown that goods were sold under a deceptive appearance or description, to award something more than nominal damages is, in my opinion, the law. I find, on looking at *Rodgers v. Nowill* (4), to which GODDARD, L.J., called attention in the course of the argument, the following observation by MAULE, J., at p. 127. He is referring to the direction of the trial judge to the jury in a case where the plaintiffs were not really troubling themselves about the quantum of damages. What they were anxious to obtain, apparently, was relief in equity, and, accordingly, what they were endeavouring to get in this particular action in the Court of Common Pleas was a judgment establishing their right. In referring to the direction of the trial judge, MAULE, J., says, at p. 127 :

- D That direction in substance was, that a manufacturer has a right of action against one who affixes to his own goods, the known and accustomed mark of the former, and sells them upon a representation that they are of the manufacture which such mark would denote them to be. Such conduct towards a trader, naturally imports damage ; for, it cannot be doubted that supplying the market with spurious goods, has a tendency to injure the maker of the genuine article.
- E That, if I may say so with respect, appears to me to be not merely good law but also good sense, and to say to a jury that, in spite of the fact, as it might be, that the market has been flooded with deceptive goods, they are not in law entitled to return a verdict for more than 40s. damage unless the plaintiff establishes passing off in fact would appear to me to violate one's common sense. It is a matter in which the ordinary knowledge of business which a jurymen is entitled to use tells him that it is impossible in business to put upon the market large quantities of deceptive goods without doing, at any rate, some damage. What that damage is to be is a matter which is to be considered in the light of all the facts of the case and the whole of the evidence led.

- G I may relate that to one specific matter to which LUXMOORE, L.J., refers—the case of the sales to the middleman in the present case. LUXMOORE, L.J., calls attention to the fact that resales by those middlemen were not proved. It seems to me, with all respect, that, if a large quantity of deceptive goods is sold to a middleman who in the ordinary course of business, will resell them, even if a jury is not entitled to infer that, in the ordinary course of business, those goods had been resold, they can surely take into account the necessary damage to the plaintiff's business caused by having overhanging his market, so to speak, a quantity of deceptive goods which are liable to be sold at any moment
- H

It seems to me that that is a consideration of a practical business kind which must be borne in mind.

There is one further matter in connection with the passages which I have read from the judgment of LUXMOORE, L.J. He thinks, if I do not misconstrue his words, that the inference which he would have to draw in the case of these middlemen before he could award anything but nominal damages in respect of those sales was an inference that the middleman himself would act fraudulently in reselling those goods to his own customers. If that is what he meant, I respectfully cannot agree with him. When deceptive goods are sold to a middleman, the middleman, in dealing with those goods, may take various courses. If he honestly does not see any possibility of confusion, then he will take no steps to distinguish the goods of the defendant from the goods of the plaintiff. He will take no steps to distinguish because the necessity of doing so will not present itself to his mind. That is one possibility. On the other hand, he may perceive the possibility of confusion and he may take special steps to see that that confusion does not take place. Thirdly, he may see the possibility of confusion and decide that it will pay him to take advantage of it, and accordingly to take no steps to distinguish the goods. All those things are possible, and it is not right to infer necessarily that any one of those courses will be taken. I must dissent, however, from the view that the only case in which it would be permissible to award damages to the plaintiff would be a case in which it was shown that the middleman had resold fraudulently. After all, the question is the amount of the damage which the plaintiff has suffered by having these deceptive goods sold. He will suffer precisely the same damage if the ultimate purchaser from the middleman is in fact misled by their deceptive description, whether or not the middleman is himself fraudulent in his intent.

Having made those observations in relation to some of the reasons of LUXMOORE, L.J., I can proceed to examine, and to examine very briefly, some of the more salient considerations in the present case. I take the view that it was competent to LUXMOORE, L.J., as it is competent to us, on a consideration of all the evidence in this case, to award such sum as we think is properly and reasonably shown to be, by taking all proper inferences into account, the damage suffered by the plaintiff by reason of the wrongful acts of the defendants. It becomes necessary, therefore, to consider shortly some of the facts of this case, and some of the considerations to which attention must be paid.

First of all, it has been said more than once—and, indeed, it is obvious—that, in the case of sales of deceptive articles, the court is not entitled to assume that every one of those sales would have been obtained by the plaintiff. For obvious reasons, that is an assumption which would be quite unwarranted. The unwarrantable nature of such an assumption is further strengthened, of course, where there are differences in price, differences in quality and so forth, because it is not legitimate to assume

- that a person who bought the defendants' article at a lower price, if it were sold at a lower price, would necessarily have bought the plaintiff's article at a higher price even if he were deceived into thinking that the defendants' article was the plaintiff's. That is a consideration which must be borne in mind. In the present case, I may say in passing, on the matter of
- A price, that it seems to me that the evidence, when properly considered, does not show that the price at which the defendants were selling in comparable cases was very much less than the price of the plaintiff's articles, although, as I have said, it is not legitimate to assume that even a small reduction in price would not have had some effect.
- B The next matter to which attention may be called is that of the sales which took place. A proportion only—I need not go into figures—was to customers of the old firm, the business of which the plaintiff had acquired. It is manifest that different considerations may well apply, and different probabilities may come into the case, when customers are
- C being dealt with. A customer, *ex hypothesi*, knows about the person with whom he has dealt in the past, and, knowing about that person, and presumably, but not necessarily, knowing his name—in the present case, I think he would necessarily know his name—when he finds a deceptive name, he is likely to confuse the one with the other. On the
- D other hand, it may fairly be said that a non-customer, one who had not previously been a customer, would not be so likely to be confused in that way. In the present case, it is to be observed that the only customers with whom we are concerned are persons in the trade. This is not a case where sales to the public—to a private car owner for example, who has brake linings
- E put upon his car—really come into the picture, although, of course, there are many cases of direct sales to transport undertakings. People of that kind and concerns of that kind one would expect to find more or less in the same state of knowledge as that in which the trade would be as to who were the manufacturers in the trade, and that, again, is another matter
- F of which account should properly be taken. Another matter which may properly be taken into account is, no doubt, that the defendant Trist was personally known to customers and to the trade, and that it is not the least bit improbable—in fact, it would be probable—that a certain amount of business would naturally follow him without any improper
- G action upon his part. That is a circumstance to which counsel for the respondents rightly calls attention, and it is a factor in the matters to be considered. Again, it is pointed out that a receiver and manager had been in for some time, and that certain employees of the old business had left when the partnership broke up. That is referred to, and several of the
- H matters to which I have referred are relied upon to explain the alleged drop in sales.

That brings me to this question. It is said on behalf of the plaintiff that he has established a drop in his sales which is evidence of damage suffered owing to this improper trading. Counsel for the defendants criticised that evidence, and claimed that the evidence showed

no drop in sales referable to the improper trading, and relied upon that circumstance as disproving damage. I myself do not find any real assistance in the evidence in this case with regard to the alleged drop in sales. There are various explanations given of why that drop should have taken place, and there is a great deal of controversy about it. Personally, I find the evidence in such a state that it does not assist me one way or the other. Evidence of a general drop in sales may be valuable or may be quite valueless in cases of this kind. Similarly, evidence of no drop in sales again may be valuable or may be quite valueless. It does not in the least follow that, because there has been a drop in sales, it is necessarily due to the deceptive trading complained of, nor does it in the least follow that, because there has been no drop in sales, therefore the deceptive trading has had no effect. Evidence of that kind is evidence which must be regarded with very great caution. Valuable though it may be in certain cases, in other cases it may be of very little value. In the present case, I do not find the evidence in such a condition with regard to that matter as to enable me to base any inference on it or to strengthen any inference by its help. A

I now come to say a word with regard to the sales to the middlemen, who are three in number. In, I think, one case, we have some idea of the proportion who were customers of the plaintiff. I have already said that the absence of resale by the middlemen is not a thing which troubles me. Nor am I very much affected by the suggestion that, in the case of those sales, the plaintiff, in order to secure them, would have had to incur very much greater expenses than he suggested in his own figures. I think on the whole that in those sales to the middlemen it is not an unfair inference to draw that, in any case where the plaintiff could have obtained the sale, he could have sold to the ultimate purchaser upon substantially the terms which they claimed. In the case of one of the middlemen at least, one has to remember that a substantial proportion of the people with whom he dealt consisted of customers, and one has to give due weight to that fact. B

In the case of a sale to a middleman, the tort is really complete when the offending goods are sold to him. That matter was decided by this court in *Lever v. Goodwin* (5), where the controversy was as to the form of the account of profits, which was the particular type of relief which the plaintiff elected to take in that case. Of course, in taking an account of profits, which is the equitable relief, the damage which the plaintiff has suffered is totally immaterial. The object of the account is to give to the plaintiff the actual profits which the defendants have made and of which equity strips them as soon as it is established that the profits were improperly made. However, in my opinion, whichever form of relief is granted, the wrong is the same. There are not two separate wrongs, one conferring a right to an account of profits and one conferring a right to damages. They are the same wrong, and in *Lever's* case (5) COTTON, L.J., in dealing with an argument that the only profit which the plaintiff could E

ask for was profit in respect of sales to the ultimate purchaser, said, at p. 7 :

But, in my opinion, that is mistaking the whole gist of this action. The defendants as I understand, do not sell anything to retail purchasers, what they sell they sell to middlemen, that is to say, to people who purchase from them as wholesale merchants, and who are going to sell it by retail; and the complaint A against the defendants is this : " You have dressed up your soap in such a dress that those middlemen to whom you sell it are enabled, by its having that deceptive dress upon it, to sell it to the ultimate purchasers as the soap of the plaintiffs." The profit for which the defendants must account is the profit which they have made by the sale of soap in that fraudulent dress to the middlemen. It is immaterial how the middlemen deal with it. If they find it for their benefit not to use it fraudulently, but to sell the soap to the purchasers from them as Goodwin's, that cannot affect the question whether the sale by the defendants to those middlemen of this soap in a fraudulent dress was a wrongful act. It still remains a wrongful act, because it put into the hands of the middlemen the means of committing a fraud on the plaintiffs by selling the soap of the defendants as the soap of the plaintiffs.

A tortious act, therefore, in the case of a sale to a middleman, is C committed by selling the deceptive goods to that middleman, and, if the relief given is an account of profits, one stops there and finds out the profits on those sales. If, on the other hand, what is being asked for is damages, obviously the profit made on those sales is not the relevant consideration, and a further inquiry falls to be made—what is the damage which is D fairly to be attributed to that initial wrongful act of selling deceptive goods to the middleman ?—and that will appear on a consideration of all the circumstances and the probabilities of the case. Let me take the exact case which COTTON, L.J., takes, where he assumes that the middleman sells the soap to the purchaser as Goodwin's—that is to say, as the E defendants'. That, as he points out, has nothing to do with an inquiry as to profits. However, I agree with what counsel for the respondents says—namely, that it has a great deal to do with the question of damages, because, if it were proved, or if the proper inference were, that a middleman, in making his sales, had taken steps to distinguish those goods F from the plaintiff's goods, it could be truly said with regard to those sales that the plaintiff had not suffered damage. In the case of sales to the middleman, the real problem is the probabilities of the case, and the inference which in fairness may be drawn.

Then there are the cases of the sales direct to purchasers, transport G people, and so forth. I need not deal specially with those except to say that I think I am right in saying that the actual cases of persons who were misled, with regard to which evidence was called, came from that category. It is also pointed out that the actual cases of deception proved—deception in fact—were cases of persons who had been customers of the old firm. H There are two cases, Ludgate and McKay. Counsel for the appellant relies on two further cases, Cox and Caunter, and in addition to that there is evidence of confusion in cases where the deceptive goods were not actually bought.

Taking all that, I think it comes to this. The plaintiff has called evidence—not a great volume, but some evidence—showing how in this

particular business the deception is likely to take place in practice. It shows that the possibility of deception is a real business possibility, and he is entitled to have due weight attributed to that evidence which he has called. I do not propose to go into any more detail with regard to that, except to say that, with regard to the two cases of Cox and Caunter, LUXMOORE, L.J., in dealing with those cases, which he thought were A not cases of deception, took the view that the evidence of those two witnesses did not suggest that they were asking for the plaintiff's goods. We have had the evidence read to us and have carefully considered it, and, speaking for myself, I cannot take the view of it which LUXMOORE, L.J., took. I think that the evidence does show that they were intending B to get, in the orders which they placed, the plaintiff's goods, and that, when they got the defendants' goods with the misleading description upon them, they were led to suppose that their requirements had been duly satisfied, and it was only subsequently that they discovered that this was not the case. It is a perfectly fair matter of criticism that C the volume of evidence of actual deception and confusion which the plaintiff has called is not great, and that is a matter which it is fair to take into account. On the other hand, it does show, and I think clearly shows, as I have said, the way in this particular trade, in which deception comes about in practice, and it is valuable evidence, and not by D any means to be brushed aside.

The only other matter to be considered is the question of general injury to the plaintiff's business. A claim, which in my opinion is highly exaggerated, was made with regard to that, and I cannot find any evidence which would justify me in attributing a large sum to that E particular matter. On the other hand, this court is entitled, as I think a jury would be entitled, to use ordinary business knowledge and common sense, and to consider that one cannot have deceptive trading of a considerable volume without inflicting, at any rate, some measure of damage on the goodwill. How long that will last, what its extent will be, is F a thing which no evidence, except in the most exceptional case, could satisfactorily define, and the matter is reduced, as many of these matters are reduced, to the formation of a rough estimate in a way in which a jury could properly form one.

I have referred in some detail to some of the considerations put before G us. I am conscious that I have not referred to all of them, but I have carefully listened to the whole of the arguments on each side, and have given due weight to all the considerations which arise in the case—not merely those which I have mentioned, but also those which I have not mentioned. I have also borne in mind that some of the sales in question H are sales in respect of which the plaintiff has already been awarded damages under the heading of solicitation. Doing the best I can, and forming what I conceive to be a conclusion fair and just to both sides, and being careful only to draw such inferences as may fairly be drawn. I have come to the conclusion that a fair sum to award to the plaintiff

by way of damages for what he has suffered is the sum of £2,000, with the result, therefore, that the order of LUXMOORE, L.J., must be varied by substituting that sum for the sum of 40s. which he awarded.

CLAUSON, L.J. : In view of the terms of the consent judgment taken
A in this case, it must, in my judgment, be taken as established for the purposes of the present inquiry that the defendants' conduct was such as to give the plaintiff a right to recover from the defendants such damages as, in the opinion of the court, the plaintiff had suffered by reason of the defendants' conduct. Accordingly, it is unnecessary, for
B the purposes of the present case, to attempt to answer the question whether the presence of fraud is a necessary element in the defendants' conduct if that conduct is to lead to a judgment for damages in favour of the plaintiff. I should feel great difficulty, myself, in answering that question in general terms, and without reference to the facts of a
C particular case, as such an answer would, as I venture to think, be of little value unless it were accompanied by a definition of the word "fraud" as used in the question, and I am not prepared at the present moment to commit myself to such a definition.

I agree with the reasons which have been given by SIR WILFRID
D GREENE, M.R., for the conclusion that LUXMOORE, L.J., was wrong in regarding himself, in the circumstances of this case, as bound not to fix the damages in excess of the figure of 40s., and I agree with the figure which SIR WILFRID GREENE, M.R., has mentioned as a proper figure to adopt as a fair estimate of the damage which, in the circumstances
E put in evidence before the court, has been occasioned to the plaintiff by the defendants' conduct. I do not find it necessary to add any further observations upon that evidence.

GODDARD, L.J. : I agree both with the order proposed by SIR
F WILFRID GREENE, M.R., and also with the figure which he has suggested as to the amount of damages to be given in this case. I should like to add a few words of my own upon the question generally, because points of considerable interest have been argued. It is, perhaps, odd that there is no clearer authority than there is as to the principles which are
G to be applied in these cases to the assessment of damages.

We are concerned in this case only with a claim for damages, which is essentially a legal claim, a claim at law. This class of action was well-known to the common law, and precedents in works on pleading have been cited in the course of the case as showing what it was necessary
H to plead.

I find it of some assistance in coming to a conclusion in this case to analyse in my own mind what exactly are the cause of action and the right of action, which are two different things. The action is one of that class which is known as an action on the case, akin to an action of deceit. In an action on the case, the cause of action is the wrongful act or default

of the defendant. The right to bring the action depends on the happening of damage to the plaintiff. A man, for instance, may be negligent, and the consequences of his negligence may not cause damage for 12 months. The cause of action is the breach of duty. The right to bring the action depends upon the happening of the damage. This class of case, however, forms an exception, or an apparent exception, to the ordinary action of deceit, because, in an ordinary action of deceit, the plaintiff's cause of action is false representation, but he cannot bring the action until the damage has accrued to him by reason of that false representation. In passing off cases, however, the true basis of the action is that the passing off by the defendant of his goods as the goods of the plaintiff injures the right of property in the plaintiff, that right of property being his right to the goodwill of his business. The law assumes, or presumes, that, if the goodwill of a man's business has been interfered with by the passing-off of goods, damage results therefrom. He need not wait to show that damage has resulted. He can bring his action as soon as he can prove the passing-off, because it is one of the class of cases in which the law presumes that the plaintiff has suffered damage. It is in fact, I think, in the same category in this respect as is an action for libel. We know that for written defamation a plaintiff need prove no damage. He proves his defamation. So it is with a trader. The law has always been particularly tender to the reputation and goodwill of traders. If a trader is slandered in the way of his business, an action lies without proof of damage. That does not mean to say that the plaintiff cannot give evidence showing that he has suffered damage in fact. The more he can show that he has suffered damage in fact, the larger the damages he can recover. The more the defendant can show that he has suffered no damage in fact, the less he will recover. In the case of a libel published to a person who knew the true facts, and to him only, although the plaintiff would have a cause of action, the damages would necessarily be very small. In the case of a libel published in a newspaper with a large circulation, the damages would naturally be larger.

The class of case to which I have referred in argument, which is very nearly akin to this class of case, is one which is an exception to the law of damages for breach of contract—namely, the action by a trader for the wrongful dishonour of his cheque. In *Marzetti v. Williams* (6), it was decided that a person could bring an action for the wrongful dishonour of a cheque without proving actual damage. However, it was later decided, in *Rolin v. Steward* (7), that in the case of a trader substantial damages could be given for the wrongful dishonour of a cheque, because the act of a bank in dishonouring a cheque must be detrimental to a trader. The proper direction to the jury, as laid down by LORD CAMPBELL, L.C.J. in that case, was as follows, at p. 599 :

[The jury] ought not to limit their verdict to nominal damages, but should give . . . such temperate damages as they should judge to be a reasonable compensation for the injury [the plaintiff] must have sustained from the dishonour of [his] cheque.

Exactly the same considerations seem to me to apply to a case of passing off. If authority be needed, *Rodgers v. Nowill* (4) is ample authority for that. I need not repeat, as SIR WILFRID GREENE, M.R., has read it, the passage in which MAULE, J., showed that damage was imputed in that case. If damage is imputed in that case, then it is for the jury, taking all the facts of the case into consideration, to say what is fair and proper compensation to the plaintiff, without being limited to questions of what in truth are special damages. If it be necessary for a plaintiff in this class of case, before he can get more than nominal damages, to show that he has lost this, that or the other order, one would have to put this class of case, I think, into a third division of law, a case in tort, in which nominal damages can be recovered, although no damage be proved. If, however, a plaintiff wants more than nominal damages, he will have to prove this, that and the other. However, I do not think that that is the law. I think that *Rodgers v. Nowill* (4) shows that, once one has established passing off, there is injury to goodwill, and this court or the jury must assess, by the best means they can, what is a fair and temperate sum to give to the plaintiff for that injury. It is true that in *Rodgers v. Nowill* (4) only 40s. was given, but, if I may follow out the history of the case, one finds by reference to the report in 6 Hare that what had happened in the case was that an action was started before SIR JAMES WIGRAM, V.-C., asking merely for an injunction, not even asking for an account of profits, or for damages. In fact, damages in those days could not have been given, because I think the case was before the passing of the Chancery Amendment Act, 1858. However, there being a conflict of fact, SIR JAMES WIGRAM, V.-C., sent the case to be tried at law, and that was how it came to be tried before WILLIAMS, J. WILLIAMS, J., told the jury, when some comment was made upon the small amount of damages which apparently had been suffered by the plaintiff in that case, that they need not trouble themselves with damages, because the action was brought merely to establish a right, not to recover money. However, it was argued—unsuccessfully, as it appears in that case—that the jury ought not to have given more than a farthing, and that the damages ought to be reduced from 40s. to a farthing. The court, however, would not have that argument, for the reasons which have been pointed out.

I have one word to say on the cases which have been decided. *Leather Cloth Co. v. Hirschfeld* (8) has been cited and relied on by counsel for the respondents. It is curious that in that case, although there was a claim for damages, SIR WILLIAM PAGE WOOD, V.-C., gave no damages at all. He did not even give nominal damages. I respectfully think that that was wrong. I think that that was contrary to the decisions at law, which say that, if passing off is established, some damages must at any rate be given. Notwithstanding his high authority, if, by his remarks at p. 302, beginning “It lies with the plaintiff to prove some distinct damage” down to the end of his judgment, he means that the

plaintiff can recover only such damages as he can actually prove in pounds, shillings and pence, and can actually put before the court by means of showing loss of individual sales, and so forth, I can only say that I respectfully dissent from that part of the judgment, and that I do not think it is in accordance with the other authorities to which I have referred.

The only other thing I desire to say is that I share with CLAUSON, L.J., a doubt—and a very considerable doubt—as to whether it is the law that damages can be claimed for innocent passing off. It is not necessary to decide it in this case. It may be—I say no more—that, in such a case, where there has been an unwitting invasion of the plaintiff's right, though innocent, the plaintiff's claim would be limited to nominal damages. However, that is not a point which it is necessary to decide in this case, and I do not think that it ought to be decided without a great deal more consideration and argument.

Appeal allowed and judgment entered for the appellant for £2,000.

Solicitors: *Ashurst, Morris, Crisp & Co.* (for the appellant); *Gregory, Rowcliffe & Co.*, agents for *Bevan, Hancock & Co.*, Bristol (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

W. I. RADCLIFFE S.S. CO., LTD., AND WYNNSTAY S.S. CO., LTD. *v.* EXPORTKHEB OF MOSCOW. THE LLANISHEN.

[KING'S BENCH DIVISION (SINGLETON, J.), June 21, 1939.]

Shipping—Charterparty—Construction—Option to charterers to load and discharge at two safe berths in one port without extra charge.

A charterparty contained a clause giving the charterers the option of discharging at two safe berths in one port without extra charge. There was also a further clause providing for the delivery of the cargo at such wharf, dock, or other safe place as charterers might direct. The charterers shifted the vessel from a wharf in the Millwall Dock to one in the Victoria Dock, both within the limits of the Port of London, and the owners contended that the option of two safe berths for discharging the cargo must be exercised within one wharf or dock by reason of the words in the further clause:—

HELD: the charterers were entitled, in exercise of their option under the charterparty, to act as they had done.

[EDITORIAL NOTE. The question here is whether, upon the construction of the charterparty, there is an option to call for a shift from one dock to another or merely from one berth to another in the same dock. The matter is decided, upon a consideration of the whole document, in favour of the former construction.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 30, p. 546, para. 693; and FOR CASES, see DIGEST, Vol. 41, pp. 524-528, Nos. 3529-3559.]

Case referred to:

(1) *King Line, Ltd. v. Moxey, Savon & Co., Ltd.* (1939), 62 Lloyd L.R. 252.

APPEAL by the claimants by way of special case stated from the decision in an arbitration between the claimants and respondents. The facts are fully set out in the judgment.

A. A. Mocatta for the appellants.

J. V. Naisby for the respondents.

A

SINGLETON, J. : The question involved in this case is a very short one. The claimants, W. I. Radcliffe S.S. Co., Ltd., and Wynnstay S.S. Co., Ltd., are the owners of the steamship Llanishen, and the respondents, Exportkhleb of Moscow, were the charterers. The steamer, under the charterparty, loaded a full and complete cargo at Theodosia, and other ports mentioned in the charterparty, in Sept., 1938, and proceeded there-with towards Falmouth for orders to the discharging port. On Sept. 26, the respondents, the charterers, through their agents, gave orders to the claimants' agents that the ship was to proceed to London to discharge, first at the wharf of Messrs. McDougal in the Millwall Dock, and then at the respective wharves of Messrs. Rank and Messrs. Spillers at the Victoria Dock. The claimants, through their agents, denied the right of the respondents to order the ship to discharge at two separate docks. The orders were followed, and the expense of the removal of the ship from the Millwall Dock to the Victoria Dock amounted to £140. The claimants claim that sum of £140 against the respondents, there being no question to be decided between the parties as to the later shift within the Victoria Dock itself.

B

C

D

E

The matter came before Mr. Cyril Miller, who was the umpire appointed in accordance with the terms of the Arbitration Act, and before him it was agreed :

... that both the Victoria and the Millwall Docks are geographically and commercially within the limits of the Port of London.

F

Moreover, Mr. Miller so found. The contentions of the parties, then, were based clearly and wholly upon what was the true construction of certain parts of the charterparty itself. The contention of the claimants was that :

G

... under the charterparty the respondents were not entitled to require the ship to discharge at two separate docks in the same port without paying for the expense of shifting the ship from one dock to the other.

H

The respondents' contention was that, under the provisions of the charterparty :

... they were entitled, without extra charge, to require the ship to discharge at any two safe berths within the port of discharge whatever the distance between the berths and whether they were or were not situate in the same dock or other discharging area within the port.

As I have said, the question I have to determine is on this particular charterparty. There is no dispute on the common law. It is laid down in SCRUTTON ON CHARTERPARTIES, 14th Edn., p. 146, as follows :

In the absence of express provision or custom the shipowner is not bound to shift from the selected berth to suit the convenience of the charterer.

The authority cited in support of that is *King Line, Ltd. v. Moxey, Savon & Co., Ltd.* (1). In that case, GODDARD, L.J., dealing with the question of a charterparty in another form altogether, said :

Under the charterparty in this form, once the charterer has designated the berth to which the ship is to go and the ship has arrived at that berth, the shipowner has discharged his full duty that he has undertaken under the contract to perform at the port when he takes his cargo on board. I do not know if it was in the mind of the county court judge who decided this case that there is any right on a charterer or his agent to order the ship, if she has once arrived at her berth which has been selected, to go to another berth at her own expense within the limits of the port. What the circumstances may be which led to the shifting of this particular ship and why she shifted is evidently a matter which has to be fully inquired into, and, therefore, I say no more about that. But the ship is not bound, once she has arrived and made fast to a berth to which she has been ordered, to shift again from that berth for the purpose of taking on board part of the cargo which is the subject-matter of the charter. A

That is, of course, dealing with the case of a ship which had gone to a particular port to take on board a cargo, and the berth to which she should go had been nominated or designated by the charterer. In those circumstances, she could not be called upon to move unless the charterer made arrangements, and, of course, any expense of that sort which was involved would apply in the case of a ship which had discharged at any particular berth, the berth being nominated by the charterer. The circumstances of this case, however, are not the same. It is pointed out to me, in the first place, that the charterparty, which bears the date of Aug. 10, 1938, gives an option to the charterers to load at one or two ports. Nothing arises upon that, but it is interesting to notice that, at the end of cl. 1 of the charterparty, it is provided as follows : C

Shifting from one berth to another shall not be considered as a further place of loading. Charterers have the option of loading and discharging at two safe berths in one port without extra charge and time for shifting not to count. Further shiftings to be for charterers' account and time for shifting to count. D

Counsel for the charterers submitted to me that the true meaning of the middle part of that is that the charterers can have one free shift. They have the option of loading and discharging at two safe berths in one port. The area mentioned is "port," not "dock" or "wharf." Counsel for the appellants in his argument relied chiefly on cl. 21 of the charterparty, which deals with the discharge, and which is in these terms so far as relevant : E

The cargo to be delivered according to the custom of the port, at such wharf, dock, or other safe place (always afloat) as charterers or their agents may direct on steamer's arrival in accordance with bills of lading. F

Counsel for the appellants submitted that, if there was to be a free shift—in other words, if the option of two safe berths for discharging the cargo was to be exercised by the charterer—it must be within one wharf or dock or other safe place, by reason of the words in cl. 21 of the charterparty. He said that, if the words at the conclusion of cl. 1 were to be read in the way in which the charterers would have them read, cl. 21 would have read, and ought to have read : "Such wharves, docks or other safe places." In other words, they would have been in the plural. G

It seems to me that, if the argument of the shipowners is to be accepted, one destroys entirely the option given to the charterers by the words which are almost at the end of cl. 1 of the charterparty. The charterers had the option of discharging at two safe berths in one port. They called upon the ship to proceed to London and discharge first at the wharf of
 A Messrs. McDougal, in the Millwall Dock, and then at the respective wharves of two other firms in the Victoria Dock. The shift being called for, the first shift, was from the Millwall Dock to the wharf of Messrs. Rank in the Victoria Dock. Those were, as I think, two safe berths in one port. They were both within the Port of London. That is admitted,
 B and it is found by the umpire as a fact. Indeed, it could not be disputed. In those circumstances, it seems to me that the charterers, in calling upon the ship to proceed to a discharging berth within the port of loading, first at the wharf of Messrs. McDougal, at the Millwall Dock, and then at the wharf of Messrs. Rank, at the Victoria Dock, were exercising their
 C option under the charterparty. The umpire, in para. 6 of the special case, so finds :

Subject to the opinion of the court, I hold that the respondents were entitled under the charterparty to require the Llanishen to discharge first at a wharf in the Millwall Dock and then at a wharf in the Victoria Dock, without any extra charge to the respondents, and accordingly I award and determine that the claimants
 D are not entitled to recover the sum of £140 or any sum from the respondents.

That is my view. In para. 7, the umpire states the question for the opinion of the court as follows :

The question for the opinion of the court is whether upon the true construction of the charterparty and upon the facts found in this case the respondents are
 E entitled to order the steamship to discharge at two wharves in separate docks, both of which docks are within the Port of London.

As I have said, I agree with the umpire's view. I think that the answer to that question is in the affirmative. Then it follows that, under para. 8 of the special case, the award set out in para. 6 stands.
 F *Judgment for the respondents with costs.*

Solicitors : *Holman, Fenwick & Willan* (for the appellants) ; *Richards, Butler & Co.* (for the respondents).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

G

Re SWANWICK HOUSE, PRESTBURY.

[CHANCERY DIVISION (Simonds, J.), **June 15, 1939.**]

Land Improvement—Expenditure payable out of capital—Alterations—To enable buildings to be let—Conversion of dwelling-house into shops and flats—Settled Land Act, 1925 (c. 18), Sched. III, Part I (xxiii).
 H *Settlements—Incidence of expenditure as between capital and income—Conversion of dwellinghouse into shops and flats—Expenditure to enable buildings to be let.*

The tenant for life of settled property consisting of a Georgian dwelling-house, a cottage and a shop desired to convert the premises into residential flats and shops, with a view to increasing the rental

value thereof, and applied to the court for a direction that the expenditure was payable out of capital moneys in the hands of the trustee of the settlement :—

HELD : the proposed conversion was an improvement within the Settled Land Act, 1925, Sched. III, Part I (xxiii), and the expenditure ought to be sanctioned and paid out of capital.

[EDITORIAL NOTE. The matter here is quite a short one, but is of importance, because it is often desired to convert an old-fashioned house into flats or some other form of dwelling which is more easily let at the present time. Such reconstruction cannot, of course, generally be considered by a tenant for life unless the expense is to be borne by the capital of the settled property. A

AS TO ALTERATIONS PAYABLE OUT OF CAPITAL, see HALSBURY, Hailsham Edn., Vol. 19, pp. 382-385, para. 790 ; and FOR CASES, see DIGEST, Vol. 30, pp. 286-288, Nos. 128-143.] B

Case referred to :

- (1) *Stanford v. Roberts*, [1901] 1 Ch. 440 ; 30 Digest 287, 130 ; 83 L.T. 756 ; *sub nom. Re Stanford, Stanford v. Roberts*, 70 L.J.Ch. 203. C

ADJOURNED SUMMONS for the determination of the question whether the conversion of a dwelling-house, known as Swanwick House, and a cottage and a shop adjoining it into residential flats and shops was an improvement authorised by the Settled Land Act, 1925, the costs whereof might properly be paid out of capital moneys arising under that Act. D

Settled estates including the above-mentioned property stood limited to a tenant for life with remainders in tail, the remaindermen being infants at the time of the summons. Swanwick House was a Georgian dwelling-house situated in the main street of Prestbury, formerly let at a rent of £90 per annum, but at the time of the summons unoccupied. The cottage was let on a monthly tenancy and the shop upon a yearly tenancy. With a view to increasing the rental value of the property, it was desired to convert it into shops and flats, the shops being on the ground floor and the flats on the upper floor, the cost of such conversion to be paid out of capital moneys in the hands of the Public Trustee, the trustee of the settlement. It was estimated that, as a result of the conversion, aggregate rental would be greatly increased, and that the alterations would enable the same to be let. E

J. M. Easton for the tenant for life, the applicant.

A. Walmsley for the Public Trustee. F

F. C. Watmough for the infant tenant in tail. G

Easton : The proposed conversion is an improvement under the Settled Land Act, 1925, Sched. III, Part I (xxiii), and will enable the property to be let more profitably than it can be at present. The necessary expenditure ought to be sanctioned and the money paid out of capital moneys in the hands of the trustee : *Stanford v. Roberts* (1). H

Walmsley supported the proposal.

Watmough : The expenditure will benefit the infant tenant in tail, and is a proper expenditure to enable the property to be let to the best advantage.

SIMONDS, J.: The expenditure ought to be sanctioned, and the question asked must be answered in the affirmative.

Declaration that the conversion of the property was an addition or alteration reasonably necessary or proper to enable the same to be let within the Settled Land Act, 1925, Sched. III, Part I, para. xxviii, or was otherwise an improvement authorised by that Act for the benefit of the settled land within sect. 83 of that Act, and that the cost of such conversion be paid out of capital.

Solicitors : *Milne, Bury & Lewis*, Manchester (for all parties).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

WAY & WALLER, LTD. v. VERRALL.

[KING'S BENCH DIVISION (Singleton, J.), June 22, 23, 26, 1939.]

Agency—Commission—Agent prevented from earning—Wilful default of principal—Just excuse.

The defendant had for some time been in negotiation for the sale of his property to a prospective purchaser, when he received another offer through the plaintiffs. The plaintiffs were informed of the earlier negotiations, but were told that, although the price had been agreed, no contracts had been exchanged, and that the defendant was free to accept their offer, which was accordingly accepted on June 17, 1938, "subject to contract." On the same day, the defendant's solicitors wrote terminating the previous negotiations, and also on the same day sent a draft contract to the solicitors for the plaintiffs' client. On June 27, the defendant's solicitors wrote pointing out that they had not received the approval of the draft contract, and that there were "other persons in the market making inquiries about the property." The solicitors of the plaintiff's client replied on June 29 that they were awaiting the result of certain searches, and also put several questions to the defendant's solicitors. The latter on the same date wrote a letter stating that, owing to continued delay in settling the terms of the contract, their client had decided to sell the property elsewhere. On the following day, the purchaser's solicitors returned the draft contract approved. Meanwhile, on June 27, the first prospective purchaser had written to the defendant's solicitors reopening negotiations, and the property was ultimately sold to him for the price which the plaintiffs' client had agreed to pay:—

HELD: there was an implied term in the agreement between the plaintiffs and the defendant that the defendant would not by his wilful default prevent the plaintiffs from earning their commission. There had been no delay in the approval of the draft contract, and the defendant had ultimately obtained only the price offered by the plaintiffs' client, so there could not be a "just excuse" for the defendant's action, the real purpose of which was to avoid the payment of two commissions. There had, therefore, been wilful default, and the plaintiffs were entitled to damages.

[EDITORIAL NOTE.] In *Trollope v. Caplan* (5) it was said that there might be "just excuse" for the withdrawal from a contract of sale, but the term "just excuse" was not further defined. Since then the matter has been considered in one or two cases, and, in the present case, nearly all the authorities are considered in detail. The judge arrives finally at the view that in the present case the vendor refused to go on with the sale because he would become liable to pay two commissions, and that, in the circumstances

of this case, that was not a just excuse. Of course, where there are a number of agents, preliminary negotiations can be carried on simultaneously with a number of prospective purchasers, who may all be willing and able purchasers, and of whom at some time or other the vendor has to choose one. It would seem that, upon entering into an agreement to sell "subject to contract," the vendor has made a choice from which he cannot resile unless there is unreasonable delay or inability supervenes on the part of that purchaser.

AS TO PREVENTING AGENT FROM EARNING REMUNERATION, see HALSBURY, *Hailsham Edn.*, Vol. 1, pp. 261, 262, para. 435; and FOR CASES, see DIGEST, Vol. 1, pp. 509-512, Nos. 1754-1769.]

Cases referred to:

- (1) *Trollope (George) & Sons v. Martyn Bros.*, [1934] 2 K.B. 436; Digest Supp.; 103 L.J.K.B. 634; 152 L.T. 88.
- (2) *The Moorcock* (1889), 14 P.D. 64; 12 Digest 611, 5048; 58 L.J.P. 73; 60 L.T. 654.
- (3) *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488; 12 Digest 610, 5042; 60 L.J.Q.B. 734; 65 L.T. 286.
- (4) *Lazarus v. Cairn Line of Steamships, Ltd.* (1912), 106 L.T. 378; 12 Digest 611, 5051.
- (5) *Trollope (George) & Sons v. Caplan*, [1936] 2 K.B. 382; [1936] 2 All E.R. 842; Digest Supp.; 105 L.J.K.B. 819; 155 L.T. 365.
- (6) *Kahn v. Aircraft Industries Corp'n., Ltd.*, [1937] 3 All E.R. 476; Digest Supp.; affg., [1937] 1 All E.R. 757.
- (7) *Keppel v. Wheeler*, [1927] 1 K.B. 577; Digest Supp.; 96 L.J.K.B. 433; 136 L.T. 203.
- (8) *Raymond v. Wooten* (1931), 47 T.L.R. 606; Digest Supp.
- (9) *Dickinson & Son v. Vickers* (1931), *Estates Gazette*, p. 16.
- (10) *Musson v. Mozley*, [1936] 1 All E.R. 64; Digest Supp.
- (11) *French (L.) & Co. v. Leeston Shipping Co.*, [1922] 1 A.C. 451; 12 Digest 612, 5054; 91 L.J.K.B. 655; 127 L.T. 169.
- (12) *White v. Turnbull, Martin & Co.* (1898), 78 L.T. 726; 1 Digest 516, 1785.
- (13) *Dudley Bros. v. Barnet*, [1937] S.C. (Ct. of Sess.) 632.

ACTION claiming commission earned for securing a purchaser for the defendant's property. The facts are fully set out in the judgment.

S. R. Edgedale for the plaintiffs.

Maxwell Fyfe, K.C., and *R. Etherton* for the defendant.

SINGLETON, J.: This is a difficult case. The plaintiffs are a firm of estate agents and the defendant was at all material times the owner of certain properties. The plaintiffs were employed by the defendant on the terms that, if they introduced a purchaser of those properties, or were instrumental in introducing a purchaser, or one who was ready and willing to complete, on terms properly acceptable to the defendant, the defendant would pay them commission on the usual scale. They say that they did introduce a purchaser of those properties who was ready and willing to complete on the defendant's terms, and that commission of £157. 5s. is due to them accordingly. Alternatively, they claim as follows:

... if, contrary to the plaintiffs' contention the said commission by the terms of the said agreement was only payable in the event of sale being effected the

plaintiffs say that it was an implied condition of the said agreement that the defendant would not wrongfully prevent the plaintiffs from earning the said commission.

It is pleaded as follows :

A In breach of the said agreement the defendant by his solicitors wrongfully prevented the plaintiffs from earning the said commission in that they by letters dated June 29, 1938, and July 1, 1938, to the solicitors for the said purchaser refused to complete the sale of the said property to the said purchaser notwithstanding that all the terms of the said sale had been agreed or would have been agreed between the parties.

B The defendant denies that the plaintiffs introduced a purchaser who was ready and willing to complete on terms acceptable to him. He further denies that there was any implied term to pay commission, and he further denies that he has committed any breach of any such implied term. He further contends that it was well known to the plaintiff that other agents were employed and that the ultimate purchaser was introduced by other agents, and he also pleads as an alternative plea that C he had "just excuse" for not continuing the negotiations entered into with the purported purchaser of the plaintiffs.

D The facts are in a small compass. The property had been in the hands of different agents for some time, and among the agents who had been concerned were a firm of Cory & Cory, who had introduced a prospective purchaser, a client of Messrs. Waterhouse & Co., to purchase at the figure of £6,700. On Apr. 1, 1938, Messrs. Frere, Cholmeley & Co., the defendant's solicitors, sent to Messrs. Waterhouse & Co. for their approval a draft contract for the purchase of the property. Certain difficulties arose in regard to drains and other matters, and on May 24 the vendor E agreed to reduce the price to £6,400. On May 26, 1938, Messrs. Waterhouse & Co. returned the draft contract to be slightly amended. There was some further delay, and nothing was done until June 16, when Messrs. Waterhouse & Co. wrote to Messrs. Frere, Cholmeley & Co. as follows :

F We understand from you to-day that your client has not yet signed the contract and that you cannot give us any assurance as to when you will be in a position to exchange. As you are aware, you and we have agreed the draft contract in accordance with Messrs. Cory & Cory's letter accepting our client's offer on the understanding that completion took place on the 25th instant. We agreed to that date as the date for completion. You will of course appreciate that if your client G considers that not being legally bound to our client he could negotiate a sale elsewhere, he could hardly object if our client took him at his word and refused to go on with the purchase. We appreciate that points may arise on the settlement of contracts which justify either side withdrawing from an agreed sale or purchase but we think it would be extremely unfortunate to the profession if, where contracts are actually signed, a purchaser or vendor is to be put to that expense and the matter goes off when there is no subject-matter in dispute between the parties. H We have had to consult three trustees, whose signatures we have had to obtain to the necessary cheque for the deposit and we have done our best to keep you in touch with the position and to meet your client by agreeing to complete on the 25th instant. There is very little time now to complete the purchase but assuming that the matter could be completed by the end of the month, we should not be disposed to quarrel with your client in regard to the question of payment of interest as from the date actually fixed by the contract, which, having been signed, we would rather not alter.

That letter of June 16 was received with pleasure, apparently, by Messrs.

Frere, Cholmeley & Co., because on June 17, 1938, they wrote as follows :

We are in receipt of your letter of yesterday. Your client has played fast and loose with our client, and while we much regret that negotiations have terminated, we have no alternative but to ask you to be good enough to return to us by the bearer of this letter the copy documents which we sent to you.

A

Thus the negotiations with Messrs. Waterhouse & Co. came to an end. I can understand that, in the circumstances, the defendant may have felt that he was under some moral obligation to pay commission to Messrs. Cory & Cory, who had introduced Messrs. Waterhouse & Co.'s client as a prospective purchaser. Indeed, it may well be, but I express no opinion, that there was more than a moral obligation upon him in those circumstances. It may be that some question might have arisen as to whose fault it was that the negotiations had not gone through, because the contract had been signed on the one side, and the parties seem to have agreed in general at least, but, as far as I can see, that purchase by the clients of Messrs. Waterhouse & Co. would have gone through in a short space of time at the figure of £6,400 had not the defendant's solicitors broken off the negotiations as they did by the letter of June 17. It may be that the reason for breaking off the negotiations was that an offer had come from the plaintiffs, Messrs. Way and Waller, Ltd.

B

C

D

Mr. Halsey of the firm of Way and Waller, Ltd., told me that on June 3 he had a conversation with Mr. Verrall, the defendant, and he asked if this property, which had previously been mentioned to the plaintiffs, had been sold, because he had a likely purchaser. Mr. Verrall told him that the property was not actually sold, but the price had been agreed, although the contract had not been exchanged. He said further that there had been delay on the part of the proposed purchasers, and he added that, as the other negotiations had been going on so long, he thought that he was entitled to deal with Messrs. Way and Waller, Ltd., if they could get a purchaser, and he would tell the other agents that. He mentioned that he was agreeable to pay commission, as indeed it had been intimated in an early correspondence that commission would be payable to them if they brought about a sale. Mr. Halsey told him that he had a buyer who might be interested at about £6,500. Something was said about the other agents' commission, and Mr. Verrall added something to the effect that, if Messrs. Way and Waller, Ltd., were able to put forward an offer equal to the other, plus the amount which he would have to pay the other agent, he would either accept, or consider accepting, the offer.

E

F

G

Messrs. Way and Waller, Ltd., on June 3 sent particulars of this property to a surveyor, at the request of Mr. Graham Green, who is a solicitor with the firm of Kingsford, Dorman & Co., and on June 15, Mr. Graham Green made an offer of £6,650 for the property. The offer of £6,500 was the first offer, and, in accordance with that, the plaintiffs telephoned to the defendant and told him that they had received this offer and asked

H

A for his instructions. The defendant said that he was disposed to accept that offer. On June 17, the defendant's solicitors informed the plaintiffs that they were at once sending the contract to Messrs. Kingsford, Dorman & Co. They added that they had received a letter from the other solicitors about the other negotiations, but that they could not force them, the defendant's solicitors, to complete, and that, therefore, the defendant was quite free to deal with the people put forward by the plaintiffs. The evidence for the plaintiffs showed that, unless they were assured by the defendant's solicitors that the latter were in a position to deal with the proposed purchasers put forward by them, they would not have gone on B with the matter at all.

C It is clear to my mind that the defendant was ready and willing to accept this offer of £6,650 for the property which was put forward by the plaintiffs. I heard the evidence of the different witnesses, and I am bound to say that I prefer the evidence of the witnesses for the plaintiffs to the defendant's evidence and the evidence called on behalf of the defendant. The offer put forward by the plaintiffs was accepted "subject to contract," and on June 17 Messrs. Frere, Cholmeley & Co. sent the draft contract to Messrs. Kingsford, Dorman & Co. who were the solicitors acting for the proposed purchaser.

D I am satisfied that, in the ordinary course, the plaintiffs' clients would have acquired this property. However, on June 27, Messrs. Frere, Cholmeley & Co. wrote to Messrs. Kingsford, Dorman & Co. as follows :

E We are rather surprised that we have not heard from you ere this in regard to the final approval of the draft contract. We understood from Mr. Graham Green when we had the pleasure of speaking to him on the telephone, that he was only waiting the receipt of his local land charge certificate before releasing to us the document in question. We need hardly remind you that there are other persons in the market making inquiries about the properties in question.

F That letter was replied to by a letter of June 29 from Messrs. Kingsford, Dorman & Co. in the following terms :

G We duly received your letter of the 27th instant and regret that it has not been possible for us to return the draft contract approved hitherto. We have not yet received the result of all our local land charge searches and we are also awaiting certain information from the company's surveyors, before we can return the contract to you approved. We have little doubt, however, that we shall be able to return it to you within the next day or two. On referring to the two licences you sent us on the 23rd instant, we find that the licence dated Feb. 20, 1934, is a licence to Mr. Fuller, the original lessee, to assign to Messrs. Arno & Gatter. The licence dated Nov. 28, 1934, is one to Arno & Gatter giving them permission to assign to Fullers Library, Ltd. We understand that Messrs. Arno & Gatter are the present lessees of No. 1D and we therefore imagine that a contemplated assignment by Messrs. Arno & Gatter to Fullers Library, Ltd., was never carried into effect. Can you confirm this ?

H That letter crossed one of the same date, June 29, from Messrs. Frere, Cholmeley & Co. to Messrs. Kingsford, Dorman & Co., in the following terms :

We regret to inform you that owing to the continued delay in settling the terms of the contract herein, our client has decided to sell the property elsewhere. We should be glad therefore if you would kindly return to us the documents which we have sent to you in connection with the matter.

That letter surprised Messrs. Kingsford, Dorman & Co., and I think that it was a letter which might well surprise any solicitors in view of what had happened. On June 30, Messrs. Kingsford, Dorman & Co. write to Messrs. Frere, Cholmeley & Co. as follows :

We have received your letter of yesterday's date and have endeavoured to get in touch with you by telephone but without success. By the same post we received the replies to the remainder of our local land charge searches and we are therefore able to return the draft contract approved and this is sent herewith. On hearing from you that you are able to proceed we will at once have the contract engrossed for signature. A

It is clear, however, that on June 29 the defendant through his solicitor refused to continue with the purchaser introduced by the plaintiffs. B
 The reason for that also is clear, because, before writing their letter of June 27, 1938, Messrs. Frere, Cholmeley & Co. had had a letter on the same date from Messrs. Waterhouse & Co. The reason for writing that letter of June 27, which contained the sentence "We need hardly remind you that there are other persons in the market making inquiries about the properties in question," was that the defendant's solicitors had heard from Messrs. Waterhouse & Co., who were ready and willing to buy, and they thought, apparently, that the first prospective purchaser might still buy. They did not say to Messrs. Kingsford, Dorman & Co., "There are other people, with whom we had a contract at one time, who are again coming along, and who want to do something," but put it in that rather doubtful way : "... there are other persons in the market making inquiries about the properties in question." C

As a result of a letter from Messrs. Waterhouse & Co. to Messrs. Frere, Cholmeley & Co. on June 27, those parties again became in negotiation, D
 and by June 29—that is, within 2 days—contracts had been exchanged, stating the purchase price as £6,650, the same figure as the plaintiffs' client had been willing to pay. E

I have no doubt myself that, after the letter of June 27 from Messrs. Waterhouse & Co. to Messrs. Frere, Cholmeley & Co., they were told that there were others—namely, the plaintiffs' proposed purchaser—who were willing to pay £6,650, and that led the client of Messrs. Waterhouse & Co. to come up from the figure of £6,400 to £6,650. That figure of £6,650 is £250 more than the figure at which the defendant was ready and willing to sell to the client of Messrs. Waterhouse & Co. up to June 17, and the increased figure clearly came about because of the efforts of Messrs. Way and Waller, Ltd. There had not been any delay on the part of Messrs. Kingsford, Dorman & Co., nor had they raised any questions unnecessarily. I am satisfied that the matter would have gone through in the ordinary course within a few days. I am further satisfied that it is usual to allow a reasonable time for inquiries when a stage of "subject to contract" has been reached, and there was no more than a reasonable time taken in this case. F
G
H

The defendant apparently felt that he ought to pay, or might be liable to pay, some commission to Messrs. Cory & Cory, even if the sale to the

plaintiffs' purchaser went through. Counsel for the plaintiffs suggested at a comparatively early stage of the case, and he still suggests, that the reason for this change was that the defendant might avoid the liability, legal or moral, to pay two commissions, and that he was liable to pay two commissions. I am forced to say that I find it difficult to discover any other reason whatever for the change which was made. Counsel for the defendant suggested that there was some delay. I have said that I do not think that there was any delay. Counsel for the defendant suggested too that some of the questions raised by Mr. Graham Green's firm presented difficulties, and that the answers had not been completed. I do not think that there was any such difficulty in fact. I think that Mr. Graham Green and his firm were ready and willing to carry this matter through, and would have carried it through in the course of a few days but for the breaking off of negotiations by Messrs. Frere, Cholmeley's letter written on the instructions of their client. I am really forced to the conclusion that the change was made to avoid this possibility of two commissions being payable. I can see no other reason for it.

Counsel for the defendant submitted that the plaintiffs were not entitled to succeed. In the first place, he said that there was no sale, and that commission was only payable on the sale, and he further submitted that the plaintiffs were not entitled to damages because there was no breach of any implied term. He said that it was known that other agents were concerned, and that, if another agent introduced the one who ultimately bought, that was a risk of the plaintiffs' employment, and they were not entitled either to commission or to damages. In any event, he submitted that there was "just excuse" for the defendant acting as he did, and it could not be said that there was any arbitrary breach of any implied term by him, or any unlawful default by him. The words "just excuse" he took, of course, from the judgment in the well-known case of *Trollope (George) & Sons v. Martyn Bros.* (1). In that case, George Trollope & Sons, the plaintiffs, estate agents, were instructed by the defendants to find a purchaser for certain property "subject to contract." In that case, the facts are stated as follows, at pp. 437, 438 :

The plaintiffs . . . wrote to the defendants as follows : "With reference to our conversation . . . we confirm your acceptance of the offer made by . . . Major Howard, to purchase the freehold of this property subject to contract. . . . We take this opportunity of confirming that in the event of the sale materialising we shall look to you for payment of the usual scale commission." To that letter the defendants replied : "We have to acknowledge receipt of your letter . . . and confirm our telephone conversation with you . . . to accept the offer . . . for this property, subject to contract. . . . We also confirm that, in the event of this sale being satisfactorily completed, we shall pay you the usual scale of commission."

An engrossment of the contract was . . . signed by Major Howard. . . . The defendants refused to proceed further with the sale.

Thereupon the plaintiffs claimed commission, or, alternatively, damages for breach of an implied term that the defendants would do nothing to prevent the plaintiffs from earning their commission. It was found

as a fact that Major Howard was ready and willing to buy the property. It was held (SCRUTTON, L.J., dissenting) :

... that although in an agreement "subject to contract," the matter, as between vendor and purchaser, must be deemed to remain in negotiation until contracts are exchanged, there must, as between the plaintiffs and the defendants, be implied a term that if the purchaser introduced by the plaintiffs was ready and able to complete the contract, the defendants would not by refusing to complete prevent the plaintiffs from earning their commission, and as the defendants had, without just excuse, refused to complete, they were liable to the plaintiffs in damages, the proper measure of which in the circumstances was the amount of commission the plaintiffs would have earned had the transaction been completed.

In the course of his dissenting judgment, SCRUTTON, L.J., dealing with an implied term in the contract, uses these words, at p. 443 :

... it is not enough to say it is "reasonable." I refrain from doing more than mention *The Moorcock* (2). LORD ESHER, M.R., expresses the rule in *Hamlyn & Co. v. Wood & Co.* (3) [p. 491] : "I have for a long time understood that rule to be that the court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned." I myself have given a long judgment on the cases involved in *Lazarus v. Cairn Line of Steamships, Ltd.* (4). In my opinion the proposition that if the employer prevents the agent from earning his commission he is liable, is much too wide.

I think that everyone accepts that statement as sound. The statement that the mere fact that the employer prevents the employee from earning his commission is much too wide, or, as SCRUTTON, L.J., said, at p. 443 :

The prevention must be a fault or a default, in the sense that it is a breach of an express contract, or of some contract that must of necessity be implied, as where the employer has no title to the property he contracts to sell, or in breach of contract does not perform a term of the contract. In my opinion the "prevention" by the employer must be "wrongful," a "default," a breach of his contract with the purchaser to entitle the agent to base an action upon it. Mr. Bowstead heads his art. 65 "if he wrongfully prevents."

The judgment of the majority of the court in *Trollope (George) & Sons v. Martyn Bros.* (1) was the judgment of GREER, L.J., and MAUGHAM, L.J., as he then was. I refer to the judgment of GREER, L.J., at p. 450 :

It is to be observed that the contract between the plaintiffs and the defendants made by the letters of Apr. 21 and Apr. 24, related to commission in the event of the completion of a sale of the property "subject to contract." It is quite true that commission in terms would not become due until the satisfactory completion of the sale, but I think the agreement means that if the purchaser from whom the plaintiffs had obtained the offer for the property subject to contract was prepared to sign a contract in the terms required by the owners, they would do nothing to prevent the satisfactory completion of the transaction so as to deprive the plaintiffs of the commission which they had agreed to pay.

I think that GREER, L.J., there was meaning to say that in so doing they would do nothing wrongful. He continued, at pp. 450, 451 :

The view I take of the present case may be shortly stated as follows. The service for which the defendants engaged Messrs. Trollope & Sons was, that they would introduce as a purchaser of the property in question their customer Major Howard who would be prepared to buy on the terms of contract prepared by the defendants' solicitors and approved by Major Howard's solicitors. When the latter assented to the terms of contract sent by the vendors' solicitors, and on behalf of the buyer indicated the latter's acceptance of those terms, the plaintiffs had completed the

work they had undertaken to do, though the vendor might still have been free to refuse to sign the contract, without any liability on his part to the proposed purchaser. But as between the plaintiffs and the defendants, the latter could not after the plaintiffs' work was complete deprive them of the fruits of their work by withdrawing their consent to the signing of the contract and the completion of the sale. I think this view is in accordance with the trend of the decisions I have cited.

A He added, at p. 452 :

In my judgment, having regard to the terms of the contract between the plaintiffs and the defendants in this case, there was an implied undertaking by the defendants that they would not after the plaintiffs' work was completed deprive them of the fruits of their labour by refusing to sign the contract tendered to the plaintiffs' buyer by the defendants' solicitors with their authority, or by refusing without just cause to complete the transaction on the terms to which they had asked the plaintiffs' customer to consent. I think such a term may be implied in the contract contained in the two letters to which I have called attention. Adopting the words of LORD ESHER, M.R., in *Hamlyn & Co. v. Wood & Co.* (3), I am of opinion, on considering the terms of the contract in the present case in a reasonable and businesslike manner, that an implication necessarily arises that the parties must have intended that there should be a stipulation in favour of the agent that when the agent had done all that he had contracted to do, the principal would not by withdrawing, without reasonable cause, so far as the agent was concerned, from the transaction, deprive the agent of the commission which would become due if the sale with his customer had been completed.

In the same case, MAUGHAM, L.J., said, at p. 456 :

D The sole cause of the matter not going through was the default of the defendants. By "default" I mean a refusal without any reasonable ground to proceed with the matter.

E The question then remains whether there was not an implied term in the circumstances that the defendants would not prevent the plaintiffs from earning their commission. In my opinion where a person is employed to do work on behalf of another, payment to be made on completion of the work, there is a necessary implication that the employer will not do anything to prevent the earning of the remuneration, unless at any rate he has some just excuse for his interference with the course of events obviously contemplated by both parties when they entered into the contract of employment.

F I think it is clear that the course of events obviously contemplated by both parties when they entered into the contract of employment was that, if the agent did introduce a purchaser who was apparently ready and willing to agree to the terms required by the vendor, a reasonable time should be given to the plaintiff to see if there was this agreement. In other words, if a state of agreement was reached "subject to contract," a reasonable time should be given to see if the terms of the one were accepted by the other—that is, to see if there was agreement. That is an ordinary course of proceeding between solicitors in a matter such as this, as Mr. Graham Green pointed out to me, and the course of events contemplated by the parties was that the ordinary practice should be followed.

H The case of *Trollope (George) & Sons v. Martyn Bros.* (1) was followed by *Trollope (George) & Sons v. Caplan* (5). In that case, there had not been complete agreement between the parties. Probably it was thought that there would be, and the county court judge gave judgment and assessed the full amount of the commission. A retrial was ordered, on the ground that he had not considered whether or not it was certain, or highly probable, that there would have been complete agreement

between the parties. In that case, GREER, L.J., in dealing with the matter, said, at p. 392 ([1936] 2 All E.R. at p. 848) :

The learned county court judge who tried this case gave judgment on the alternative claim made by the respondents for damages for breach of contract, and he awarded as such damages the full amount of the commission. In order to succeed in recovering anything more than nominal damages the respondents would have had to prove not merely that the appellant had broken an implied term of the contract of employment, but they would have had to establish by sufficient evidence that by reason of the appellant's wrongful withdrawal of their authority to sell on the basis that the tenants' rent was £180 they had lost the amount of their commission. This means that there would have had to be evidence making it highly probable that if the appellant had allowed the transaction to go on all the terms would have been agreed and a contract would have been entered into between the appellant and the proposed purchasers at the agreed price.

In the same case, GREENE, L.J., put it a little differently, at p. 399 ([1936] 2 All E.R. at p. 853) :

I am unable to accept this [the county court judge's judgment] as a correct statement of the law. It is not the circumstances that the agents have done everything they could to earn their commission coupled with a withdrawal by the principal without reasonable cause that justifies an award of damages equal to the commission. Before such an award can properly be made it must in my opinion be found as a fact that but for the action of the principal a binding contract would have been made which is quite a different thing. It does not in the least follow from the fact that the agent has done everything he can do that a binding contract will be made. Nor does it follow from the fact that the withdrawal of the vendor at that stage was an arbitrary one that but for such withdrawal a binding contract would have been made. It is, in my judgment, a question of fact in each case whether or not the contract would have been made if it had not been for the vendor's action, and to this question the learned county court judge does not appear to have directed his mind ; or at least if he did direct his mind to it it was on the hypothesis (which I have already shown was incorrect) that all the terms of the proposed contract had been agreed.

I refer to that case because in the present case, at the time of the withdrawal by the defendant, it had not been notified to the defendant that all the terms were agreed to. Virtually I think that they were. I am satisfied with the evidence of Mr. Graham Green that if I use the expression of GREER, L.J., in *Trollope (George) & Sons v. Caplan* (5), it is highly probable, to say the least of it, that the whole thing would have been carried through within a day or two, and, indeed, on the evidence of Mr. Graham Green, I am satisfied that it would have been. As GREER, L.J., pointed out, I think that it would have been carried through within a few days but for the breaking off of the negotiations.

It is necessary, I think, that I should say a few words about certain other authorities which were cited to me. I have already said that I regard this as a case of difficulty, and many people have thought that there has been somewhat of a readiness to imply a term into a contract of this kind, and that cases in favour of agents have gone quite a long way. One case which was cited to me was *Kahn v. Aircraft Industries Corp., Ltd.* (6), a case which was before me, and one in which there was a considerable amount of money involved. That case reached the Court of Appeal, and, indeed, it was thought at one time that it would go to the House of Lords, as there was a considerable amount of money involved, but it did not. I do not think that it carries this case any further.

Keppel v. Wheeler (7), however, is of importance, not so much on the actual decision of the case, as because of certain words of BANKES, L.J., at pp. 586, 587. That case had to do with what happened when an agent's duty to his principal terminated. In giving judgment, BANKES, L.J., said, at pp. 586, 587 :

- A In these circumstances, I am not going to discuss all the matters which have been debated in testing this question whether the agency had or had not determined, because it seems to me that an agent may well say : " I have done everything which, assuming that the matter went through, would entitle me to receive my commission," and yet remain under the obligation of an agent to disclose such matters as the particular offer in this case. As indicating that this is the correct
- B view of the situation I will give three instances of what might have occurred during the interval between May 29 and June 12. Of course Mr. Essam might have changed his mind ; the matter was only in negotiation. If he had done so it could not be said that the respondents were entitled to their commission upon the ground that they had done all they were bound to do, and had earned their commission as soon as the appellant accepted the offer subject to contract. Again, these respondents were not employed as exclusive agents ; if the appellant had found a purchaser
- C during this period who was prepared to give more, or who for some reason was a more desirable purchaser, he would have been entitled to sell the property to that person, and the respondents would have had no cause of complaint. Or again, if the other agents had found during this interval a person whom the appellant preferred, or who would give a larger amount, the appellant would have been entitled to accept that person, and the respondents would have had no cause of complaint. Those are three good tests of the position as between these parties, indicating that it is not true to say that the relationship between the parties ceased on May 29, and that on that date the respondents were entitled to their commission and were
- D entitled to say that they were free for all purposes from any duty as agents for the appellant.

- Counsel for the defendant pointed out to me that those words of BANKES, L.J.—particularly the third available course of action and to some extent the second—covered the position in this case. He submitted that, if the
- E defendant had found elsewhere a purchaser whom he preferred, he was entitled to sell to him, and, following the words of the second available course of action of BANKES, L.J., the plaintiffs would have no remedy. Equally, he said, if the other agents had come forward with a
- F purchaser whom the defendant preferred, and who would give a larger amount, there was no remedy to the agent. I confess that that passage makes me pause considerably, and it was followed in *Raymond v. Wooten* (8). I ought to say that those words of BANKES, L.J., were not, as I think, a necessary part of his judgment.

- G In *Raymond v. Wooten* (8), which was a case in the Divisional Court, it was held as follows :

- Where an agent is instructed, but not as sole agent, to sell a house, and he procures an offer to purchase "subject to contract," and that offer is accepted by the vendor "subject to contract," but the sale subsequently goes off owing to the vendor's obtaining a better offer through another person, the agent cannot recover commission from the vendor as there is no binding contract of sale, and he cannot recover damages from the vendor, as the vendor has not committed any breach of contract whereby the agent was prevented from earning his commission.
- H

That case was in the Divisional Court on July 27, 1931, but in January, 1931, there had been in the Divisional Court the case of *Dickinson & Son v. Vickers* (9). I am not sure, I confess, whether or not the first decision was cited in the second case. SCRUTTON, L.J., in *Trollope (George) & Sons*

v. *Martyn Bros.* (1) appears to think that it was not, but I am not sure whether that is so. When *Raymond v. Wooten* (8) was considered in the Court of Appeal in *Trollope (George) & Sons v. Martyn Bros.* (1), GREER, L.J., said that it was wrongly decided, and added, at p. 450 :

The appellants relied upon the decision of the Court of Appeal in *Keppel v. Wheeler* (7), but in my judgment this decision does not help them, as the court held that the agents were entitled to their commission but were liable in damages for breach of a duty in not communicating an offer received for an additional price before the completion. I note that BANKES, L.J., says [p. 586] "In these circumstances I am not going to discuss all the matters which have been debated in testing this question whether the agency had or had not determined, because it seems to me that an agent may well say: 'I have done everything which, assuming that the matter went through, would entitle me to receive my commission,' and yet remain under the obligation of an agent to disclose such matters as the particular offer in this case." The opinion expressed, in my judgment, is, I think, inconsistent with the decision of SWIFT, J., and CHARLES, J., in *Raymond v. Wooten* (8), but in my opinion that case was not rightly decided.

That is the view of GREER, L.J., on *Raymond v. Wooten* (8), and, although GREER, L.J., did not say so, I think that it follows that the third available course of action of BANKES, L.J., in *Keppel v. Wheeler* (7) is likewise open to question. That was the view taken by HORRIDGE, J., in *Musson v. Moxley* (10). I think that again it is right to say that it was not a necessary part of his judgment, because HORRIDGE, J., came to a conclusion on another point altogether, but he added, at p. 65 :

If I am wrong on that, I think the plaintiff is entitled to succeed, because the defendant would then, in refusing to go on with the contract, have prevented the plaintiff from earning his commission. The case of *Raymond v. Wooten* (8) raised the very point, and in that case the Divisional Court held that as the contract was "subject to contract" therefore the plaintiff could not recover. That case was considered in the judgment of GREER, L.J., in *George Trollope & Sons v. Martyn Bros.* (1)...

Then he sets out the passage which I have just read, and goes on, at p. 66 :

Therefore, if this is to be followed out logically, it means that in *Raymond v. Wooten* (8), where the defendant had refused to go on with the transaction, even though the contract was subject to contract, the plaintiff was entitled to damages in lieu of his commission.

That seems to me to be exactly this case. HORRIDGE, J., continues, at p. 66 :

Therefore, if I am wrong about the deposit, the plaintiff would recover the amount he claims by way of damages.

Then he proceeds to deal with *Keppel v. Wheeler* (7).

In the course of his argument, counsel for the defendant said that, if one referred to *Trollope (George) & Sons v. Martyn Bros.* (1), it was clear that the defendant could escape responsibility for commissions in all cases of this nature if he had "just excuse" for the action which he took, and that that was shown by the judgment both of GREER, L.J., and of MAUGHAM, L.J. The "just excuse" which counsel for the defendant put forward in this case may be that the defendant preferred to sell to someone else. It may be, as he put it, that there was delay, and that there was another offer. I think that that covers the two ways in which

he put it forward. I have said already that there was no delay, and that cannot be a "just excuse." Nor do I think that there was anything between the parties really. There was no real reason to think that the sale would not have gone through. I think that it would have gone through. As to the fact of another offer being a "just excuse," if GREER,

- A L.J., is right in that passage of his judgment in *Trollope (George) & Sons v. Martyn Bros.* (1) in which he said that *Raymond v. Wooten* (8) was wrongly decided—if he is right in saying that another offer and an increased offer would not provide a "just excuse"—then can it be a "just excuse" if another offer of the same figure is put forward? I
- B gather from what GREER, L.J., said in *Trollope (George) & Sons v. Martyn Bros.* (1) that he would have decided *Raymond v. Wooten* (8) otherwise and held that the agent was entitled to commission, but, when all these cases are examined, one thing is clear, and that is that the subject is one of great difficulty. I hope very much that this case will go elsewhere, and that the law may be made clearer than it is, but I have to look at
- C it on its own facts. I think that the only reason which I can draw for the change from the purchasers introduced by Messrs. Way and Waller, Ltd., to Messrs. Waterhouse & Co. about July 29 is that the defendant in this case desired to avoid the risk of having to pay two commissions.
- D If that was so, he broke off the negotiations with Messrs. Way and Waller, Ltd.'s, prospective purchaser arbitrarily and wrongfully when they had introduced a purchaser who was ready and willing to complete on the terms the vendor desired. In saying this, I am bearing in mind *L. French & Co. v. Leeston Shipping Co.* (11). There is a passage in the
- E opinion of LORD DUNEDIN which gives me considerable trouble in any case with which I deal. LORD DUNEDIN said in that case, at p. 455 :

- I would only like to add one observation as to the reservation which was made in *White v. Turnbull, Martin & Co.* (12), and which seems to have rather troubled BANKES, L.J., in this case, as to wilful default. I think that wilful default would only arise if it could be shown that the act which had been done, and which should
- F have had as its sequel the non-earning of further commission, had been done by the doer of it, not *prima facie* for the purpose of his own, but simply and solely to avoid payment of the commission.

- That is putting the law on the facts of that case fairly high against the agent. In my view, if this case is right, the change was to avoid payment
- G of commission to Messrs. Way and Waller, Ltd., as well perhaps as being liable for commission to Messrs. Cory & Cory, and I think that that is of itself sufficient to decide this case.

- Counsel for the plaintiffs referred me to a recent case in Scotland, *Dudley Bros. v. Barnet* (13), which I think covers this case. He further
- H submitted that in any event the defendant ought not to be allowed to escape liability, when in fact the purchasers were those with whom the defendant had broken off negotiations and had told the plaintiffs that those negotiations were broken off. In those circumstances, counsel for the plaintiffs submitted that the defendant could not be heard to say that no commission was payable to the plaintiffs merely because the

defendant had sold to someone, as to whom he had told the plaintiffs that the negotiations had ceased. I do not think it is necessary to go into that further.

The plaintiffs are entitled to damages. I have considered whether or not I ought to award as damages the total sum or a part of it, and, in view of what I have said as to the likelihood, or more than likelihood, that the sale to the plaintiffs' proposed purchaser would have gone through, I think that the amount ought to be the full amount claimed. There will be judgment for the plaintiffs for £157 5s. and costs.

Judgment for the plaintiffs for £157 5s. and costs.

Solicitors: *Seaton Taylor & Co.* (for the plaintiffs); *Frere, Cholmeley & Co.* (for the defendant).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

TERRY v. TERRY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), **June 22, 27, 28, 1939.**]

Divorce—Desertion—Institution of proceedings for justices' order—Date of institution—Issue of summons—Matrimonial Causes Act, 1937 (c. 57), s. 6 (3).

The respondent deserted his wife on Jan. 27, 1934. On Jan. 28, 1937, she instituted proceedings in a court of summary jurisdiction, and on Feb. 3 following, obtained a separation order. She subsequently presented this petition for divorce on the ground of desertion for a period of 3 years immediately preceding the presentation of the petition:—

HELD: on the true construction of the Matrimonial Causes Act, 1937, s. 6 (3), the date of the institution of the proceedings was the date of the issue of the summons, and not the date on which the order thereon was made, and the date of the issue of the summons was the terminal date which concluded the period of desertion. Desertion for the statutory period had, therefore, been proved.

[EDITORIAL NOTE. Where a spouse has brought proceedings for a decree of judicial separation or for an order in a court of summary jurisdiction, a period of 3 years' desertion must be proved before the institution of the proceedings. The question here is whether the words "institution of proceedings" mean the date of the issue of a summons or the date of the service of the summons or the date of the order made upon the summons. The judge has decided in favour of the date of the issue of the summons.

AS TO EFFECT OF JUSTICES' ORDER ON DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 658, 659, paras. 968, 969; and FOR CASES, see DIGEST, Vol. 27, pp. 319-321, Nos. 2978-2999.]

Case referred to:

- (1) *Gibbs-Smith v. Gibbs-Smith*, [1939] P. 170; [1939] 1 All E.R. 332; Digest Supp.; 160 L.T. 364.

UNDEFENDED PETITION by wife for dissolution of marriage on the ground of desertion. The facts are fully set out in the judgment.

Leslie Brooks for the petitioner.

HODSON, J. : This is a petition for dissolution of marriage on the ground of desertion. On Feb. 3, 1937, the petitioner obtained an order in the court of summary jurisdiction on the ground of desertion directing, *inter alia*, that she should be no longer bound to cohabit with her husband, the respondent to this petition. The summons was issued on

A Jan. 28, on a printed form containing the following words :

Wherefore your wife, pursuant to the statute in that case made and provided, applies that an order may be made that she be no longer bound to cohabit with you.

The summons was served on Jan. 30, 1937. Under the Matrimonial

B Causes Act, 1937, s. 6, the period of desertion immediately preceding the institution of proceedings for an order under the Summary Jurisdiction Acts shall, if the parties have not resumed cohabitation and the order has been continuously in force since the granting thereof, be deemed immediately to precede the presentation of the petition for divorce.

C The question has arisen in this case whether or not the desertion which had preceded the separation order had extended for 3 years immediately preceding the institution of those proceedings. It has been argued that the section should be read as if the date of the order were the terminal date which concludes the period, but, on the true construction of the

D section, I think that the date of the institution of the proceedings is the material date. Sect. 6 (3) of the Act of 1937 provides as follows :

For the purposes of any such petition for divorce, a period of desertion immediately preceding the institution of proceedings for a decree of judicial separation or an order under the said Acts having the effect of such a decree shall, if the parties have not resumed cohabitation and the decree or order has been continuously in force since the granting thereof, be deemed immediately to precede the presentation

E of the petition for divorce.

It is true that the mere issue of the summons was nugatory until it was brought to the notice of the respondent by service, and did not suspend the obligation to cohabit, as HENN COLLINS, J., decided in

F *Gibbs-Smith v. Gibbs-Smith* (1). In that case, he was considering the effect of a petition for divorce in the High Court. However, the words of the statute are plain, and I think that the date of the summons must be taken to be the date of the institution of the proceedings. The desertion commenced in this way. In Oct., 1933, the respondent said

G that he would prefer to live with his mother, and left his wife against her will. She saw him repeatedly, and asked him to reconsider his decision. At Christmas, 1933, she rejoined him at his mother's house for a period which it has been difficult to ascertain with accuracy. The petitioner, however, has given evidence that they were together there

H until about Jan. 27, 1934. She fixes the date as being about 4 days before her father had purchased a business, which it was intended should be run by the petitioner and the respondent, in conjunction with her father and mother, at Kingston. The father and mother took over the business on Feb. 1 or Feb. 2, 1934. The petitioner left the house of the respondent's mother as she did for the purpose of going home to pack

up, and, when she left, she was under the impression, given to her by her husband, that he was going to join her at the shop at Kingston on the date arranged. He never did so, notwithstanding her request by letter, and they never lived together again. The business was given up within a few weeks, and on June 10, 1934, the husband wrote to his wife finally declaring his intention not to return to her any more. A

The terminal date from which desertion must commence would be, at the latest, Jan. 28, 1934, and I think, therefore, that the date on which the husband failed to arrive at the new business, as promised, was too late to come within the period of 3 years. I am satisfied, however, from the conduct of the respondent, that he never really intended to rejoin B his wife, and that desertion commenced from the time when she left his mother's house, which I find to be either Jan. 27 or Jan. 28, 1934, to pack up her things with a view to settling in the new home. The law takes no account of part of a day for such a purpose as this, and desertion for a period of 3 years, therefore, was complete on Jan. 27, 1937, the day C before the issue of the summons. In these circumstances, desertion has been proved, and there will be a decree *nisi*.

Decree nisi granted.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Weigall & Inch*, D
Margate (for the petitioner).

[Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.]

Re RIPON (HIGHFIELD) HOUSING ORDER, 1938. APPLICATIONS OF WHITE AND COLLINS. E

[COURT OF APPEAL (MacKinnon and Luxmoore, L.JJ., and Humphreys, J.), **June 21, 22, July 6, 1939.**]

Public Health—Housing—Compulsory purchase—“Park, garden or pleasure ground”—“Required for the amenity or convenience of any house”— F
Finality of Minister's decision—Housing Act, 1936 (c. 51), s. 75.

A local authority, proceeding under the Housing Act, 1936, ss. 73, 74, made a compulsory purchase order for the purpose of acquiring land as a site for the erection of houses for the working classes. The land acquired was alleged to be part of the grounds of a large house, and, therefore, not properly included in a compulsory purchase order as forming—in the words of sect. 75—“part of any park, garden or pleasure G ground, or otherwise required for the amenity or convenience of any house.” A local inquiry was duly held, and the Minister confirmed the order, but excluded a considerable part of the land therefrom :—

HELD : (i) for land to be protected from a compulsory purchase order under sect. 75, it may either be land which is part of a park, garden or pleasure ground, or land which is otherwise required for the amenity or convenience of a house. Once it has been shown to be part of a H park, it is unnecessary to show in addition that it is also required for the amenity or convenience of a house.

(ii) the word “park” in this section bears, not its original legal meaning, but its wider popular meaning. Land does not cease to be parkland merely because it is let for grazing.

(iii) there is no general rule that, when the Minister has made a

decision under this section, that decision cannot be questioned in a court of law. The proceedings before the court are not in the nature of an appeal. They are new and independent proceedings. The court has jurisdiction to review a finding of fact on which the existence of its jurisdiction depends—in this case, the question of whether the land was part of a park.

A (iv) on the facts of the present case, the land in question was part of a park. A compulsory order for its purchase was, therefore, not within the powers given by the Act, and there was no jurisdiction to make or confirm such an order. The order of the Minister ought, therefore, to be quashed.

B (v) there is, however, nothing in the Act to prevent a local authority from compulsorily acquiring the whole of a property. It is a part only which cannot be compulsorily taken.

Decision of CHARLES, J. ([1939] 1 All E.R. 508) reversed.

Re Bowman, South Shields (Thames Street) Clearance Order, 1931 (3) distinguished.

Bunbury v. Fuller (4) followed.

C [EDITORIAL NOTE. It was stated in the court of first instance that, there being evidence upon which the Minister could arrive at his decision, and there being no usurpation of jurisdiction, the matter could not be reviewed in the courts. The Court of Appeal, however, have not taken this view, and they have held that there is jurisdiction to review a finding of fact in this case. Properly considered, the proceedings were not in the nature of an appeal, but were new and independent proceedings. In addition to this general question on the jurisdiction, the court have carefully considered the construction of the Housing Act, 1936, s. 75, and also the meaning of the word "park" as used therein.

D AS TO CONDITIONS OF ACQUISITION OF LAND FOR HOUSING PURPOSES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 562-564, para. 1185; and FOR CASES, see DIGEST, Supp., Public Health, Nos. 502g-506d. For THE HOUSING ACT, 1936, s. 75, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 29, E p. 622.]

Cases referred to:

- (1) *Pease v. Courtney*, [1904] 2 Ch. 503; 40 Digest 746, 2766; 73 L.J.Ch. 760; 91 L.T. 341.
- (2) *R. v. Bradford*, [1908] 1 K.B. 365; 26 Digest 356, 819; 77 L.J.K.B. 475; F *sub nom. R. v. Bradford, Ex p. Chambers*, 98 L.T. 620.
- (3) *Re Bowman, South Shields (Thames Street) Clearance Order, 1931*, [1932] 2 K.B. 621; Digest Supp.; 101 L.J.K.B. 798; 147 L.T. 150.
- (4) *Bunbury v. Fuller* (1853), 9 Exch. 111; 19 Digest 482, 3416; 23 L.J. Ex. 29; 23 L.T.O.S. 131.
- (5) *Re Newhill Compulsory Purchase Order, 1937, Application of Payne*, [1938] G 2 All E.R. 163; Digest Supp.; 158 L.T. 523.
- (6) *Re Butler, Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936*, [1938] 2 K.B. 210; [1938] 2 All E.R. 279; Digest Supp.; 107 L.J.K.B. 419; *sub nom. Butler v. Minister of Health*, 159 L.T. 47.
- (7) *Stocker v. Minister of Health*, [1938] 1 K.B. 655; Digest Supp.; 107 L.J.K.B. 146; 158 L.T. 29; *sub nom. Re London County (Stoke Newington) Housing Order, 1936, Stocker's Appeal*, [1937] 4 All E.R. 678.
- H (8) *London General Omnibus Co., Ltd. v. Lavell*, [1901] 1 Ch. 135; 22 Digest 188, 1585; 70 L.J.Ch. 17; 83 L.T. 453.

APPEAL from a decision of CHARLES, J., dated Feb. 8, 1939, and reported [1939] 1 All E.R. 508, where the facts of the case and a description of the property in question are fully set out.

R. M. Montgomery, K.C., and W. E. P. Done for the appellants.

The Solicitor-General (Sir Terence O'Connor, K.C.) and Valentine Holmes for the respondent.

Montgomery, K.C. : To make the order in question here, the Minister must have decided that this land was not part of a park. There is no evidence that that was so. The word " park " has the ordinary meaning which it has in common speech. The definition given in the IMPERIAL DICTIONARY was accepted by SWINFEN EADY, J., as he then was, in *Pease v. Courtney* (1). [Counsel referred to *R. v. Bradford* (2), *Bunbury v. Fuller* (4) and *Re Newhill Compulsory Purchase Order, 1937, Application of Payne* (5).] A B

Done : The statute gives a certain power to a local authority, but there are limitations of that power, and it is for the courts to see that those limitations are not exceeded. The court is not concerned with the view of the Minister, but only with what he has done. Otherwise the right to appeal given by sect. 2 would be valueless. C

The Solicitor-General : The words " land . . . which forms part . . . of any park . . . or is otherwise required for the amenity or convenience of any house " cannot be applied to a park by itself. The word " otherwise " shows that the park must be associated with the house. [Counsel referred to *Re Newhill Compulsory Purchase Order, 1937, Application of Payne* (5), *R. v. Bradford* (2), *Re Bowman, South Shields (Thames Street) Clearance Order, 1931* (3), *Re Butler, Camberwell (Wingfield Mews) No. 2 Clearance Order, 1936* (6) and *Stocker v. Minister of Health* (7).] D

Holmes : In *Re Bowman, South Shields (Thames Street) Clearance Order, 1931* (3), SWIFT, J., construed the 1930 Housing Act and that case has invariably been accepted by all three judges who dealt with cases under that Act, and by the Court of Appeal. SWIFT, J., decided that these were matters solely for the Minister. The provisions of that Act were repeated by Parliament in precisely the same form in 1936. The Act provides an alternative remedy to a writ of *certiorari*, but it is a very limited right E F of appeal. Even if all the evidence before the Minister were to the effect that this land was a park, that would not conclude the matter. The court must also find that all that the evidence showed was that it was required for the amenity of the house. If it is not required for the amenity or convenience of the house, the land can be taken even if it is part of a park. G The court must give a meaning to the word " otherwise " in this section. Any other construction renders that word otiose.

Montgomery, in reply : In *Re Bowman, South Shields (Thames Street) Clearance Order, 1931* (3), the position was one to which sect. 75 (or its equivalent) did not apply, and in that case SWIFT, J., did go too far. H The question whether a house is insanitary is not one suitable for a court to decide. It is more for an engineer or an architect. This is not an appeal at all, and therefore it is not a retrial. The court has evidence, just as in a case of *certiorari*, to show that there was no ground on which the Minister could decide as he did. The 1936 Act was a mere consolidating

Act, and cannot, because it repeats the words of the old Act, mean that no court can question the decision of SWIFT, J. A view by an inspector cannot take the place of evidence: *London General Omnibus Co., Ltd. v. Lavell* (8).

- A MACKINNON, L.J. : This is an appeal from an order of CHARLES, J., by which he dismissed a motion by the appellants. That motion was made pursuant to R.S.C., Ord. 55B, r. 71, and the Housing Act, 1936, Sched. II, s. 2. The appellants, alleging themselves to be persons aggrieved by a compulsory purchase order confirmed, under the Act of
B 1936, by the Minister, moved the court to quash the order on the ground that it was not within the powers of the Act. The question, therefore, was whether the order was within those powers. If, on such an application, the court is satisfied that the order was not within the powers of the Act, the court, under Sched. II, s. 2 (ii), "may"—and, if so satisfied,
C ought to—quash the order. By R.S.C., Ord. 55B, r. 72, the evidence upon such an application is to be by affidavit, unless at the hearing the court orders oral evidence to be given. No order for any but affidavit evidence was made in this case.

- The material parts of the Housing Act, 1936, are as follow. By sect. 74,
D a local authority may make an order for the compulsory purchase of land and submit such order to the Minister for his consideration under Sched. I. By sect. 75, it is provided as follows :

- Nothing in this Act shall authorise the compulsory acquisition . . . of any land which . . . forms part of any park, garden or pleasure ground, or is otherwise
E required for the amenity or convenience of any house.

- By Sched. I, s. 3, the local authority, before submitting the order to the Minister, must publish advertisements and serve notices, so that persons interested in the land may put forward their objections. By sect. 4, if such objections are made, the Minister, before confirming the
F order, shall cause a local inquiry to be held, and shall consider any objection not withdrawn, and also the report of the person who held the inquiry, and may then confirm the order with or without modification. By Sched. II, s. 1, when an order has been confirmed by the Minister, the local authority is to publish that fact in a specified manner. By
G Sched. II, s. 2, any person aggrieved by an order so confirmed, and desiring to question its validity on the ground that it is not within the powers of the Act, may apply to the court to quash the order, and the court has thereupon the power and the duty which I mentioned above.

- This case concerns a property named Highfield, on the outskirts of
H Ripon. The property consists of a large house with some 35 acres of land surrounding it. Its occupant is an old lady who is of unsound mind. The applicants were Mr. Rennoldson, the receiver in lunacy of her estate, and the executors of the will of her deceased sister, who, subject to her life interest, have a half-share of the property. On Jan. 3, 1938, the Ripon City Council made an order, under sect. 74 of

the Act, for the compulsory purchase of some 23 acres of the land attached to Highfield House, and on Jan. 12 they served a notice of this order on Mr. Rennoldson, as receiver. On Jan. 26, he served on the Minister a notice of objection. In that he specified 8 grounds of objection, of which the second was as follows :

That the order is contrary to the Housing Act, 1936, s. 75. The land proposed to be acquired forms part of parkland, garden, and pleasure ground, and is required for the amenity or convenience of Highfield House. A

The Minister thereupon directed Mr. E. E. Hall to conduct a public inquiry at Ripon, and Mr. Hall did so on Mar. 23 and Mar. 25. We were told that Mr. Hall is an architect. We have had in evidence a report of the proceedings before him. It appears from that that Mr. Hall intimated that he intended to inspect the property himself. It is probable that he did so, but we have no evidence about that. The proceedings before him appear to have ranged over a great diversity of topics. The precise point, relied on by the appellants before us, that this land was part of a "park," and therefore, under sect. 75, outside the powers of the Act, does not appear to have been clearly raised. In the examination of Mr. Ingram, housing director to the corporation, however, counsel for the corporation asked : B

With regard to the question of parks, gardens and pleasure grounds in relation to Highfield, is it within your knowledge that the land is let ?—Yes. To a Mr. Scholefield, who uses it for agricultural purposes, the grazing of cattle. D

In the examination of Mr. Molyneux, the city surveyor, reference was made to a previous order in regard to a place called Holmfield, and he was asked : E

Was not this a similar proposal to purchase a paddock adjoining a large house ? —It was turned down by the Minister, inasmuch as, in his opinion, it came within the protection of the Housing Act . . . the Highfield paddock was let on a yearly tenancy, while the other [at Holmfield] was not let at all.

Mr. Denman, an expert land agent, said that this land was "a typical piece of parkland," that the amenity of it was having it attached to the house, and that, from the point of view of that amenity, it did not in the least matter if it was occupied by the owner or let for grazing. Finally counsel for the corporation is reported as making a submission as follows : F

With regard to sect. 75 of the Act, it is obvious that it means a park, garden or pleasure ground attached to the house. . . . This land is now in no sense attached to this house as park or garden. . . . It cannot be said to be a park, garden or pleasure ground, because it is let on a yearly tenancy and not required for the purpose of this house. It is not used at all by the occupiers. G

Presumably Mr. Hall made a report to the Minister, and the Minister, under Sched. I, s. 4, considered that report. What he reported we do not know. An affidavit by Mr. Wrigley, of the Ministry of Health, was before us. Paras. 3 and 4 of that are as follow : H

(3) Before a decision was arrived at to confirm the order the subject matter of this appeal with modifications the report of Mr. E. E. Hall as to the evidence given

at the inquiry and as to his personal inspection of the land included in the order together with the representations made by the applicants were duly considered.

(4) As a result of such consideration it was considered that the land the subject-matter of this appeal did not form part of the park, garden or pleasure ground of Highfield and that in any event the same was not required for the amenities or convenience of the said house.

A That, however, is all we know of the materials before the Minister on which he made his decision.

On June 24, 1938, the Minister confirmed the compulsory purchase order, with a modification (by decreasing the amount of the land to be taken) which is immaterial. On July 13, notice of this confirmation was served by the council on Mr. Rennoldson.

B On Aug. 22, notice of motion under R.S.C., Ord. 55B, r. 71, was served on the Minister and the council by the present applicants, asking that the order might be quashed as being "not within the powers of the said Act." This alleged as the most material ground that "the said land formed and still forms part of a park." The only evidence filed on this motion, C under R.S.C., Ord. 55B, r. 72, consisted of three affidavits, by Mr. Rennoldson and Mr. Denman, for the applicants, and by Mr. Wrigley for the respondents. The only material evidence on the question whether this land is part of a park is that of Mr. Denman, who describes the estate as follows:

D The estate comprises approximately 35.72 acres of land including 27 acres of paddock land in the nature of amenity parkland and approximately 8 acres of grounds with chauffeur's lodge, large garages, conservatories and kitchen gardens. The house itself is an imposing stone-built residence. It is a house of the type and size to which it is invariably expected to find paddock and parkland attached. Without them the house and grounds are not such as to attract a purchaser or tenant.

E To the west and north-west of the dwelling-house and gardens lies an expanse of open grassland studded with trees of an approximate area of 23.46 acres. This land is undoubtedly the parkland attaching to the house of Highfield. It is obvious on inspection of the site that the architect in designing Highfield so placed the house as to benefit by the amenity of the open stretch of land on its west side while at the same time a convenient and pleasant approach was provided from Palace Road and College Road with a through drive, the approach from Palace Road being made through the gardens and the latter through the park. It is an essential F part of a house of this type to possess besides its ordinary formal garden an open expanse of paddock land, generally as in this case possessing ornamental timber and described as a park or parkland. The primary purpose of this parkland is the protection of the mansion house, both as to its approach and its aspect. Often the land can be utilised for running horses etc. but usually it is let off to neighbouring farmers or owners for grazing purposes, and the fact that this land is so let does not render it the less properly described in the market as parkland.

G A plan of the property is exhibited to Mr. Rennoldson's affidavit.

The OXFORD ENGLISH DICTIONARY defines a park as follows:

1. *Law*. An enclosed tract of land held by royal grant or prescription for keeping beasts of the chase. 2. Hence extended to a large ornamental piece of ground, usually comprising woodland and pasture, attached to or surrounding a country house or mansion, and used for recreation, and often for keeping deer, cattle, or sheep. (In these the name has either come down from a time when the ground was legally a park in sense 1, or has been more recently given to a ground laid out in imitation of such as were originally parks . . .)

It is true that 35 acres is not a very large piece of ground, but I see no reason why it should not be a park, if perhaps a small one. In *Pease v. Courtney* (1), SWINFEN EADY, J., was concerned with an area of 55 acres attached to a house. He held that this was a "park" within

the Settled Land Act, 1890, s. 10, and that the word as used in that section is not confined to an ancient legal park, but includes an ordinary private park. Not having available then the OXFORD ENGLISH DICTIONARY, he had to rely on the following definition in the IMPERIAL DICTIONARY :

A considerable extent of pasture and woodland, surrounding or adjoining a mansion-house, devoted to purposes of recreation or enjoyment, but chiefly to the support of a herd of deer, though sometimes to cattle and sheep. A

So in *R. v. Bradford* (2) the court held that a field of 30 acres attached to a house was a "park" within the meaning of that word in the Highway Act, 1835. It is to be noted that the field in that case was let for grazing. B

Upon the evidence before us, I am satisfied that this land was part of a park within the meaning of sect. 75 of the Act of 1936, that its compulsory purchase was, therefore, not within the powers of the Act, and that therefore the order of the Minister ought to be quashed. I say C "upon the evidence before us." I have said that we do not know what materials were before the Minister, though para. 3 of Mr. Wrigley's affidavit refers to, but does not specify, these materials. I would add, however, that, if Mr. Hall, and the Minister in his turn, accepted the contention of counsel for the corporation at the inquiry—namely, that D this land had ceased to be a park when, and because, it was let for grazing—that was manifestly an erroneous view. It is notorious that hundreds of undoubted "parks" throughout the country are so let for grazing. I should not be surprised to hear that this obtains at Chatsworth or Badminton, or even in Windsor Great Park. E

In the court below, CHARLES, J., appears to have approved a contention which was renewed before us for the respondents—namely, that this case is governed by the decision of SWIFT, J., in *Re Bowman, South Shields (Thames Street) Clearance Order, 1931* (3), and by some later cases in which a supposed principle laid down by that case has been F followed. *Bowman's* case (3) arose under the Housing Act, 1930, but that Act contained in sect. 11 (3) a provision identical with Sched. II, s. 2, of the 1936 Act. Bowman, as the person aggrieved, was complaining of a clearance order, and alleged, among many things, and as his principal grievance, that his houses were not unfit for human habitation. That G was a pure question of fact. Counsel for the applicant had to admit that there was evidence on which the council and the Minister might come to the conclusion that the houses were unfit. In those circumstances, SWIFT, J., said, at p. 635 :

I do not think that this court is authorised to retry or rehear the case . . . H Accordingly, he declined to hear evidence as to the condition of the houses. That decision, upon the facts of that case, was no doubt correct. It is absurd, however, to deduce from it a suggested rule that, whenever the Minister has made a decision, it cannot be questioned in this court by an aggrieved person. Indeed, any such rule would obviously reduce

to a complete nullity the right of anybody to apply to the court under Sched. II, and would make that right absolutely worthless.

Counsel for the respondent impressed upon us the importance of the duties of local authorities as to rehousing under this Act, and deprecated interference with them. I appreciate that importance, but it must be
A subject to observance of the clear words of sect. 75 of the Act. Moreover, I might point out that that section refers only to land "which forms
part of any park, garden or pleasure ground." There would be nothing to prevent the Ripon Council from acquiring compulsorily the whole of the Highfield property, including the house, or the whole of the Holmfield
B property, as to part of which they made a previous unsuccessful attempt. The owners would have no power to interfere with them. Perhaps they would have the consolation that, however much they suffered sentimentally, they would not suffer financially. In the result, I think that
CHARLES, J., was wrong in dismissing this application, that the appeal
C should be allowed, and that the Minister's order should be quashed. The appellants must have their costs here and below.

LUXMOORE, L.J.: The question to be determined on this appeal is whether there was jurisdiction for a local authority to make an order
D empowering the compulsory purchase of land forming part of a residential property known as Highfield. This property is situate at Ripon in Yorkshire, and contains a total area of approximately 35 acres. The part which is included in the order occupies about 20 acres. The appellants, who are persons interested in the property, contend that there
E was no jurisdiction to make or confirm the order, because the land to which it relates is part of the park of Highfield, or, alternatively, that it is required for the amenity of the dwelling-house situate on the Highfield estate.

The order in question was made by the Ripon Borough Council and
F has been confirmed by the Minister of Health. It purports to have been made and confirmed under the powers conferred by a number of sections contained in the Housing Act, 1936, Part V. This part of the Act relates to the provision of housing accommodation for the working classes. Sect. 71 imposes on every local authority the duty of reviewing housing
G conditions in its areas and of framing proposals. Sect. 72 provides for the mode in which such housing accommodation may be provided. Sect. 73 confers on each local authority power to acquire land, including any houses or other buildings thereon, as a site for the erection of houses for the working classes. Sect. 74 (1) provides as follows :

H Land for the purposes of this part of this Act may be acquired by a local authority by agreement, or they may be authorised to purchase land compulsorily for those purposes by means of a compulsory purchase order made and submitted to the Minister [of Health] and confirmed by him in accordance with the provisions of Sched. I to this Act.

Sect. 74 (4) provides as follows :

The provisions of Sched. II to this Act shall have effect with respect to the

validity and date of operation of a compulsory purchase order made under this section.

Pausing here, it is to be observed that up to this point no limitation is placed on the nature of the land which may be taken by a local authority, whether the purchase be by agreement or under a compulsory purchase order. Sect. 75, which contains restrictions upon the compulsory acquisition of land for the purposes of Part V of the Act, provides as follows :

Nothing in this Act shall authorise the compulsory acquisition for the purposes of this part of this Act of any land which is the property of any local authority, or which is the property of statutory undertakers, having been acquired by them for the purposes of their undertaking, or which at the date of the compulsory purchase order forms part of any park, garden or pleasure ground, or is otherwise required for the amenity or convenience of any house.

It is under the last-mentioned section that the question to be determined arises, for it is contended that the land which is comprised in the order under consideration is part of the park of Highfield, and cannot, therefore, be the subject of an order empowering compulsory purchase. It is also contended that, if the land is not part of the park of Highfield, the order is invalid because the land affected is required for the amenity or convenience of the house on the Highfield estate. A question was raised on the construction of the section, the contention on the one hand being that, if the land sought to be taken were part of a park, garden or pleasure ground, no further question could arise, while on the other hand it was said that the words "required for the amenity or convenience of any house" qualify the words "part of a park, garden or pleasure ground." It is to be observed that the words "part of a park, garden or pleasure ground" are themselves words of qualification, the governing words being "any land." In the dependent sentence, beginning with the words "which at the date of the compulsory purchase order," the words "forms part of any park, garden or pleasure ground, or is otherwise required for the amenity or convenience of any house" relate to the antecedent "any land," and the words "forms part of any park, garden or pleasure ground" are as much descriptive of the words "any land" as are the words which are to be found in the latter part of the dependent sentence, introduced by "or," the second disjunctive. The section should, in my judgment, be read in the same way as if it had been expanded as follows : "any land which is part of a park, garden or pleasure ground, or any land which is otherwise required for the amenity or convenience of any house." The presence of the word "otherwise" seems to preclude any other meaning, for it predicates that the land to which it refers is other than "part of a park, garden or pleasure ground."

Apart from any question of grammar, this construction appears to me to be the sensible one, for it recognises that, once it is established that land sought to be taken is part of a man's park, garden or pleasure ground, it ought not to be necessary for its owner to show that he requires

it for the amenity or convenience of his house. It is obviously in a different position from that of land belonging to such an owner which does not form part of his park, garden or pleasure ground. In such a case, it seems fair to put on the owner, who seeks to prevent the making of a compulsory order, the burden of proving that the land sought

A to be affected is required by him for the amenity or convenience of his house, which is not being taken. It is to be noticed that, so far as the "park, garden or pleasure ground" is concerned, what is prohibited from being subjected to a compulsory order is a part only of land falling within that description. There is nothing in the section to prevent the

B house, park, garden and pleasure ground from being taken compulsorily, if they are taken as a single entity. In my judgment, the section, on its true construction, excludes from liability of inclusion in a compulsory purchase order any part of a park, and, if it can be shown that the land in question in this case is part of a park, there is no jurisdiction

C to make or confirm such an order, and it ought to be quashed. So much for the question of construction.

The next question to be determined is what is meant by the word "park." Is it used here in its strict legal sense, or is it used in its wider and more popular meaning? In its strict legal significance, the word

D "park" means :

A tract of land enclosed and privileged for wild beasts of chase by the monarch's grant or by prescription.

In its popular sense, it is defined in the OXFORD ENGLISH DICTIONARY as follows :

E . . . a large ornamental piece of ground, usually comprising woodland and pasture, attached to or surrounding a country house or mansion, and used for recreation, and often for keeping deer, cattle, or sheep.

The word "park" has frequently been held to have been used in its popular sense in Acts of Parliament: *Pease v. Courtney* (1), where

F SWINFEN EADY, J., held that the word was so used in the Settled Land Acts, and *R. v. Bradford* (2), where a Divisional Court, of which CHANNELL, BRAY and SUTTON, JJ., were members, held that the word was used in the same sense in the Highway Act, 1835. I have no hesitation in holding that in the Housing Act, 1936, the word "park" is used in its popular

G meaning.

No question arises with regard to the procedure followed in the making and confirming of the order to which objection is made. The proper steps laid down by Sched. I of the 1936 Act were complied with. One of those steps included the holding of a public inquiry by an inspector

H appointed by the Minister of Health, who heard counsel for various parties interested, including the borough council and the appellants, and the evidence of certain witnesses. In addition, the inspector viewed the land in question. He made a report as to the result of his inspection and also relating to the inquiry. Both these reports were submitted to, and considered by, the Minister of Health, who, after considering them,

confirmed the order made by the borough council. We are told that the order was confirmed because :

. . . it was considered that the land the subject of the order did not form part of the park, garden or pleasure ground of Highfield and that in any event the same was not required for the amenities or convenience of the said house.

After the order had been confirmed, the appellants, being persons who felt themselves aggrieved by the order, and being desirous of questioning the validity of the order on the ground that it was not within the powers of the Act, made an application to the High Court for that purpose under the provisions of Sched. II, s. 2. It is to be remembered that an application made under this section is not by way of appeal from the order of the borough council or from its confirmation by the Minister. It is an independent proceeding, and is made to the High Court by motion, as required by R.S.C., Ord. 55B, r. 71. The application in the present case was by motion, and it was supported by affidavit evidence in accordance with the provisions of R.S.C., Ord. 55B, r. 72. This rule provides that the evidence upon the hearing of the application—that is, under the Housing Act, 1936—shall be by affidavit, except in so far as the court at the hearing may direct oral evidence to be given. The appellant's evidence consisted of two affidavits, the contents of which were directed to informing the court with regard to the physical features of the land comprised in the order, and certain other information material for the consideration of the two points raised by the appellant—namely, (i) that the land in question was part of the park of the dwelling-house, and (ii) that it was required for the amenity and convenience of that house. The respondents to the motion are the Minister of Health and the Ripon Borough Council. The evidence filed on their behalf consists of an affidavit by an officer of the Ministry of Health who is described in the affidavit as the director and principal assistant secretary of the Housing and Town Planning Division of the Ministry of Health. He states as follows in his affidavit :

(3) Before a decision was arrived at to confirm the order . . . with modifications [which are not material to be considered on this appeal] the report of Mr. E. E. Hall [the inspector who held the public inquiry to which reference has already been made] as to the evidence given at the inquiry and as to his personal inspection of the land included in the order together with the representations made by the applicants [the appellants] were duly considered. (4). As a result of such consideration it was considered that the land the subject-matter of this appeal did not form part of the park, garden or pleasure ground of Highfield and that in any event the same was not required for the amenities or convenience of the said house.

There are exhibited to this affidavit (i) the order made by the Ripon Borough Council, and the plan attached thereto, (ii) the applicant's notice of objection, and (iii) the transcript of the shorthand notes of the proceedings at the inquiry. No disclosure is made of either of the two reports made by the inspector, nor is there any statement of the reasons why the Minister came to his conclusion, but it appears from the statement in para. 4 of the last-mentioned affidavit that the Minister took the view that the material point to be considered was whether the land affected was required for the amenities or convenience of the house,

and that, if it was not required for those purposes, it was immaterial whether or not it formed part of the park. If this was the view taken of the construction of sect. 75 of the 1936 Act, I think, for the reasons already stated, that the Minister was in error in so doing.

- A shows that the only ground relied upon by the Ripon Borough Council to establish that the land in question was not part of the park of Highfield was the admitted fact that it was let to a farmer for the grazing of cattle and sheep, and it was argued that this letting prevented the land from being part of the park. It was admitted—at any rate, in this court—that this argument was untenable. It appears to me that, in view of the decision in *R. v. Bradford* (2), that admission was inevitable. The evidence before the inspector was not given on oath, and the proceedings were necessarily far less formal than they would be in a court of law. I have carefully considered the transcript, and can find but little evidence directed to prove that the land in question is part of the park of Highfield, and none to justify a finding that it is not part thereof. There is some evidence, however, to support the view that the land is not required for the amenities or convenience of the house. The evidence in the affidavits in support of the application is uncontradicted, and leads only to the conclusion that the land is part of the park. This evidence was not before the Minister, and, although it was before CHARLES, J., when he heard the motion, he does not appear to have considered it, for, in refusing to quash the order of the borough council and its confirmation by the Minister, he based that refusal on the ground that the Minister had decided that the land in question was not part of the park, or required for the amenity or convenience of the house, and that, as these were questions of fact, he would not interfere with the findings, as he had no power to retry or to rehear the case. In my judgment, CHARLES, J., was in error in deciding as he did. As I have already pointed out, the proceeding before CHARLES, J., was not by way of appeal from any order made by the borough council, or its confirmation by the Minister of Health. It was a new and independent proceeding, and not a rehearing of a retrial.

- The first and most important matter to bear in mind is that the jurisdiction to make the order is dependent on a finding of fact, for, unless the land can be held not to be part of a park, or not to be required for amenity or convenience, there is no jurisdiction in the borough council to make, or in the Minister to confirm, the order. In such a case, it seems almost self-evident that the court which has to consider whether there is jurisdiction to make or confirm the order must be entitled to review the vital finding on which depends the existence of the jurisdiction relied upon. If this were not so, the right to apply to the court would be illusory. There is, however, ample authority that the court is entitled so to act, for the point has been considered in a number of cases. It is sufficient to refer to *Bunbury v. Fuller* (4). In that case,

COLERIDGE, J., delivering the judgment of the Court of Exchequer Chamber, said, at p. 35 :

... it is a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to inquiry in the superior court. Then, to take the simplest case—suppose a judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits. On its being presented, the judge must not immediately forbear to proceed, but must inquire into that preliminary fact and for the time decide it, and either proceed or not with the principal subject-matter according as he finds on that point; but this decision must be open to question, and if he has improperly either forborne or proceeded on the main matter in consequence of an error on this, the Court of Queen's Bench will issue its *mandamus* or prohibition to correct his mistake. A

As in *Bunbury v. Fuller* (4), and also in *R. v. Bradford* (2), so also in the present case, the decision on the question whether or not the particular land is part of a park is preliminary to the exercise of the jurisdiction to make and confirm the order conferred by the Housing Act, 1936, s. 75, and is, therefore, open to review in this court. In arriving at his decision, CHARLES, J., stated that he agreed with the decision of DU PARCQ, J., in *Re Newhill Compulsory Purchase Order, 1937, Application of Payne* (5), and with that of SWIFT, J., in *Bowman's case* (3), in support of the view that he had no power to review the decision of the Minister of Health because the question to be determined was one of fact. In the latter case, a question arose with regard to the validity of a clearance order under the Housing Act, 1930. The validity was challenged on a number of grounds, one of which was that there was no sufficient evidence to show that the buildings were unfit for habitation or dangerous or injurious to health. Counsel for the applicant admitted that there was evidence upon which the local authority might have come to the conclusion that the buildings were unfit for habitation or dangerous or injurious to health, although he asked to be allowed to call further evidence on the point. During the argument, SWIFT, J., said, at p. 627 : B

An application may be made to this court under sect. 11 (3) [which for all practical purposes is the same as the Housing Act, 1936, Sched. II, s. 2 (ii)] only on the grounds there specified, namely, that the order is not within the powers of the Act, or that some requirement of the Act has not been complied with, or on the further ground that there was no evidence to support the order; but not on the ground that there was not sufficient evidence to support the order. In this case it cannot be contended that there was no evidence to support the findings as to the condition of these houses. C

There is nothing to show what was the nature of the further evidence it was desired to bring before the court, and it may well be that in substance the evidence before the court was, for all practical purposes, sufficient. In this court, reliance was placed on the statement of SWIFT, J., at p. 634, that an aggrieved person : D

... is not ... entitled to come here and complain that the local authority have made E

a mistake in fact in making the order. He is not entitled to say that his house is not insanitary or unfit for human habitation, and, that, therefore, the order should not have been made.

- If this statement was intended by the judge to be of universal application to all cases under sect. 11 (3) of the 1930 Act, and therefore also to all cases under Sched. II, s. 2, of the 1936 Act, I should have no hesitation in saying that it went too far, for it ignores the rule laid down in *Bunbury v. Fuller* (4), to which reference has already been made, a decision which SWIFT, J., had no power to overrule. Indeed, no reference appears to have been made to it during the argument of *Bowman's* case (3). I think that the remarks of SWIFT, J., must be read in the light of the facts of the case before him, and especially with regard to the provisions of sect. 1 of the 1930 Act, which appear in express terms to make the local authority the judge of whether or not the houses in question are fit for habitation, for the material words of that section are as follow :

(1) Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied [that the houses in the area are unfit, then an order may be made].

- This provision differs materially from the present case. Sect. 75 of the 1936 Act does not refer in terms to the local authority being satisfied that the land is not part of a park. The making of the order for compulsory purchase is prohibited if the land is part of a park, a matter which can only be proved or disproved by evidence. In the *Newhill* case (5), DU PARCQ, J., came to a conclusion on the facts, and added, at p. 167, that, if he was wrong in so doing, it was :

- ... enough to say that the evidence does not satisfy me that the Minister was wrong when he came to the conclusion . . . that it [the land in question] was not a pleasure ground. . . . The Minister having made up his mind about it, as far as I can tell, on proper materials, and without misdirecting himself as to the true point at issue, it is not for me to interfere, when there are no materials upon which I can interfere.

- The judge obviously thought that the materials for deciding the particular case were sufficient, for he came to a conclusion on them, and, that being so, no question arose with regard to the consideration of further evidence, for there was no reason why the question of further evidence should be considered. I am quite unable to accept the view of this case taken by CHARLES, J., that DU PARCQ, J., purported to lay down a rule that a finding by the Minister in respect of any matter arising under sect. 75 cannot be disturbed.

- The true position with regard to applications under Sched. II, s. 2, of the 1936 Act appears to me to be that the judge to whom the application is made is bound to consider the available evidence, whether given at the local inquiry or given by the affidavits in support of, or in opposition to, the motion, and, if there is a conflict with regard to the facts raised, or if the evidence is insufficient to enable him to come to a conclusion, he is free to direct that oral evidence be given, whether by way of cross-

examination or by way of additional evidence under the provisions of R.S.C., Ord. 55B, r. 72.

In the present case, as I have already stated, I am satisfied that there was no evidence before the inspector sufficient to entitle the local authority or the Minister to come to a conclusion that the land in question was not part of the park of Highfield. I am further satisfied that, on the affidavit evidence on the present application, which could not be excluded or ignored, although it was not before the Minister of Health, the only conclusion open to the court is that the land was a part of the park of Highfield. If there was any other evidence before the Minister, he has failed to disclose it, and the court is, therefore, unable to consider it. I have refrained from dealing with the question whether the land was required for the amenity or convenience of the house, because, on the construction of sect. 75 which I have held to be correct, this question is immaterial. In these circumstances, it seems to me plain that there was no jurisdiction in the Ripon Borough Council to make, or in the Minister to confirm, the order for compulsory purchase, and that CHARLES, J., should, therefore, have quashed the order. In my judgment, the appeal must be allowed, with costs here and in the court below.

MACKINNON, L.J. : I am authorised and desired by HUMPHREYS, J., to say that he has read these judgments, and that he concurs in them and agrees with the proposed order.

Appeal allowed with costs in both courts.

Solicitors : *Clarke, Rawlins & Co.*, agents for *J. H. & H. F. Rennoldson*, South Shields (for the appellants) ; *The Solicitor*, Ministry of Health (for the respondent).

[*Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.*]

LOCK v. ABERCESTER, LTD.

[CHANCERY DIVISION (Bennett, J.), July 3, 4, 5, 1939.]

Easements—Right of way—Proof of user for horses and carts—Right to use for mechanically-propelled vehicles.

The successive rectors of H. had used a way across a farm as the means of getting to and from the rectory. It was proved that the rectors and those having business with them had used the way both on foot and with horses and carts for more than 40 years. Upon a union of benefices, the rectory was sold, and the new owner, who used the land for agricultural purposes, caused the way to be used by mechanically-propelled vehicles. It was contended that proof of user by horse-drawn vehicles did not give a right to use the way for mechanically-propelled vehicles :—

Held : the user proved gave a right to use the way for mechanically-propelled vehicles.

[EDITORIAL NOTE.] A somewhat similar point to that here discussed was mentioned incidentally in *A.-G. v. Hodgson*, [1922] 2 Ch. 429 ; Digest Supp., but there

the right of way was created by grant. In the present case, the right of way is claimed by reason of user, but it is held that, although the user proved is one by horse-drawn vehicles only, yet the right of way acquired is a general right of way for vehicular traffic however propelled. It therefore extends to motor traffic.

As to EXTENT OF USER, see HALSBURY, Hailsham Edn., Vol. 11, pp. 322-327, paras. 574-578; and FOR CASES, see DIGEST, Vol. 19, p. 112, Nos. 719-724.]

A ACTION for a declaration that the plaintiff was entitled to a right of way.

Erskine Simes for the plaintiff.

Alexander Grant, K.C., and *Roger Turnbull* for the defendants.

B BENNETT, J.: The object of this action is to establish that the plaintiff as the owner of property in the parish of Holt, in the county of Worcester, known as the Old Rectory, has as an appurtenance to the Old Rectory a right of way for herself and her servants on foot and with horses, cattle, and carriages over part of the farm known as Naunton Farm, owned by the defendants. The dominant tenement, the Old Rectory, is shown coloured pink on the plan annexed to the statement of claim, and the servient tenement owned by the defendants and the ground over which the right of way passes is also shown on the plan, the servient tenement being coloured yellow. The way to the Old Rectory was in the occupation, first of all, of the parson of the parish, Mr. Sale, who was rector from 1847 to 1896, and his successor was a Mr. Stamer, who was rector from 1897 to 1900. He was succeeded by Mr. Eccleston, who was rector till 1904, and Mr. Eccleston's successor was a Mr. Fox, who was rector from 1904 till 1931, when he died. Then, or shortly after the date when he died, there was a union of benefices, and, as the result of that, the Ecclesiastical Commissioners for England, acting under the powers of the Union of Benefices Measure, 1923, sold the rectory and some land forming part of it to the plaintiff, who was then Miss Matthews, and her aunt, Mrs. Hodgetts. The property was conveyed to those two ladies by a deed dated Dec. 14, 1932. Since the date of that deed, Mrs. Hodgetts, the plaintiff's aunt, has released her interest to the plaintiff, who is now seised in fee simple of the Old Rectory and the land shown on the plan drawn on the conveyance coloured pink and green. The proof by the plaintiff is that, from about 1882, until Mar., 1938, G the successive rectors of Holt and persons having business at the rectory used the way in dispute as a means of getting to and from the rectory. There is proof that the rectors of Holt themselves, and their horses and carts, went to and from the rectory over the way in dispute without ever having been stopped, and without their ever having asked permission of anyone. There is proof that the butcher and the baker H during the whole of that period delivered goods at the rectory using the way in dispute as a means of getting to and from the rectory. There is proof that tradesmen who sold hay, straw, and corn to the rectory used the way in question as a means of bringing to the rectory the goods which they sold to the rector, conveying their goods sometimes on

floats, sometimes on drays, drays dragged by a horse and sometimes by two horses. Moreover, there has been given before me evidence of witnesses whose evidence is really unimpeachable as to the general user over the period I have stated, which is more than 40 years, of the way in question as a means of conveying goods by horses and carts to and from the rectory, and, as a result of that evidence, I have no doubt whatever A that the plaintiff has established that there is an easement to persons on foot, with carts and with horses, over the way in question, shown on the statement of claim plan coloured purple, from the rectory to the main road leading to Worcester. When the rectory house was sold to the plaintiff, she put the house and the land to a use not altogether the B same as that to which it had been put by the several owners who occupied it before her. She began to use it for agricultural purposes, and I gather that she now has cows, chickens, and so on, which require to be fed, and that the tradesmen who supply her with the goods which she requires for that purpose, and with goods required for what is now the Old Rectory C house, use not only horse-drawn vehicles but also vehicles which are mechanically propelled. A great many of the vehicles which are used by tradesmen for delivering things of that kind usually weigh more than the horse-drawn vehicles which were used in the days before the petrol engine had been invented and before people made use of the D modern motor car, and, not perhaps unnaturally, the present occupier of Naunton Farm, occupying the field over which the way in dispute passes, did not altogether like mechanically-propelled vehicles passing over his ground, nor did his landlords, the defendants. The question is whether they have a right to object. In Mar., 1938, the E defendants, taking the ground that there was no right of way at all over the way in dispute, and that the enjoyment theretofore had been merely permissive, locked one of the gates which was on the alleged right of way, and denied that there was a right of way for the plaintiff to the Old Rectory. It was that act on the part of the defendants which has given F rise to the present litigation. I have already said that, in my judgment, the evidence has established beyond question that, as an appurtenance to the rectory, there is a right of way on foot, with horses and with carts. Of course, so far as proof is concerned, in the earlier part of the period there was no proof, so far as carriages were concerned, as regards carriages G other than horse-drawn vehicles. The point which counsel for the defendants has taken is that, if proof is given of the use of horse-drawn vehicles, that does not give the right to use the way by mechanically-propelled vehicles, and, before a way used by mechanically-propelled vehicles can be claimed by the plaintiff, there must be proof that there H has been a regular user by vehicles mechanically propelled. In my judgment, that is not the law. What is claimed is a carriageway, and, if one is claiming a carriageway, one's right is not restricted to carriages drawn by a particular kind of animal which one proves has drawn carriages over the way in question. As an example of the proof, if one's carriage

has been drawn by a horse and one is not infringing one's rights, then if one drives over it in a cart drawn by a donkey or an ass one is still within one's rights, and, in my judgment, the claim is proved if the carriage is propelled by some form of engine. That I hold to be the law, and I do not think that it would be right to hold otherwise. As regards

A great many rights of way which have been acquired by prescription, there are now no longer available for use the methods which were used in those days. In these days, there are used horse-drawn carriages and motor vehicles. As a matter of law, I decide that, where proof is given of a user over the required period by carriages drawn by horses, so as
B to establish a carriageway as an appurtenance, the right which is acquired is one which enables the owner of the property to which the road is an appurtenance to use the way with mechanically-propelled vehicles.

The action, in my judgment, succeeds. The defendants acted wrongfully from any point of view, because plainly, in my judgment, the
C right to use the way for horse-drawn vehicles has been established, and also because the defendants have failed to establish the real point in the case which has been argued—namely, whether or not the proof entitles the plaintiff to a way for mechanically-propelled vehicles. I think that the declaration to be made is that the plaintiff is entitled to the right
D of way from the Old Rectory as shown on the plan annexed to the statement of claim and thereon coloured pink and green, and over the way shown on the statement of claim plan coloured purple to the public highway and back again to her premises for herself, her servants on foot, and with horses, carriages and other conveyances at all times and
E for all purposes. There is a reference to a way for cattle, too, but there is no proof of any use which I think would warrant the making of a declaration that the way in question is a drift way. I will make the declaration in the terms I have stated. I do not know whether an injunction to restrain the defendants from locking the gates is necessary,
F but I will give the plaintiff liberty to apply for an injunction. The defendants must pay the costs of the action.

Judgment for the plaintiff with costs.

Solicitors: *Clinton & Co.*, agents for *Harrisons*, Worcester (for the plaintiff); *Edwin Coe & Calder Woods*, agents for *Tree, Hemming &*
G *Johnston*, Worcester (for the defendants).

[*Reported by MAURICE SHARE, ESQ., Barrister-at-Law.*]

HARTOG v. COLIN & SHIELDS.

[KING'S BENCH DIVISION (Singleton, J.), June 27, 1939.]

Mistake—Price of subject-matter of transaction—Goods offered at certain prices per pound instead of per piece—Offeree's knowledge of mistake—Whether acceptance of such offer a binding contract.

The defendants contracted to sell to the plaintiff 30,000 Argentine hare skins, but by an alleged mistake they offered the goods at certain prices per pound instead of at those prices per piece, the value of a piece being approximately one-third that of a pound. In verbal and written negotiations which took place prior to the sale, reference had always been made to the price per piece and never to the price per pound, and expert evidence was given that Argentine hare skins were generally sold at prices per piece:—

HELD: the plaintiff could not reasonably have supposed that the offer expressed the real intention of the persons making it, and must have known it to have been made by mistake. The plaintiff did not, by his acceptance of the offer, make a binding contract with the defendants

[EDITORIAL NOTE. An intending purchaser is not permitted to "snap up" an offer which he knows to have been made under a mistake. There have been decisions on this matter as a point in the law of contract, but there is no previously reported decision of a case of this kind where the contract was one for the sale of goods.

AS TO MISTAKE IN PRICE OFFERED, see HALSBURY, Hailsham Edn., Vol. 23, p. 138, para. 195; and FOR CASES, see DIGEST, Vol. 35, pp. 108, 109, Nos. 132-140.]

Cases referred to:

- (1) *Tamplin v. James* (1880), 15 Ch.D. 215; 35 Digest 101, 84; 43 L.T. 520.
- (2) *Webster v. Cecil* (1861), 30 Beav. 62; 35 Digest 108, 133.
- (3) *Paget v. Marshall* (1884), 28 Ch.D. 255; 35 Digest 128, 291; 54 L.J.Ch. 575; 51 L.T. 351.
- (4) *Harris v. Pepperell* (1867), L.R. 5 Eq. 1; 35 Digest 111, 164; 17 L.T. 191.
- (5) *Wood v. Scarth* (1855), 2 K. & J. 33; 35 Digest 140, 385; 26 L.T.O.S. 87.
- (6) *Islington Union v. Brentnall & Cleland* (1907), 71 J.P. 407; 35 Digest 108, 137.
- (7) *Smith v. Hughes* (1871), L.R. 6 Q.B. 597; 35 Digest 107, 125; 40 L.J.Q.B. 221; 25 L.T. 329.

ACTION for damages for breach of a contract of sale of goods. The plaintiff alleged that the defendants had agreed to sell him 30,000 Argentine hare skins and had failed to deliver them. He claimed loss of profit, or, in the alternative, the difference between the contract price and the market price at the time of the breach.

The defendants pleaded that their offer was by mistake wrongly expressed. They alleged that they had intended to offer the goods sold at certain prices per piece, and not at those prices per pound, as their offer was expressed. They further alleged that the plaintiff was well aware of this mistake on their part, and fraudulently accepted an offer which he well knew that the defendants had never intended to make. In the circumstances, the defendants denied that any binding contract was entered into, and, if there was, counterclaimed for its rescission.

E. Holroyd Pearce and *H. J. Phillimore* for the plaintiff.

H. C. Marks for the defendants. [Counsel referred to *Tamplin v. James* (1), *Webster v. Cecil* (2), *Paget v. Marshall* (3), *Harris v. Pepperell* (4), *Wood v. Scarth* (5), *Islington Union v. Brentnall & Cleland* (6), *Smith v. Hughes* (7), HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 23, p. 23, p. 138, para. 195, and POLLOCK ON CONTRACTS, 10th Edn., p. 485.]

SINGLETON, J. : In this case, the plaintiff, a Belgian subject, claims damages against the defendants because he says they broke a contract into which they entered with him for the sale of Argentine hare skins. The defendants' answer to that claim is : " There really was no contract, because you knew that the document which went forward to you, in the form of an offer, contained a material mistake. You realised that, and you sought to take advantage of it."

Counsel for the defendants took upon himself the onus of satisfying me that the plaintiff knew that there was a mistake and sought to take advantage of that mistake. In other words, realising that there was a mistake, the plaintiff did that which JAMES, L.J., in *Tamplin v. James* (1), at p. 221, described as " snapping up the offer." It is important, I think, to realise that in the verbal negotiations which took place in this country, and in all the discussions there had ever been, the prices of Argentine hare skins had been discussed per piece, and later, when correspondence took place, the matter was always discussed at the price per piece, and never at a price per pound. Those witnesses who were called on behalf of the plaintiff have had comparatively little experience of dealing in Argentine hare skins. Even the expert witness who was called had had very little. One witness, Mr. Caytan, I think, had had no dealings in them for some years, though before that he had had some, no doubt. On the whole, I think that the evidence of Mr. Wilcox, on behalf of the defendants, is the more likely to be right—namely, that the way in which Argentine hare skins are bought and sold is generally per piece. That is shown by the discussions which took place between the parties in this country, and by the correspondence. Then on Nov. 23 came the offer upon which the plaintiff relies. It was an offer of 10,000 Argentine hares, winters (100 skins equalling 16 kilos.), at $10\frac{1}{4}d.$ per lb. ; 10,000 half hares at $6\frac{3}{4}d.$ per lb. ; 10,000 summer hares at $5d.$ per lb. Those prices correspond, roughly, in the case of the winter hares, to $3\frac{3}{4}d.$ per piece, half hares $2d.$ per piece, and summer hares $1\frac{3}{4}d.$ per piece. The last offer prior to this, in which prices were mentioned, was on Nov. 3 from the defendants, and the price then quoted for winter hares was $10\frac{3}{4}d.$ per piece. Even allowing that the market was bound to fall a little, I find it difficult to believe that anyone could receive an offer for a large quantity of Argentine hares at a price so low as $3\frac{3}{4}d.$ per piece without having the gravest doubts of it.

I mention merely the price of the winter hares, because Mr. Wilcox told me, and I accept his evidence, that at some time the price of

Argentine winter hares fell to 9d. I am satisfied, however, from the evidence given to me, that the plaintiff must have realised, and did in fact know, that a mistake had occurred. What did he do? Mr. Hartog put it forward as being a *bona fide* act on his part that he at once went to Mr. Caytan and entered into a contract with him. I am not sure that it points to a *bona fide* act at all. Mr. Caytan, who was called before me, apparently entered into an arrangement with him on that same day, Nov. 23, to buy Argentine winter hares at 11 $\frac{3}{4}$ d. per lb., so that the price, if there had been a contract at 10 $\frac{1}{4}$ d. per lb., has risen on the sale of the goods to Mr. Caytan to 11 $\frac{3}{4}$ d. per lb. That is 1 $\frac{1}{2}$ d. up, which is a considerable increase, and much greater than that which he had been offering to pay in the letters which passed earlier. It is a much greater increase. A

I cannot help thinking that, when this quotation in pence per pound reached Mr. Hartog, the plaintiff, he must have realised, and that Mr. Caytan, too, must have realised, that there was a mistake. Otherwise I cannot understand the quotation. There was an absolute difference from anything which had gone before—a difference in the manner of quotation, in that the skins are offered per pound instead of per piece. B

I am satisfied that it was a mistake on the part of the defendants or their servants which caused the offer to go forward in that way, and I am satisfied that anyone with any knowledge of the trade must have realised that there was a mistake. I find it difficult to understand why, when Mr. Caytan bought in this way at 11 $\frac{3}{4}$ d. per lb., he could not tell me what the total purchase price was, and I cannot help thinking that there was an arrangement of some sort, amounting rather to a division of the spoil. That is the view I formed, having heard the witnesses. I do not form it lightly. I have seen the witnesses and heard them, and in this case can form no other view than that there was an accident. The offer was wrongly expressed, and the defendants by their evidence, and by the correspondence, have satisfied me that the plaintiff could not reasonably have supposed that that offer contained the offerers' real intention. Indeed, I am satisfied to the contrary. That means that there must be judgment for the defendants. C

Solicitors: *J. H. Fellowes* (for the plaintiff); *Wild, Collins & Crosse* (for the defendants). D

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.] E

Re LANDI, GEORGI v. NAVANI.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.J.J.), **June 29, 30, 1939.**]

Limitation of Actions—Co-owners—Receipt of rent and profits by one co-owner—Co-owner trustee of the legal estate—Real Property Limitation Act, 1833 (c. 27), s. 12—Law of Property Act, 1925 (c. 20), s. 12.

L. and F. were tenants in common of certain premises in which they resided until the end of 1923. Thereafter the rent of the premises was received by L. down to the date of his death on May 14, 1935. It was contended that the title of F. to his half-share in the property was divested at the end of 12 years by the operation of the Real Property Limitation Act, 1833, s. 12:—

HELD: (i) the provisions of the Real Property Limitation Act, 1833, s. 12, which were the appropriate limitation in respect of undivided shares until Dec. 31, 1925, were not saved by the Law of Property Act, 1925, s. 12.

(ii) the Real Property Limitation Act, 1833, s. 12, though unrepealed, ceased on Dec. 31, 1925, to apply to undivided shares, when the latter became merely interests in the proceeds of sale of the land.

(iii) as from Dec. 31, 1925, L. was a trustee, and could not plead any Statute of Limitations, and an account of the net rents received since that date must be ordered.

[EDITORIAL NOTE.] Before 1926, joint tenants and tenants in common had an interest in the land, and, for the purpose of limitation of actions, the appropriate provision was the Real Property Limitation Act, 1833, s. 12. This provision is in its terms applicable to an interest in the land only, and is plainly inapplicable to an interest arising under a trust for sale. The Court of Appeal have rejected the argument that the section, which has not been repealed, is still applicable to undivided shares by reason of the Law of Property Act, 1925, s. 12, and it would appear that, where a tenant in common is also a trustee of the entirety, there is no Statute of Limitations applicable to the case.

AS TO CO-OWNERS AND LIMITATION OF ACTIONS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 711, 712, paras. 942-944; and FOR CASES, see DIGEST, Vol. 32, pp. 457-459, Nos. 1227-1253.]

Cases referred to:

- (1) *Re Jolly, Gathercole v. Norfolk*, [1900] 2 Ch. 616; 32 Digest 484, 1467; 69 L.J.Ch. 661; 83 L.T. 118.
- (2) *Kennedy v. De Trafford*, [1897] A.C. 180; 38 Digest 694, 389; 66 L.J.Ch. 413; 76 L.T. 427; *affg.*, [1896] 1 Ch. 762.
- (3) *Henderson v. Eason* (1851), 17 Q.B. 701; 20 Digest 269, 293; 21 L.J.Q.B. 82; 18 L.T.O.S. 142; *revsd.* (1848), 12 Q.B. 986; *previous proceedings* (1847), 2 Ph. 308.

INTERLOCUTORY APPEAL from an order of SIMONDS, J., dated May 8, 1939. The testator, Egisto Landi, died May 14, 1935. In May, 1936, an originating summons was taken out for the determination of a number of questions concerning his estate, and an administration order was made on July 26, 1937. One of the claims against the estate was that of the appellant, Eleanora Fantoni, as the personal representative of her late husband. The testator and Mr. Fantoni were entitled in equal shares to a property known as 125, Whitechapel Road, E. The testator alone, however, had received the rents since 1923. Mrs. Fantoni claimed a half-share of the property and one-half of the net rents received by the

testator. The matter came before SIMONDS, J., who found as a fact that the property had been purchased by the testator and Mr. Fantoni as co-owners in equal shares, but that the Statutes of Limitation afforded an answer to the claim made by Mrs. Fantoni. It was from the second of those findings that this appeal was brought.

E. Milner Holland for the appellant. A

H. Wynn Parry, K.C., and *J. F. Bowyer* for the respondent.

Holland: In order that the claim against the testator's estate could be barred, the period of 12 years must have been completed before his death. It is an admitted fact that the two purchasers were in joint occupation until 1923. The testator was not in adverse possession after 1923, but he was treating himself as agent for his co-tenant, and collecting the rents and managing the property in that capacity. If that be a fact, the statute could not run in his favour on principle, and also on the wording of the Real Property Limitation Act, 1833, s. 12. Prior to the enactment of that section, the occupation of one of a number of co-tenants was the occupation of all. The conditions imposed by sect. 12 are special. The effective limitation section is now the Real Property Limitation Act, 1874, s. 9. The statute 4 & 5 Anne, c. 3, gave one co-tenant a right to an account. Since 1925, that statute has not been needed, as, by the Law of Property Act, 1925, the testator was converted into a trustee. *Re Jolly, Gathercole v. Norfolk* (1) establishes that, when title has been extinguished, there can be no right to recover rent. It will be necessary to limit the claim for rent received from Jan. 1, 1926, onwards. The appellant's right is a right to an account. Either it is an action of a beneficiary against a trustee—in which case no Statute of Limitations runs—or the appellant is entitled as a creditor. The evidence shows that Landi was not in occupation for 12 years. SIMONDS, J., has found that he was, having been influenced to come to that conclusion by *Kennedy v. De Trafford* (2). The right claimed by the appellant up to 1926 was under the Act of 1705, which was repealed by the Law of Property Amendment Act, 1924. Since 1925, co-owners have been trustees for each other. I am clearly entitled to an account from 1926, and I ask for an account from 1923. [Counsel referred to *Henderson v. Eason* (3).] B
C
D
E
F

Parry, K.C.: The Law of Property Act, 1925, s. 35, must be read in conjunction with, and subject to, any qualification in sect. 12 of the same Act. There is a qualification there to the effect that, if there appears to be, at the time when the Act comes into force, any Statute of Limitations in operation which would, but for sect. 35, have enured to benefit one co-owner, the full effect of sect. 35 must not be given. Where two people were not to be regarded as statutory trustees before the Act—and therefore either of them might be a person against whom the Statute of Limitations might run—neither of them is to be adversely affected by sect. 35. Otherwise, there is no force in sect. 12. In considering the case of two co-owners whose relationship to each other was G
H

- created prior to the coming into operation of the Act, one must ascertain whether there is a Statute of Limitations running in favour of one of them. The mere presence of sect. 35 in the Act of 1925 does not defeat a claim under any Statute of Limitations. The words "for his own benefit" in the Real Property Limitation Act, 1833, s. 12, are directed
- A to the circumstances in which the money is received, and not to the legal consequences which flow from its receipt. The mere receipt of money by one co-owner in circumstances in which he ought to pay it over will prevent that money from being received by him for his own benefit. The test is the circumstances in which the money was received.
- B At any time within 12 years, one co-owner could bring an action against, or make an arrangement with, the other co-owner, and thus prevent his saying he was receiving the money for his own benefit. Sect. 12 of the Act of 1833 has not been repealed, and therefore effect should be given to it if possible. The continued preservation of sect. 12 of the
- C Act of 1833 has the effect of making it necessary to bring into effect sect. 12 of the Act of 1925. [Counsel referred to *Re Jolly, Gathercole v. Norfolk* (1).]

Bowyer followed on the same side.

Counsel for the appellant was not called upon in reply.

- D
- SIR WILFRID GREENE, M.R.: This appeal from a decision of SIMONDS, J., raises for consideration a large number of interesting points, but, upon the view which I take of the case, it will not be necessary for me to express any concluded opinion upon some of them. The question arises
- E in this way. At the date of his death, on May 14, 1935, Egisto Landi was, as SIMONDS, J., found, co-owner with one Mr. Fantoni of certain leasehold premises, No. 155, Whitechapel Road. Their interests were those of tenants in common in equal shares. That matter of fact SIMONDS, J., decided in favour of the present claimant, and from that decision
- F there is no appeal. SIMONDS, J., also decided, however, that the claim of the plaintiff was barred by the Statute of Limitations, that claim being a claim to one moiety of the net rents of the property received by the testator during his life and not accounted for. One curious feature of the case is that, assuming that the title of Mr. Fantoni and his
- G legal personal representative—for he is dead—to his moiety of the land had been extinguished by the Statute of Limitations, by the will of the testator the testator's interest in the property is bequeathed to Mr. Fantoni and his wife. The effect of that might give rise to an interesting question in connection with the application of the Statute of Limitations,
- H for the reason that, at the death of the testator, the statutory period of limitation—if, indeed, the Statute of Limitations applied to the facts—was not yet completed, and, accordingly, at that date the title to one moiety, on any view, remained vested in Mr. Fantoni. However, it is not necessary to go into that matter.

The parties had lived in the premises down to the end of 1923, and

thereafter they were out of occupation and the rents were received throughout by the testator down to his death, which took place on May 14, 1935. The statutory period of limitation, therefore, if it applied, began at the end of 1923, and would not have come to an end until the end of 1935—that is to say, some 7 months after the death of the testator.

The judge dealt with the question of the Statute of Limitations in this way. The claim, being a claim in respect of a share of rents which had accrued before the end of the 12 years, could only be rejected if the statute had run against the claimant, and if, moreover, the effect of its so running had been, not merely to divest the claimant (who is, as I have said, the legal personal representative of Mr. Fantoni) of title to the undivided moiety, but also to bar the right to recover a share of rents which had accrued before that title was extinguished by the statute. The judge proceeded upon the basis that, if extinction of the title was shown to have taken place by virtue of the statute, that operated to bar the right to a share of rents which accrued before that date. There, again, whether or not that consequence would follow from the extinction of the title is a question of some nicety. I need say no more about it than that the right to recover the share of rents from Mr. Fantoni was originally a right under 4 & 5 Anne, c. 3 (the relevant section of which was repealed by the Law of Property (Amendment) Act, 1924, s. 10), and, therefore, had a special character of its own. I do not propose to enter into the question whether or not that proposition is right—namely, that the extinction of the title extinguished the claim to the share of the previous rents. The judge, proceeding upon that basis, therefore had to consider the question whether or not the title of Mr. Fantoni and his legal personal representative had been extinguished under the relevant Statute of Limitations. He points out in his judgment that, but for the Real Property Limitation Act, 1833, s. 12, the possession of the testator would have been a possession on behalf of both of the tenants in common, with the result that that possession could not have been relied upon for the purpose of the Statute of Limitations. Sect. 12 deals with that matter, because it provides that, when one of several tenants in common (I take only the relevant case) has :

... been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.

If that be the relevant section, and if the matters to which I have already referred are assumed to be decided in a particular way, I agree that a question would arise whether, upon the facts of this case, the receipt by the testator, Mr. Landi, of the profits and rents which he received was a receipt for his own benefit, and that that question would be the crucial question. The judge dealt with it by answering it adversely to the claimant. He held that, notwithstanding the fact that during

the time he was receiving these rents the testator admitted to his co-owner that he was receiving them on behalf of both, and was accordingly liable to account for them, and notwithstanding the fact that in his account-book under a head showing that they were co-owners of the property he entered all his receipts and payments, on the true construction of the section, applying it to the facts, his receipt was a receipt for his own benefit. I do not find it necessary to examine the reasons for the judge's judgment in that respect, but it must not be taken from that that I accept the correctness of his view, because it appears to me that there are very formidable arguments in support of

- A the contrary opinion. That particular problem I do not attempt to solve, because, upon the view which I take of this case, it does not fall for decision. I only wish it not to be taken that, either upon that point or upon any of the other questions which I have mentioned, as to which I am not proposing to express my opinion, I am accepting anything which has been said.

- C The ground upon which I think the case falls to be decided is one with which the judge does not deal, since it was not argued before him. The whole position of land held in undivided shares was, of course, entirely altered by the recent property legislation. Before that legislation came into force at midnight on Dec. 31, 1925, tenants in common were each of them entitled to possession. Each of them was entitled to receive and collect the rents, and each of them had the right given him by 4 & 5 Anne, c. 3, to call upon the other to account if he had received more than his share. They were the legal owners of the land, but, when midnight of Dec. 31, 1925, arrived, the position was entirely changed. They then acquired a character which they had not acquired before—namely, the character of trustees. The previous relationship of tenants in common, or joint tenants, had nothing to do with trusteeship. It was, of course, possible for tenants in common by appropriate conveyancing methods to introduce the conception of trusteeship into their relationship, but the mere fact that they were tenants in common introduced no fiduciary element at all. Under the Law of Property Act, 1925, that fiduciary element unquestionably came into the picture, and it constitutes a trust under which their obligation as trustees is an obligation to sell the property and divide the proceeds, and in the meantime their possession is the possession of trustees, because it is in that capacity that they hold the legal title. Their receipts of the rent would be in the same capacity—namely, as reversioners holding the reversion expectant on the determination of the lease. Of course, they have another character as well, that of beneficiaries. Each of them is a trustee and each of them is a beneficiary. Nevertheless, as from that midnight, the character in which they, if they act jointly, or one of them, if one acts alone, receive or receives rent is entirely different from the character in which the same persons or person would have received it before that midnight. Their obligations with regard to rent received are *prima facie* the usual obliga-

tions of trustees. I may add in passing that, where there are more than 4 co-owners, the effect is to vest the land in the Public Trustee, and, assuming that he receives the necessary request to act, there can be no question that, in respect of his ownership, his possession, his receipt of rents and profits, his capacity is that of a trustee, and none other.

There is one further point to which I may call attention in this connection. Under the old law, when one tenant in common died, his heir or devisee before 1897, and since 1897 his legal personal representative, succeeded to his rights and succeeded to his rights at law, with the result that that legal personal representative had, equally with the surviving tenant in common, a right to possession and a right to receive the rents and profits. One result of the Law of Property Act, 1925, is to take that right away. When one tenant in common dies now (I will still call him a tenant in common), his legal personal representatives have no right to go into possession, and have no right to collect the rents. That right survives, and survives only, to the survivor in his capacity as surviving trustee, and, unless and until another trustee is appointed, his hand, and his hand alone, is the hand to receive the rents. A B C

That has some bearing, as will at once appear, upon the question with which I am now about to deal, because the effect of the Act has been to deprive the legal personal representative of a deceased co-owner of any right himself to go into possession or to obtain the rents, and by that means prevent the other co-owner from continuing to enjoy the currency of the Statute of Limitations, if (as it is argued) it still applies. If he wished to stop the running of time (assuming that it does run), he would have to take more elaborate proceedings to do it. D E

Prima facie (and this is really, I think, not disputed by counsel for the respondent), the Real Property Limitation Act, 1833, s. 12, does not upon its face contain language apt to apply to the situation as it has existed since Dec. 31, 1925. Sect. 12 is contemplating a quite different state of affairs from that which now exists. It is contemplating the legal ownership of land owned by joint tenants, tenants in common or co-parceners, carrying with it the rights which those interests conferred. The language is quite inapt to cover the case of one of two trustees who are also their own beneficiaries, and for the reason, if for none other, that a trustee in possession can never be possessing for his own benefit. He can never be receiving rents and profits for his own benefit. Therefore, if the matter had stood there, I should have had no difficulty in coming to the conclusion that sect. 12 of the Act of 1833 has no application to the case, and that the period since Dec. 31, 1925, must, for the purpose of the Statute of Limitations, be dealt with upon the footing that the possession of Mr. Landi was the possession of a trustee in whose favour no Statute of Limitations could run, because he would have been in possession of trust property, and the rents which he received would have been trust property, and he therefore would have been accountable for the entirety as from Jan., 1926. F G H

In answer to that argument, however, attention is called to the Law of Property Act, 1925, s. 12, which provides as follows :

Nothing in this part of this Act affects the operation of any statute, or of the general law for the limitation of actions or proceedings relating to land. . . .

- I need not read the rest, which deals with easements and things of that kind. It is said that, before the Act came into operation, the Statute of Limitations relevant to the case embodied sect. 12 of the Act of 1833 (a section which enured for the benefit of a tenant in common who had been in possession for his own benefit), and that the language of sect. 12 of the Act of 1925 must be construed so as to lead to the result that a tenant in common who had been in possession for his own benefit previously to Dec. 31, 1925, should be considered thereafter as still remaining in possession in a similar character, notwithstanding the fact that he had had imposed upon him by the Act the character of a trustee. It is said that, unless that effect be given to the Law of Property Act, 1925, s. 12, the curious result will be produced that sect. 12 of the Act of 1833 is left upon the statute book with no apparent subject-matter upon which it can act. That argument is one which does not particularly impress me, because it would not be strange to find, in dealing with this very complicated and novel land legislation, that a particular section like that had been left unrepealed. I do not know that that section may not have some scope or operation in regard to other matters. It may have some operation in a case where there are more than four co-owners. I do not know, and I do not pause to inquire whether there might not be a case where it might still have an operation. However, even if there are no such cases, I should not be embarrassed by that argument. Moreover, in passing, it is worth noticing that many of the repeals consequential upon this legislation were not made until later, because the necessity had escaped the observation of the legislature at the time. For example, the section of the Act 4 & 5 Anne, c. 3, which conferred the right on one co-owner to obtain an account from his fellow co-owner, although it had become unnecessary and obsolete by the passing of the Law of Property Act, 1922, was not repealed until the Act of 1924. However that may be, I find myself unable, as a matter of construction, to give to the Law of Property Act, 1925, s. 12, the effect which is claimed for it. To make sect. 12 of the Act of 1833 apt to cover the present position under which co-owners are trustees would involve an alteration of its language, which I myself find extremely difficult to make, because it would involve recasting the whole of a section aimed, as I have already said, at one particular type of right in order to fit it to a totally different type of right. I cannot extract any such wide and sweeping effect from the language of sect. 12 of the Act of 1925, which appears to me to be directed to very much simpler matters. It is further to be noticed—and this, I think, is a very important aspect of the matter, as was pointed out by CLAUSON, L.J., in the course of the argument—that land is defined by sect. 205 of the Act, unless the context

otherwise requires, as excluding an undivided share in land. That is not inconsistent with, and, indeed, as CLAUSON, L.J., pointed out, flows from, the scheme of the Act in dealing with undivided shares. It is worth noticing that the section which first introduced that scheme—namely, the Law of Property Act, 1922, s. 10—is expressed as follows :

For removing the difficulties incidental to land being held in undivided shares, and for preventing the creation of undivided shares in land, except under a settlement and behind a trust for sale, the provisions contained in the third schedule to this Act (under which land held in undivided shares is vested or will become vested in trustees on trust for sale) shall have effect.

The object, therefore, was to get rid of well-known practical inconveniences and substitute for the real rights of the co-owners personal rights by converting their interests into personalty by virtue of the statutory trust for sale, and this was done by putting up the screen, so to speak, of the trusteeship affecting the legal estate, and keeping the beneficial interests behind it. That being the position, and interests of co-owners being now interests which merely entitle them to enforce the trusts for sale and to secure by proper means their proper share of the proceeds and the rents until sale, it was natural that, in the definition of land, undivided shares should be excluded. Therefore, on that ground, if on no other, I should be prepared to say that sect. 12 of the Act of 1925 has no application to the present case. However, that is only an additional ground reinforcing, I think, the view which I have expressed—namely, that, applying sect. 12 of the Act of 1925, sect. 35 of that Act, and sect. 12 of the Act of 1833 to the circumstances of this case, it is not possible so to construe them as to give to them the joint effect for which counsel for the respondent contends. I can myself see no reason in good sense why the legislature should have wished to enable trustees of this character to be in any better position with regard to the Statute of Limitations than any other trustees, or than the Public Trustee himself is in a case where land held in undivided shares vests in him. If the legislature had wished to do that, I cannot bring myself to believe that it would have done it by leaving its intention to be extracted by applying sect. 12 of the Act of 1833 to a set of facts to which its language is hopelessly inappropriate and by producing that result by such language as that of the Law of Property Act, 1925, s. 12. If my reasoning is correct, the Statute of Limitations has not run against the present claimant either with regard to her title as representative of Mr. Fantoni or with regard to her right to call for his share of the past rents.

The only matter which remains is the question how far she can recover those rents. It follows necessarily, from the reasoning which I have endeavoured to expound, that, as from Jan. 1, 1926, Mr. Landi received the rents in the character of trustee, that no Statute of Limitations in respect of the rents so received, being trust moneys, could run in his favour, and that, therefore, the claimant is entitled to receive the rents as far back as that time. With regard to the rents between the end of 1923, when they first began to come in, and midnight of Dec. 31, 1925,

- Mr. Fantoni's right in 1924 and 1925 with regard to them was a right to claim an account of them and payment under the statute of 4 & 5 Anne, c. 3, and, even assuming in the claimant's favour that all the other various questions were answered favourably to her, she would still admittedly be met, in respect of those rents, with the fatal answer that the
- A period of limitation for a claim to an account conferred by statute is 6 years. The result is that Mr. Fantoni's right in his lifetime was barred in respect of the rents during that period, 6 years after they were received. Accordingly, the right of the claimant to recover is limited to rents as from Jan. 1, 1926, but it extends to all the rents received since that date.
- B For these reasons, I am of opinion that the order must be varied or discharged in order to give effect to the judgment which I have just delivered. When I said "rents," I meant, of course, the net rents less outgoings.

C CLAUSON, L.J.: I agree for the reasons given by SIR WILFRID GREENE, M.R.

GODDARD, L.J.: I agree.

Solicitors: *Clyde & Co.* (for the appellant); *B. Hoddinott & Son* (for the respondent).

D [Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

GIBBONS v. WESTMINSTER BANK, LTD.

E [KING'S BENCH DIVISION (Lawrence, J.), **June 20, 1939.**]

Bankers—Cheque—Wrongful dishonour—Non-trader—Proof of damage.

A bank wrongfully dishonoured a cheque of the plaintiff, who was not a trader. The plaintiff did not, in the statement of claim, plead any matters showing a loss of credit, but proved that, after the cheque was dishonoured, her landlords had asked her to pay her rent in cash, and not by cheque:—

F HELD: (i) the plaintiff, not being a trader, was entitled to only nominal damages in respect of the wrongful dishonour of a cheque by her bank.

(ii) in the circumstances, the plaintiff was not entitled to leave to amend the statement of claim.

G [EDITORIAL NOTE. It appears that, while there is a line of authorities establishing the right of a trader to substantial damages in respect of the dishonour of his cheque without the necessity of pleading or proving actual damages, it has never been decided that the corollary to that proposition—that is, that a non-trader is entitled to only nominal damages—is the law. The present decision establishes that proposition.

H AS TO WRONGFUL DISHONOUR, see HALSBURY, *Hailsham Edn.*, Vol. 1, p. 827, para. 1348; and FOR CASES, see DIGEST, Vol. 3, pp. 217-221, Nos. 549-570.]

Cases referred to:

(1) *Marzetti v. Williams* (1830), 1 B. & Ad. 415; 17 Digest 81, 21; 9 L.J.O.S.K.B. 42.

(2) *Rolin v. Steward* (1854), 14 C.B. 595; 17 Digest 122, 306; 23 L.J.C.P. 148; *sub nom. Rollin v. Steward*, 23 L.T.O.S. 114.

(3) *Bank of New South Wales v. Milvain* (1884), 10 V.L.R. 3; 3 Digest 220, case w.

(4) *Kinlan v. Ulster Bank, Ltd.*, [1928] I.R. 171; Digest Supp.

(5) *Addis v. Gramophone Co., Ltd.*, [1909] A.C. 488; 17 Digest 78, 1; 78 L.J.K.B. 1122; 101 L.T. 466.

ACTION claiming damages for the dishonouring by the defendants of a cheque drawn by the plaintiff when her account was in funds. The facts are fully set out in the judgment.

G. H. Oliver for the plaintiff.

B. B. Stenham for the defendants.

LAWRENCE, J. : In this case, the plaintiff brought an action against the defendant bank for dishonouring a cheque of hers when her account was in funds. The cheque was dishonoured owing to a mistake. The plaintiff had paid in previously a sum of money, and this had been credited, by a slip, to a wrong account, and the bank was therefore under the impression that the plaintiff had no funds to meet her cheque. She gave a cheque to her landlords for her rent, and this cheque was dishonoured. She went and saw the bank manager when she heard of this, and she was paid £1 ls. by the bank manager, and the question which was fought out before the jury was whether she accepted that £1 ls. which was so paid to her by the bank manager in full satisfaction of any claim she might have in respect of the dishonour of her cheque. The jury found that she did not so accept it.

The question was raised at an early stage of the case, on behalf of the defendants, whether the plaintiff was entitled to nominal damages only, as she had not pleaded any special or actual damage, and it was agreed between counsel that the question of damages should be left to the jury and that this question as to whether the plaintiff was entitled to recover anything more than nominal damages should be considered after the jury had given their verdict on the basis that she was entitled to recover substantial damages. The jury accordingly gave their verdict for the amount of substantial damages to which they thought she was entitled—namely, the sum of £50. It has now been argued before me as to whether the plaintiff is entitled to anything more than nominal damages for the dishonour of her cheque by the defendant bank. It has also been argued before me that the plaintiff ought to have leave to amend the pleading so as to allege as special damage the damage which it is said she suffered from the dishonour of this cheque, in that on Aug. 18, Messrs. Ainslie, her landlords, wrote to her as follows :

In view, however, of the unsatisfactory way in which your rent has been paid in the past, and the incident of your cheque being returned on the last occasion, we think it is easier for all concerned if you were to remit your rent in future in cash.

Since that date, the plaintiff says that she has had to remit her rent in cash. I do not think that it would be right for me to allow an amendment in respect of this alleged damage. The letter in question was not

pleaded, and nothing was pleaded in regard to any actual damage of that sort suffered by the plaintiff. The letter was not disclosed until after a payment in had been made, the amount of which I do not know, and it would, therefore, be an obvious injustice to the defendant to allow the plaintiff to raise the other matter of special damage at this stage.

A Therefore, I refuse the application for an amendment of the pleading, and I have to consider the question whether or not the plaintiff, who, it is argued, is a trader, is entitled to recover more than nominal damages for the dishonour of her cheque without pleading or proving special damage.

B The authorities which have been cited to me all lay down that a trader is entitled to recover substantial damages without pleading and proving actual damage for the dishonour of his cheque, but it has never been held that that exception to the general rule as to the measure of damages for breach of contract extends to anyone who is not a trader.

C The cases in which this view has been taken, and which have been cited to me, are *Marzetti v. Williams* (1), *Rolin v. Steward* (2), *Bank of New South Wales v. Milvain* (3) and *Kinlan v. Ulster Bank, Ltd.* (4). The rule is so expressed in GRANT ON BANKING, 7th Edn., pp. 88, 89, and in SMITH'S LEADING CASES, 13th Edn., Vol. 2, p. 574, where it is

D also stated that the exception to the general rule is an exception which ought not to be extended, and reference there is made to the opinion of LORD ATKINSON in the House of Lords in *Addis v. Gramophone Co., Ltd.* (5), at p. 495. In my opinion, I ought to treat this matter as covered by these authorities, and I must hold that the corollary of the proposition

E which is laid down by these cases is the law—namely, that a person who is not a trader is not entitled to recover substantial damages unless the damages are alleged and proved as special damages. I am therefore of opinion that the plaintiff, whom I hold not to be a trader, is entitled to recover only nominal damages, and she will have judgment for 40s.

F Judgment for the plaintiff for 40s.

Solicitors: *H. G. Taunton* (for the plaintiff); *Alfred Bright & Sons* (for the defendants).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

G

WESTHOUGHTON COAL AND CANNEL CO., LTD. v. WIGAN COAL CORPORATION, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), June 15, 16, 19, 20, 21, July 6, 1939.]

H

Mines—Flooding—After defendants' mines abandoned—Due to presence of artificial work outside their land—No right in defendants to interfere with artificial work.

For the purpose of draining a number of coal mines, water was allowed to flow to a pumping-pit and there pumped out of the mines. In order to facilitate the water reaching the pumping-pit, a tunnel was

made in 1886 for the defendants, but this tunnel was outside the defendants' property, and, after 1916, the defendants had no interest in, or right to interfere with, the tunnel. From 1886 to 1932, the defendants, by means of their pumping-plant, kept their own and adjacent mines free from water, but at no time did they do this under any agreement with the plaintiffs. By 1932, the defendants' mines in the neighbourhood of the pumping-station had been worked out, and in Aug., 1932, the defendants ceased pumping. As a result, the water accumulated in the pumping-pit, and in 1933 the plaintiffs' mines were flooded. It was contended that the defendants were liable to the plaintiffs in respect of such flooding because by having the tunnel constructed the defendants had diverted the water to the pumping-pit, whence it had overflowed into the plaintiffs' property :—

HELD : as the defendants had no power to stop the water from flowing through the tunnel, it could not be said that at the relevant time they were causing or permitting the water to flow into the plaintiffs' mine, and they were not liable in damages to the plaintiffs for such flooding.

[EDITORIAL NOTE.] The judgment in this case is concerned only with the increased amount of water which collected on the defendants' premises because of the construction of the tunnel. The tunnel was an artificial work, and the diversion of the water through it, if it resulted in damage to third parties, was a matter which might render the defendants liable in damages. However, the defendants are here held not to be liable for damage resulting from water flowing through the tunnel at a time when they had no right to block up the tunnel or otherwise prevent the water from flowing through it. The fact that the defendants had for many years for their own benefit pumped away such water gave the plaintiffs no right to a continuance of the benefit to them of such pumping.

AS TO LIABILITY FOR FLOODING, see HALSBURY, *Hailsham Edn.*, Vol. 22, pp. 669-671, paras. 1438-1443 ; and FOR CASES, see DIGEST, Vol. 34, pp. 724-727, Nos. 1063-1086.]

Cases referred to :

- (1) *Hanson v. Wearmouth Coal Co., Ltd., & Sunderland Gas Co.*, [1939] 3 All E.R. 47 ; Digest Supp.
- (2) *Smith v. Kenrick* (1849), 7 C.B. 515 ; 34 Digest 725, 1067 ; 18 L.J.C.P. 172 ; 12 L.T.O.S. 556.
- (3) *Roswell v. Prior* (1701), Holt, K.B. 500 ; 36 Digest 215, 581.
- (4) *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co.*, [1921] 2 A.C. 465 ; 36 Digest 192, 332, 90 L.J.K.B. 1252 ; 126 L.T. 70 ; *affg.*, [1920] 2 K.B. 487.

APPEAL by the plaintiffs from an order of LUXMOORE, L.J., sitting as an additional judge of the Chancery Division, dated Jan. 11, 1939. The facts are fully set out in the judgment of the court delivered by GODDARD, L.J.

K. E. Shelley, K.C., Hon. H. Fletcher Moulton and W. J. Kenneth Diplock for the appellants.

Hon. Sir Stafford Cripps, K.C., C. E. Harman, K.C., Wilfrid M. Hunt and G. Granville Slack for the respondents.

Shelley, K.C. : It was the act done by the defendants in 1886 which caused the water to reach the plaintiffs in 1933. The defendants had an opportunity of preventing the consequences of their act from injuring the plaintiffs, and they did not take advantage of that opportunity. It can make no difference that the defendants had put it out of their power

to stop the flow of water when it came to the plaintiffs. The defendants had caused the tunnel to be constructed, and, if they wanted to avoid liability, they should have put matters back as they were. They cannot escape liability by saying that they are no longer in charge of the water. This water would not have got through if it had not been for some act
A of man. The persons who have done the acts which have permitted the water to reach the plaintiffs are the defendants themselves and the Scot Lane company who built the tunnel: *Hanson v. Wearmouth Coal Co., Ltd., & Sunderland Gas Co.* (1). The defendants have undoubtedly adopted the act of the Scot Lane company. The only possible defence
B is that it was the proper and normal working of the mine. That defence has not been set up. No Statute of Limitations is available. The pumping agreement was in force until 1931. It would have been contrary to the implied licence in existence for the Scot Lane company to have blocked up the way. The passage of water through Scot Lane
C was something the defendants had a right to compel. The existence of the wayleave in Scot Lane shows that the defendants were in fact bringing this water down to their own mine. When they stopped pumping, they did not stop bringing the water down. The defendants still continue to bring down the water by artificial means. The person who interferes
D with the natural course of water is primarily liable for the consequences. The only defence is that based upon *Smith v. Kenrick* (2). [Counsel referred to *Roswell v. Prior* (3) and *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co.* (4).]

E GODDARD, L.J. [delivering the judgment of the court]: This is an appeal from a judgment of LUXMOORE, L.J., sitting as an additional judge of the Chancery Division, dismissing an action brought by the plaintiffs, who claimed damages for the flooding of a mine worked by them known as the Westhoughton Bone Mine, situate in the South
F Lancashire coalfield. They alleged that this mine had been flooded by water introduced into the mine on or after Aug. 11, 1933, coming from other workings in the neighbourhood known as the Ridgways workings, and that the defendants were responsible for bringing this water from the latter into their Bone Mine. Further claims were made
G in respect of floodings of other mines of the plaintiffs, but it was conceded by them that, if the defendants were not liable in respect of the Bone Mine, neither were they liable for what happened at the other mines.

In this coalfield there are several seams of coal worked from shafts belonging to various owners, and for the purpose of this judgment it is
H necessary to mention only four—namely, the Cannel, which is nearest the surface, the King Coal, which is next beneath it, the Bone, which is still lower, and the Arley, which is the deepest of all. The plaintiffs, mines are situate to the south of the area with which we are concerned. To the north-west of their mines lies the Scot Lane mining area, and this is intersected by a large fault running roughly north and south. To the west

of, and adjoining, the Scot Lane workings lies a large area, which was worked by the defendants, who also owned a pumping-station known as the Aspull pumping-pit, where for many years they pumped water rising, not only in their own pits, but also in the Scot Lane area. Towards the north of the Scot Lane area, and to the west of the fault, is a group of three pits known as Scot Lane Nos. 1, 2 and 5, and to the south, quite close to the defendants' pumping-pit, is another Scot Lane shaft, known as No. 4. To the north-east of the Scot Lane area, and east of the fault, are some old workings called Ridgways, and this area was in part separated from Scot Lane by some mining land owned by one Dorning. Until 1886, there had been on Ridgways land a pumping-station which dealt with the water in the King Coal seam, but in 1886 or 1887 it was closed down, in circumstances which will appear hereafter.

In 1871, an agreement was made between the defendants and the owners of the Scot Lane area whereby the former undertook to pump at the Aspull pit all the water which came to that pit from the Scot Lane workings for an annual payment of £600. The agreement was for a period of 20 years, with a right to extend it for a further 10 years, and in fact it was from time to time extended till a new agreement was made for the same service in Feb., 1924.

In 1886, the defendants were minded to work the coal in the Arley seam lying under or near the Ridgways land. The freeholder of the Ridgways coal was Mr. Roger Leigh, and the lease which he had granted to Ridgways expired in 1885, as appears from the recitals to an agreement dated July 31, 1886, made between Ridgways and the defendants. From that agreement it also appears that Ridgways had to remove the pumping-plant from the land within 12 months of the expiration of their lease. The defendants, however, would have to deal with the water in the Ridgways area at the King Coal level in order to protect their workings in the Arley seam, and, accordingly, as appears from the agreement, they agreed with Ridgways to buy and continue to work that pumping-plant till they were able to draw off the water from the King Coal level to their pumping-plant at Aspull. To enable them to do this, a tunnel had to be driven from the Ridgways area, through the land owned by Dorning, thence through part of the Scot Lane area, whence it passed again through some of Dorning's land and finally emerged again on the Scot Lane area. The water would pass through this tunnel and flow to the Scot Lane pit No. 1 on the Cannel seam, which there adjoined the King Coal seam owing to the fault. Thence the water passed down the shaft to the road known as the King Coal water-road in the Scot Lane workings, and so to the Aspull pumping-pit.

The agreement between Ridgways and the defendants shows that the latter had an agreement with Mr. Leigh enabling them to construct this tunnel, and, by an indenture of even date with the agreement, Dorning granted the defendants an easement of waterway through

- his land for a term of 30 years, expiring in 1916, at a rent of £10 per annum. There was never any written agreement as to this tunnel, or as to the water flowing through it, with the Scot Lane owners, but there is no question but that they made the whole of the tunnel in question for, and at the cost of, the defendants, who also paid for its maintenance. This tunnel was referred to throughout as Tunnel I.B.
- A So matters continued till June, 1906. In that month, the Scot Lane owners gave notice to the defendants that they intended to stop working the King Coal mine, and inquired whether the defendants wished them to keep open the tunnel in question, to do which would have involved
- B keeping an engine-winder and furnace-man at the pits. The defendants determined not to go to this expense, and to rely on the water finding its own way down the tunnel and thence to the pumping-station. They continued to pay the rent reserved to Dorning under the indenture of 1886 until June, 1916, when the term expired and was not renewed.
- C In fact, since 1906 no one had ever troubled about the tunnel, and nothing had been done by way of repair or maintenance, but water continued to pass down it from the Ridgways area, and it must be assumed that it was continuing to do so in 1932 and 1933.

- On Feb. 8, 1924, a new agreement was made between the defendants
- D and the owners of the Scot Lane area, under which the defendants agreed for a payment of £500 per annum to pump at the Aspull station all the water from their mines and all the water from the Cannel and King Coal mines of the Scot Lane company, and certain other waters not material to this action, for a period of 6 years and thereafter till either party
- E gave the other 12 months' notice to determine the agreement. There was also a provision that, if the defendants gave this notice, the Scot Lane company were entitled to buy the defendants' interest in the pumping-plant, shaft and surface-works, so as to enable them to dispose of their water.
- F On June 27, 1930, the defendants gave notice to the Scot Lane company of their intention to determine this agreement on June 30, 1931, but in fact they continued to pump at Aspull till Aug. 11, 1932, when the station was closed down, presumably because the defendants' mines in the neighbourhood were worked out and were being abandoned. The
- G inevitable result was the formation of a large pound of underground water in the neighbourhood of the Aspull pumping-shaft, which was fed in part by the water which was still flowing down Tunnel I.B. and thence down the route above described. It is with regard to this water that the plaintiffs complain. Their case is that, as the water rose, it banked up
- H in the Scot Lane workings, and, when it reached a certain height, it flowed through openings in the area, in particular one or both of the roadways which had been driven through the fault of the Scot Lane company in connection with their workings, which gave it access ultimately to the plaintiffs' mine. They contended that the water in the Scot Lane area was increased in volume by that introduced by artificial means—namely,

the tunnel—from the Ridgways area, and so their mine was flooded sooner than it otherwise would have been but for the added water.

The evidence in this case was very voluminous, and counsel for the appellants, when opening the appeal, suggested that in everyone's interest it would be desirable to argue first a question of law based on an assumption most favourable to his case, admitting that, if he were A wrong in law on this assumption, he could not succeed in the appeal. To this course counsel for the respondents assented, and accordingly the argument proceeded on the following assumption of fact, which was put into writing and assented to by both parties. The judge found that, when pumping ceased, Ridgways water was still flowing through B Tunnel I.B. There is no reason to suppose that it ceased flowing at once. Assume that the water continued to flow for some reasonable time—say a week. It thus contributed to the formation of a corpus of water. The accumulation formed is (a) partly on the defendants' land and partly on the Scot Lane area, or, alternatively (b) on the Scot Lane area. C The water which came to the plaintiffs' land could only have come from that corpus of water. Accordingly, it came by reason of the overflow of a corpus of water which had been fed by water brought into it from the Ridgways area by the defendants' own voluntary act. The voluntary act was the construction of Tunnel I.B., which, at the time it was con- D structed, was a proper miner-like operation for the purpose of conducting the Ridgways water to the Aspull pumping-station, thereby facilitating the winning of the defendants' coal in another and lower mine.

For the purpose of the argument, and without deciding the point, the court is prepared to accept the contention of the appellants that, if E a mining lessee, in the course of working his mine, artificially diverts a flow of water, whether in his own or in a neighbouring mine, by a work constructed solely for that purpose, with the result that the diverted water would, but for a precaution taken by the lessee—for example, pumping—find its way into a neighbour's mine, and if the precaution F is afterwards abandoned so that the water does invade the neighbour's mine, he is liable. This, in our opinion, is the highest at which the proposition can be put, and, in accepting it for the sake of the argument, we express no opinion as to whether it makes any difference if it be found that the artificial work or diversion was or was not a proper miner-like G operation.

The point which we have to decide, however, is whether, taking this assumption in conjunction with the history of the case above set out, it can be said that the defendants have been bringing and were continuing to bring, at the relevant times—that is, from Aug., 1932, to H Aug., 1933, when the flooding took place—relevant water into the plaintiffs' mine. By relevant water is meant water which caused the flooding. In our opinion, it cannot. The defendants committed no wrong towards anyone in making the tunnel, or in bringing the water on to the Scot Lane workings, during the period they had control of the tunnel. They

had no interest in, or right to interfere with, the tunnel after 1916. The owners of the Scot Lane mines raised no objection to the water being brought on to their area after 1916. Both before and after that year, they took care of the water, if one may use that expression, by arranging with the defendants to pump it for them. When the agreement of 1924
 A expired, however, the defendants were under no duty to the Scot Lane company or to anyone else to pump any water which might be in the Scot Lane workings. It is true that the water accumulated at the sump of the Aspull pit, which was on the defendants' land, but it was from the Scot Lane area that it flowed to the sump, and it was from the Scot Lane
 B area that it escaped to the plaintiffs' mine. It is also true that, on the assumed facts, the presence of Ridgways water in the plaintiffs' mine was, as a matter of history, due to the construction of Tunnel 1.B. Nevertheless, at no time when the defendants had control of the tunnel did the Ridgways water reach the plaintiffs' mine. At the relevant
 C time—namely, the period following the cessation of pumping in Aug., 1932—Ridgways water was flowing through the tunnel to the Scot Lane workings, but for this flow the defendants, who had ceased to possess any right in respect of the tunnel some 16 years before, cannot be held to be responsible. The tunnel was not under their land. They had no
 D power to stop the flow of water in it, and we are unable to see how, on any view, it can be said that at the relevant time they were causing or permitting this water to flow into the plaintiffs' mine. Nor can it make any difference if it be assumed that, on its way to the Scot Lane mine, the Ridgways water which contributed to the flooding passed through
 E part of the defendants' mine at or near the Aspull pumping-station.

Upon the facts, the defendants were not at this time responsible for the presence of Ridgways water in their mine. It came to them from another area—namely, Ridgways—by a route over which they had no control whatever. They were perfectly entitled to let it flow through
 F their mine into the Scot Lane mine, and were not bound to do anything to stop it reaching the plaintiffs' workings *via* the Scot Lane mine. Accordingly, if the plaintiffs have a remedy against anyone, it is not against the defendants. In thus disposing of the appeal, we are deciding the case on grounds different from those upon which LUXMOORE, L.J.,
 G dealt with it, but, as we agree with him in the result, it is unnecessary for us to deal with the grounds upon which he founded his judgment.

Appeal dismissed with costs.

Solicitors : *W. Pingree Ellen*, agent for *Peace & Darlington*, Liverpool
 H (for the appellants) ; *Gregory, Rowcliffe & Co.*, agents for *Grundy, Kershaw, Farrar & Co.*, Manchester (for the respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

Re COOPER, LE NEVE FOSTER *v.* NATIONAL PROVINCIAL BANK, LTD., AND OTHERS.[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.),
July 6, 1939.]

Wills—Secret trust—Revocation of will—Secret trust excepted from revocation
—Sum subject to secret trust increased by later will—Increase not com- A
municated to trustees—Failure of increased gift.

In Feb., 1938, the testator appointed F. and W. executors of his will, and made, *inter alia*, the following bequest: "I bequeath to the said F. and W. the sum of £5,000 . . . upon the trusts which I have already communicated to them with respect thereto." The testator communicated to F. and W. that that sum of £5,000 was to be held on protective trusts for the benefit of the last defendant during her lifetime. In Mar., 1938, the testator revoked that will, and thereby restored a will made by him in 1931, and provided as follows: "The sum of £5,000 bequeathed to my trustees in the will now cancelled is to be increased to £10,000 they knowing my wishes regarding this sum." It being admitted that the gift of £5,000 made by the will of Feb., 1938, was excepted from the cancellation of that will, the question arose whether there was a valid secret trust in respect of the additional £5,000 contained in the will of Mar., 1938:— B

HELD: as there was no communication to the trustees in respect of the additional sum of £5,000, there was no acceptance by them of the trust in respect of that sum, and no trust was created. Although the testator may have intended to confer an additional benefit on the beneficiary, the additional gift failed. C

Decision of CROSSMAN, J. ([1939] 2 All E.R. 192) *affirmed*. D

[EDITORIAL NOTE. It is settled that, in order that a secret trust may be enforceable, the terms of the trust must be communicated to, and accepted by, the trustee. Here the terms had been communicated in so far as the first gift of £5,000 was concerned, but that communication could not be extended to a second gift of £5,000, although that gift was in terms an extension of the former gift. E

AS TO COMMUNICATION OF SECRET TRUSTS, see HALSBURY, 1st Edn., Vol. 28, Trusts, pp. 21, 22, paras. 34, 35; and FOR CASES, see DIGEST, Vol. 43, pp. 601, 602, Nos. 486-491.]

-Cases referred to:

- (1) *Blackwell v. Blackwell*, [1929] A.C. 318; Digest Supp.; 98 L.J.Ch. 251; 140 L.T. 444.
- (2) *Re White, Knight v. Briggs*, [1925] Ch. 179; 44 Digest 394, 2272; 94 L.J.Ch. 211; 132 L.T. 481.

APPEAL by the defendant, the beneficiary under the secret trust, from an order of CROSSMAN, J., dated Mar. 17, 1939, and reported [1939] 2 All E.R. 192, where the facts are fully set out. G

H. B. Vaisey, K.C., and *Roger W. Turnbull* for the appellant.

J. V. Nesbitt for the respondents the widow and children of the testator.

Wilfrid M. Hunt for the respondents the trustees. H

Vaisey, K.C.: The terms of the trust were already ascertainable, and were embodied in a document. So long as it can be ascertained, outside the will, what the trusts are, there is no objection. CROSSMAN, J., seems to have thought that, because the trustees agreed only to administer

a trust of £5,000, they could not be required to administer one of £10,000. That must be fallacious. There are trusts formulated and ascertained with regard to £5,000. It is difficult to see why the testator could not leave £10,000 for the purpose. The trusts were of the most simple description. The terms applied to whatever pecuniary legacy

- A was received by the trustees on the testator's death, irrespective of the amount of the legacy. The testator knew that the trustees had no objection to a particular amount, and he relied upon that. A sum could be left to the trustees of a marriage settlement to be held upon the same trusts. No one can doubt what the testator intended, and
B there is a good trust for £10,000. [Counsel referred to *Blackwell v. Blackwell* (1) and *Re White, Knight v. Briggs* (2).]

Counsel for the respondents were not called upon.

- SIR WILFRID GREENE, M.R. : In this case, it is not possible to give
C effect to what the testator obviously desired, because he has not taken the steps which the law requires to enable that desire to become effective. He was minded to make a disposition by means of what is commonly called a secret trust. That is to say, he was not disposed to set out upon the face of his will, or upon the face of some identifiable document
D described in his will, the dispositions which he desired to make. Accordingly, he adopted the familiar device of bequeathing in favour of named persons a legacy which they were to hold as trustees. The actual trusts upon which they were to hold it, however, had been communicated by him to them, and accepted by them, in his lifetime. In order that a
E disposition which it is desired to make by that process can be effective, it is necessary that the intention of the testator be communicated to the trustees, that the trustees accept the instructions of the testator, and that, acting on the faith of that acceptance, the testator makes the gift, or, if it is a gift which has been already made, leaves it unrevoked.
F It would be better if, instead of using language of my own which I have just used, I were to take three short passages from the opinions delivered in the House of Lords in *Blackwell v. Blackwell* (1). First of all, LORD BUCKMASTER says, at p. 329 :

- G It is, I think, more accurate to say that a testator having been induced to make a gift on trust in his will in reliance on the clear promise by the trustee that such trust will be executed in favour of certain named persons, the trustee is not at liberty to suppress the evidence of the trust and thus destroy the whole object of its creation, in fraud of the beneficiaries.

Then VISCOUNT SUMNER says, at p. 334 :

- H The necessary elements, on which the question turns, are intention, communication, and acquiescence. The testator intends his absolute gift to be employed as he and not as the donee desires ; he tells the proposed donee of this intention and, either by express promise or by the tacit promise, which is signified by acquiescence, the proposed donee encourages him to bequeath the money in the faith that his intentions will be carried out.

Then LORD WARRINGTON OF CLYFFE says, at p. 341 :

It has long been settled that if a gift be made to a person or persons in terms absolutely but in fact upon a trust communicated to the legatee and accepted by

him, the legatee would be bound to give effect to the trust, on the principle that the gift may be presumed to have been made on the faith of his acceptance of the trust, and a refusal after the death of the testator to give effect to it would be a fraud on the part of the legatee. Of course in these cases the trust is proved by parol evidence, and such evidence is clearly admissible.

I may say with regard to the presence of the word "absolutely" in that paragraph that LORD WARRINGTON OF CLYFFE was there referring to the class of case where, on the face of the will, the gift is absolute. One of the matters decided in *Blackwell v. Blackwell* (1), however, was that similar principles apply where the gift on the face of the will is a trust gift. Therefore, if a testator is minded to make use of the machinery of a secret trust, there must be present those elements to which reference is made in the extracts which I have read—namely, communication to the trustees, acceptance by the trustees, and the execution of the will or the codicil in reliance upon that acceptance.

In the present case, there is no question that, when the testator made his will of Feb. 10, 1938, the legacy of £5,000 thereby bequeathed to the two named trustees was effectively given and the giving of it complied with the requirements of a secret trust. The terms had been communicated, the trustees had acquiesced, and the testator made his will upon the faith of that acquiescence. However, the only trust which was in the picture on that occasion was one which related to a defined and stated sum of £5,000. That was the legacy the intention to bequeath which was communicated to the trustees. That was the legacy in respect of which they gave their acceptance. That was the legacy which the testator, induced by that acceptance, in fact bequeathed. At a later date, when, after an unfortunate sudden illness, which proved fatal in Kenya, the testator made a will on Mar. 27, 1938, he had no communication with those trustees with regard to the dispositions which he thereby made. There was no acquiescence by the trustees in the dispositions in question. The testator made that will not induced by any such acquiescence by the trustees, although he made it quite clearly in the belief that what he was doing would be effective, and that his trustees would carry it out. Nevertheless, none of the elements necessary to constitute a valid secret trust was present on the occasion of the making of that will. The actual form of that will was the cancellation of the will of Feb., 1938, and the reinstatement of an earlier will. The will continues as follows:

The sum of £5,000 bequeathed to my trustees in the will now cancelled is to be increased to £10,000 they knowing my wishes regarding this sum.

The judge construed the testamentary instructions of the testator by saying that the original gift of £5,000 was not revoked by this will and that in substance the effect of this will was to leave that gift in the earlier will unrevoked and to add to it a further £5,000. Speaking for myself, I do not think that any difference in principle emerges based on a distinction between the revocation of the original legacy and the bequest of a new legacy of larger amount, and the leaving of the original

legacy unrevoked and the addition to it of a further sum. It does not seem to me possible to say that anything can turn on so fine a point. The substance of the matter is that, having imposed on the conscience of these two trustees the trust in relation to the legacy of £5,000, and having written that legacy into his will of Feb., 1938, by this will the

A testator in effect is giving another legacy of the same amount, to be held upon the same trusts. It seems to me that, upon the facts of this case, it is impossible to say that the acceptance by the trustees of the onus of trusteeship in relation to the first and earlier legacy is something which must be treated as having been repeated in reference to the

B second legacy, or the increased legacy, whichever way one chooses to describe it. In order that a secret trust might be made effective with regard to that added sum, in my opinion, precisely the same factors were necessary as were required to validate the original trusts—namely, communication, acceptance or acquiescence, and the making of the will

C on the faith of such acceptance or acquiescence. None of these elements, as I have said, was present. It is not possible, in my opinion, to treat the figure of £5,000, in relation to which the consent of the trustees was originally obtained, as something of no essential importance. I cannot myself see that the arrangement between the testator and the trustees

D can be construed as though it meant: “£5,000 or whatever sum I may hereafter choose to bequeath.” That is not what was said, and it was not with regard to any sum other than the £5,000 that the consciences of the trustees (to use a technical phrase) were burdened. It must not be thought from what I have been saying that some trifling

E excess of the sum actually bequeathed over the figure mentioned in the first bequest to the trustees would necessarily not be caught. Such an addition might come within the rule of *de minimis*, if the facts justified it. Similarly, it must not be thought that, if a testator, having declared to his trustees trusts in relation to a specified sum, afterwards in his

F will inserts a lesser sum, that lesser sum would not be caught by the trusts. In such a case, the greater would, I apprehend, be held to include the less. In the present case, neither of these two possible methods of dealing with the difficulty is available, because here we have something to which the rule of *de minimis* could not possibly apply, for it is an

G increase, and a very substantial increase, of the legacy originally bequeathed. There is no ground, in my opinion, which would justify the court in treating the reference to that specific sum which passed between the testator and the trustees as having significance of so loose and indeterminate a character that it could be expanded at will.

H That really disposes of this appeal. I should, however, just mention one argument which counsel for the appellant submitted to us—namely, that, on the facts of this case, we should construe the provision in question as incorporating by reference into the testamentary dispositions of the testator the trusts actually declared to his trustees. The answer to that argument is a short one. Although it is true that Mr. Swan for his own

convenience committed to writing the trusts which had been verbally declared, there is no mention on the face of the will of Mar., 1938, of that document, or of any document at all. Accordingly, there is no question here of incorporating by reference into a will the terms of some existing document described sufficiently and identified in the will itself. The result is that the judgment of CROSSMAN, J., in my opinion, was perfectly A right, and the appeal must be dismissed.

CLAUSON, L.J. : I agree. CROSSMAN, J., asked himself, as it appears to me, the relevant and the crucial question as to whether or not he could, on the evidence, arrive at the conclusion that the trustees ever B accepted a trust, either impliedly or expressly, with regard to the second £5,000. He came to the conclusion that the evidence did not show that they had ever accepted such a trust, and I cannot see my way to differ from him. For those reasons, I agree that the appeal must be dismissed.

GODDARD, L.J. : I agree, and I have nothing to add. C

Appeal dismissed. Costs to come out of residue. Trustees' costs as between solicitor and client.

Solicitors : *Elvy Robb & Co.* (for the appellant) ; *Warren, Murton, Foster & Swan* (for the respondents). D

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

A. VIGERS SONS & CO., LTD. v. SWINDELL. E

[KING'S BENCH DIVISION (Asquith, J.), May 24, 26, June 14, 1939.]

Building Contracts—Building owner and subcontractor—Privity of contract—R.I.B.A. standard form of contract—Insolvency of contractor—Ratification.

On Feb. 17, 1938, the defendant entered into a contract on a standard Royal Institute of British Architects form of contract, with T. & A., F Ltd., a firm of building contractors, for the building of a block of flats, the intention of the contract being that there should be no privity of contract between the defendant and the subcontractors, even if the defendant exercised the right which she had under the contract of paying a subcontractor direct and debiting the contractor. The plaintiffs tendered for the work of flooring the flats, and in June, 1938, their tender was accepted. One B. was at all material times treated by the defendant as the architect in connection with the building. Early in June, T. & A., Ltd., went into liquidation, and on June 9 B., with the acquiescence of the defendant, wrote to T., a director of the liquidated company, informing him that it had been decided that he should take over the contract. On the same day he wrote to the defendant enclosing a copy of the letter sent to T., and also enclosing for her signature a mandate to the bank from which she had borrowed money on the security of the building advising that T. had been substituted as contractor, and authorising the bank as from June 10 to pay all subsequent amounts to T. or to such nominated subcontractors as appeared on certificates signed by the architect and countersigned by the defendant. On June 10, this mandate, duly countersigned by the defendant, was sent to the bank. On June 15, B. gave the plaintiffs a verbal order G H

to lay the flooring, and then purported to pledge the defendant's credit to the plaintiffs for the cost of the work :—

HELD : (i) so long as the original contract was not modified, B. had no authority to pledge the defendant's credit to the plaintiffs.

A (ii) the letters of June 9 and the mandate to the bank created a new contract with T. on the same terms as the original contract. They did not, therefore, create any privity of contract between the parties, nor were they evidence of an antecedent authority in B. to pledge the defendant's credit with the plaintiffs. The reference in the mandate to the payment of subcontractors by the bank, assuming that payment direct was intended, was referable to the defendant's right under the contract to pay a subcontractor direct.

B (iii) the defendant did not know before the plaintiffs had finished the work, that B. had pledged her credit to them, and had, therefore, not ratified his act in doing so.

[EDITORIAL NOTE.] The position between the various persons engaged in building operations is of importance when, as here, one party is overtaken during the period of construction by financial difficulties. In a case governed by the standard form of contract, it is held that there is no privity of contract between the building C owner and a subcontractor.

AS TO RELATIONSHIP BETWEEN BUILDING OWNER AND SUBCONTRACTOR, see HALSBURY, Hailsham Edn., Vol. 3, pp. 313-315, paras. 580-582; and FOR CASES, see DIGEST, Vol. 7, pp. 421-424, Nos. 351-368.]

Cases referred to :

- D (1) *Ramsden & Carr v. Chessum & Sons & Ward* (1913), 110 L.T. 274; 7 Digest 435, 409.
 (2) *Hampton v. Glamorgan County Council*, [1917] A.C. 13; 7 Digest 427, 375; 86 L.J.K.B. 106; 115 L.T. 726; *affg.* (1915), 84 L.J.K.B. 1506.
 (3) *Fleming v. Hector* (1836), 2 M. & W. 172; 8 Digest 515, 65; 6 L.J.Ex. 43.
 (4) *Pole v. Leask* (1863), 33 L.J.Ch. 155; 1 Digest 267, 1; 8 L.T. 645.

E ACTION to recover from the defendant the sum of £112 4s. 3d. as a reasonable price for work and labour done and materials supplied, or, alternatively, the same sum as damages for breach of contract. The facts are fully set out in the judgment.

G. O. Slade for the plaintiffs.

F *N. R. Fox-Andrews* and *John St. phenson* for the defendant.

Slade : The plaintiffs are entitled to succeed on the grounds (i) that Booth (by virtue of his office as the defendant's architect) was enabled to enter into contractual relations with the plaintiffs which were legally binding on the defendant, (ii) that Booth had express oral authority to G contract on the defendant's behalf, (iii) that the defendant's express direction to Booth gave him implied authority to contract on her behalf, and (iv) that the defendant's representation that Booth had authority to contract on her behalf amounts in law (a) to estoppel by holding out, and (b) to ratification. The plaintiffs are not bound by the original H Royal Institute of British Architects contract, as this building contract is *res inter alios acta*, in so far as the plaintiffs are concerned. The defendant's mandate to her own bankers authorised them to pay moneys direct to persons employed by her architect, Booth, thereby postulating that her architect should have authority to contract for the work.

Stephenson : Booth had no authority to pledge the defendant's credit.

Express authority is negated by the uncontradicted evidence of the defendant, and of Booth himself. The proposition that an architect *qua* architect has implied authority to pledge his employer's credit is impliedly negated by two decisions of the House of Lords, *Ramsden & Carr v. Chessum & Sons & Ward* (1), *per* VISCOUNT HALDANE, L.C., at p. 275, and *Hampton v. Glamorgan County Council* (2), *per* EARL LOREBURN, at p. 19. A No such power is included in the functions of an architect specified in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 3, p. 329 *et seq.*, para. 603 *et seq.*, and no evidence has been called, or could be called, to prove that it was customary in the profession. An agent's authority to pledge his principal's credit is less easily implied when the principal gives the agent the means of payment: *Fleming v. Hector* (3), *per* LORD ABINGER, C.B., at p. 181, and *per* PARKE, B., at p. 185. The defendant never ratified Booth's unauthorised contract, either before or after the completion of the plaintiffs' work. The fact that she never did so after the completion of the plaintiffs' work is not relied on by the plaintiffs: HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 3, p. 313, para. 518. As to the ratification of that unauthorised contract before the work was completed, the unauthorised act must be known before it can be adopted, and there is uncontradicted evidence that neither the defendant nor Castle knew of Booth's orders to the plaintiffs until after action brought. They knew that the flooring was being done, but were entitled to assume that it was being done for Taylor. The plaintiffs took the risk of Booth's warranty of authority turning out untrue, and they must pay for their failure to apply to the defendant for confirmation of it: *Pole v. Leask* (4), *per* LORD CRANWORTH, at p. 162. E

ASQUITH, J.: The work and materials in question in this case were furnished by the plaintiffs on an order given by one R. G. Booth, an architect. The order was ostensibly given on behalf of the defendant, and Booth purported to pledge her credit to pay for them. The plaintiffs say that Booth was authorised to do this, and that, since they have admittedly performed the work fully, and in an unexceptionable manner, and since also, by admission, the prices charged are reasonable, the defendant is liable to them for the amount. Alternatively, they say that, if it was a further condition of the defendant's liability that the architect had presented to her a certificate in respect of this work, and if no certificate was so presented by Booth, it was an implied term of the contract between the plaintiffs and the defendant that, on the due completion of the work, the defendant would cause Booth, the architect, to present such a certificate, and they claim the same sum as damages for breach of this implied term. H

The contract on which the plaintiffs rely is pleaded as an oral contract of June 17, 1938, evidenced by certain letters of June 18, 20, 21, or alternatively, as a written contract contained in, and constituted by, these letters. The sole issue is whether Booth had authority—express, implied,

or by way of estoppel or ratification—to bind the defendant in placing the order with the plaintiffs, subject to the fact that, if, and only if, he had such authority, and a contract therefore resulted, the question as to the presentation of a certificate being a precondition of payment also arises. The issues can be yet further narrowed. The plaintiffs
A did not rely at all strongly on the suggestion of authority by estoppel, of which there was in fact no evidence at all, nor on ratification by acceptance of the benefit of the work after it was done, for it was then impossible to reject it. The questions, therefore, apart from that of the certificate, are whether or not there was express or implied authority in Booth
B at the time when he placed the order, and, if there was not, whether or not his act in placing it was ratified before the work was completed.

The circumstances were the following. The defendant was minded early in 1938 to build, *inter alia*, a block of four self-contained flats in the neighbourhood of Saffron Walden. To that end, on Feb. 17, 1938,
C as building owner, she entered into a written contract with building contractors named Taylor & Ash, Ltd., on a standard R.I.B.A. form of contract. The terms of this form of contract which are material are the following. By cl. 15 (a) it was provided as follows :

Specialists . . . and others executing any work or supplying and fixing any
D goods for which prime cost prices are included in the specification who may be nominated or selected by the architect are hereby declared to be subcontractors employed by the contractor and are herein referred to as "nominated subcontractors."

In a document referred to on the first page of this building contract, and amounting, in my opinion, to a specification within this subclause, there
E were set out certain prime cost items. These included the flooring of the four flats, and in respect of this work on Mar. 28 the plaintiffs made a tender. In the middle of June, this tender was accepted, and they became "nominated subcontractors" within cl. 15 (a). By cl. 15 (a) (3), it is provided as follows :

F Payment is to be made to the nominated subcontractor by the contractor within 14 days of his receipt of the architect's certificate under cl. 25 hereof which includes the value of such subcontractor's work.

By cl. 15 (b), it is provided as follows :

G Before any such certificate is issued to the contractor the latter shall if requested by the architect furnish to him reasonable proof that all nominated subcontractors' accounts included in previous certificates have been discharged, in default whereof the employer may pay the same on a certificate of the architect and deduct the amount thereof from any sums due to the contractor. The exercise of this power shall not create privity of contract as between the employer [the building owner] and the subcontractor.

H It is quite clear that the intention of this agreement is that there shall be privity of contract between building owner and building contractor, and between building contractor and such subcontractors as may be nominated by the architect, but that there shall be no privity of contract between the building owner and any nominated subcontractor, and this even if the building owner exercises the right conferred on her

by cl. 15 (b), in the events therein specified, of paying a nominated subcontractor direct and debiting the contractor. So long, therefore, as nothing has happened to modify the scheme embodied in this building contract, neither the architect nor anybody else is intended to have any authority to pledge the credit of the building owner with a nominated subcontractor. Under this contract, one C. Howard Crane was nominated as architect. R. G. Booth was at this time working with Mr. Crane, but later, in May, he separated from him. For the purposes of the contract, however, he was at all material times treated throughout by the defendant as the architect in connection with the building operations. A

In March, the defendant had raised a loan from the Midland Bank on the security of the building, so far as it was then completed, to finance her further operations. Towards the end of May or the beginning of June, Taylor & Ash, Ltd., the building contractors, became deeply involved financially, and went into liquidation. On June 9, R. G. Booth wrote to Mr. Taylor as follows : C

Further to my conversation with you yesterday it was decided that Messrs. Taylor & Ash [Taylor & Ash, Ltd.] should cease from carrying on the works at Saffron Walden, and that you yourself will be taking on this contract.

Booth enclosed a copy of this letter in a letter which he wrote on the same day to the defendant, and from this letter it appears that they had discussed the substitution of Mr. Taylor for Taylor & Ash, Ltd., the day before, and it does not appear from her evidence that the defendant had objected to this substitution. Booth also enclosed in the same letter a draft mandate to the Midland Bank. This was a mandate to be signed by the defendant, and was in the following terms : D E

With reference to the loan on the above-mentioned property Messrs. Taylor & Ash, Ltd., have ceased to be employed as contractors as from to-day [June 10]. The contract is being carried on by Mr. H. T. Taylor, one of the directors of the company, and I hereby authorise you to pay all subsequent amounts to him or such nominated subcontractors as appear on the certificates signed by the architect, and countersigned by me as formerly. F

That mandate was countersigned and sent to the Midland Bank by the defendant.

The effect of this correspondence is, I think, clearly to create a new contract—namely, a contract between the defendant and Taylor in the same terms as the contract of Feb. 17 between the defendant and Taylor & Ash, Ltd., unless some modification of those terms should be deduced from the mandate of the defendant to the bank, or from the letters sent or enclosed by Booth for the defendant's perusal. Taylor personally assumes the obligations of Taylor & Ash, Ltd., under the old contract, so far as the unperformed part of the work is concerned. He is to complete the works for the same estimated costs that were contracted for by Taylor & Ash, Ltd., less all payments made either to Taylor & Ash, Ltd., or to various subcontractors for work already done by them but not yet paid for. H

How much more, if anything, do the letters and mandate to the bank

establish ? Do they in particular confer upon Booth an express or implied authority to pledge the defendant's credit direct to a nominated sub-contractor, or do they merely implement the arrangements provided for by cl. 15 (b) of the contract ? In the latter case, they could not be construed as conferring on Booth any such authority.

- A The subsequent history of the matter is relevant, and is as follows. The contract relied on was made a few days after these communications. On June 15, one Palmer received from Booth by word of mouth an order for his principals, the plaintiffs, to lay the flooring in the flats. On June 18, the plaintiffs wrote to Taylor & Ash, Ltd., reporting this fact, and on June 20 Booth wrote to the plaintiffs as follows :

The above contract is now no longer in the hands of Taylor & Ash, Ltd., but is being carried out by Mr. Taylor. Your work being carried out by a p.c. sum will be paid by my client, Mrs. Evers Swindell, of The Little House, Saffron Walden, on presentation of my certificates.

On June 21, the plaintiffs wrote as follows :

- C We note with pleasure that this account will be paid direct by your client. Booth is here quite plainly purporting to pledge the defendant's credit with the plaintiffs.

- D Two questions accordingly arise. First, do the letters of June 9, 1938, and the mandate of the bank of that date create, or evidence, an antecedent authority in Booth to pledge the defendant's credit with the plaintiffs ? Secondly, if not, did the defendant ratify Booth's unauthorised act in so purporting to pledge her credit between the date of the order and its execution ? The order was placed sometime between June 15 and June 20, and was executed between Aug. 12 and Aug. 20.

- E On the first question, my mind has fluctuated a great deal, and I have modified the view which I had provisionally formed at one period. I have come to the conclusion that, on their true construction, the material letters and the mandate neither constitute nor are evidence of any such authority in Booth. I think that the references to payment of subcontractors by the defendant's bank, assuming that they mean payment direct, are referable to cl. 15 (b) of the building contract. They are intended to operate in the events specified in that subclause, and are sufficiently accounted for by the existence of that subclause, without its being necessary to have recourse to the hypothesis of a new authority vested in the architect. It is quite true that Booth proceeded to act as though he were authorised to pledge the defendant's credit, either directly or as guarantor of Taylor's obligations. Mr. Taylor's cheques began to be dishonoured; and subcontractors, unwilling to look to his credit alone, had to be galvanised into continued action by pledges of Mrs. Swindell's credit—for instance, on June 18, Farmers, Ltd., who supplied staircases, on June 23, Barnett, the supplier of paint, on June 30, Messrs. Attree, electrical contractors, on June 30, contractors named Finch, Ltd., on July 19, Coloured Concrete Tiles, Ltd., and, later still, after August, people named Jenner & Johnson. At the material

time, however—that is, on June 9—Booth does not seem to be asserting or asking for a general authority to pledge the defendant's credit. In the very letter in which he enclosed the bank mandate to the defendant for her signature, he says :

I have to-day received from the Marley Tile Co. a letter, and they have asked me to get you to sign a guarantee in regard to the payments of their tiles. This I have promised to do, and I am bringing this letter and its enclosure down with me tomorrow. A

This implies that Booth thinks he needs, and is requesting, a special *ad hoc* authority to pledge the defendant's credit, even as guarantor, and is inconsistent with the view that he had obtained, or was obtaining, a general authority to pledge her credit without special reference or consultation in each case. It is also to be noted that The Marley Tile Co. are the only subcontractors who have a separate certificate made out by Booth in their favour. All the rest of the subcontractors, so far as they are paid at all, are paid on certificates made out in favour of Taylor. A letter of Aug. 6 from the defendant to Booth has been relied on by the plaintiffs as evidence that the defendant had given Booth an authority wide enough to cover the pledging of her credit. "I put myself entirely in your hands" she says, complaining of heartbreaking delays. However, I do not think that more can be drawn from these words than the assumption that she relied upon him to expedite matters within the limits of his original functions and authority. I therefore hold that there was no antecedent authority. B
C
D

The second point is whether, failing antecedent authority, there was ratification. To establish ratification, it is necessary, *inter alia*, to show that, between June 9 and Aug. 20, the defendant knew what Booth was doing. Neither then nor at any time until the writ did she know that Booth had pledged her credit to the plaintiffs, or that the plaintiffs even existed. If she knew that he was pledging her credit to other subcontractors wholesale, and approved or affirmed his conduct, this might ratify the transaction with the plaintiffs, even if she had no specific knowledge of that transaction. By letter of July 22, one Castle, the defendant's agent, complains that Booth had ordered staircases from subcontractors called Farmers, Ltd., on the defendant's account. By a subsequent letter of Aug. 13, he refers with bitterness to a similar transaction. I can find no instance between the middle of June and Aug. 20 (the time this work was completed) showing that the defendant or her agent Mr. Castle knew that her credit had been pledged to a subcontractor without authority specifically sought and obtained, and without her approval or acquiescence. On the contrary, as I have indicated, Castle more than once protests. There is, indeed, one early letter written on May 26, 1938, in which subcontractors named Rota Products, Ltd., ask to be paid by Mrs. Swindell as they were paid last time, or words to that effect. No one from Rota Products, Ltd., was called to give evidence, and the letter itself is not evidence E
F
G
H

of the truth of its contents. In any case, however, there is no evidence that the defendant complied with this demand for direct payment. If she had done so, she might have been acting in pursuance of cl. 15 (b) of the building contract, not by way of ratifying a pledge of her credit. Moreover, even if it were a ratification of that transaction, it would not amount, without much more, to a ratification of all similar ones, whether or not known to her.

In the result, I find or hold that the defendant neither authorised Booth to pledge her credit to the plaintiffs nor ratified his act in doing so, either specifically or by ratifying such act generally. On this finding, it is not necessary to consider the other issue—namely, whether a certificate covering the plaintiffs' fees was presented to her, or whether she ought to have procured the presentation of such a certificate to herself. I appreciate that this decision causes real hardship to the plaintiffs, who have done good work in good faith and have not been paid. As I have said, they did their work in an unexceptional fashion. The alternative remedy against Booth, which might in happier circumstances have indemnified them, is worthless, owing to Booth's insolvency, and they suffer. A decision in favour of the plaintiffs, however, would also have caused hardship, because the defendant has, as I find, paid Taylor for this work, the money not reaching the plaintiffs owing to Taylor's insolvency or misapplication of it. It would have been a hardship to the defendant to have to pay twice over, and, for the fact that the choice lies between these objectionable alternatives, Booth is to blame.

In the result, there must be judgment for the defendant, but I do not think that she should have her full costs. Discovery was most incomplete and belated. Many highly material documents were only disclosed in the course of the hearing, a circumstance which complicated and prolonged the trial. This being so, I think that she should be entitled to recover only two-thirds of the taxed costs.

Judgment for the defendant with two-thirds of the taxed costs.

Solicitors: *Beaumont, Son & Rigden*, for the plaintiffs; *Warren & Warren*, agents for *D. R. W. Stevenson, Squires & Co.*, Cambridge, for the defendant.

[Reported by CHARLES NEWTON, ESQ., Barrister-at-Law.]

NEWCASTLE-UNDER-LYME BOROUGH COUNCIL v.
WOLSTANTON, LTD., AND DUCHY OF LANCASTER.

[COURT OF APPEAL (Clauson, Luxmoore and Goddard, L.JJ.), July 3, 1939.]

Mines—Working of mines—Letting down surface without compensation—Plea of custom or prescription—Invalid plea.

In a defence to an action for an injunction to restrain the defendants from so working their mines as to let down the surface, and thus damage the plaintiffs' property, the defendants pleaded, *inter alia*, both a custom

and a right by prescription to work their mines so as to let down the surface without making compensation :—

HELD : following *Hilton v. Granville* (Lord) (2), such a custom or prescriptive right was unreasonable and invalid. That decision, being one affecting property rights, and having stood for over 90 years, ought not to be disturbed.

Decision of FARWELL, J. ([1939] 3 All E.R. 190) *affirmed*.

A

[EDITORIAL NOTE. FARWELL, J., held that *Hilton v. Granville* (Lord) (2), decided in 1844, completely covered the points taken upon the unreasonableness of the custom and upon the prescriptive right in this case. The position in the Court of Appeal was not quite the same, in that the earlier decision was one of the old Court of Queen's Bench, and, therefore, not binding upon the present Court of Appeal. The Court of Appeal, however, have treated the matter as one governed by the doctrine of *stare decisis*, and have refused to overrule an authority regulating property rights which has stood for over 90 years.

B

AS TO CUSTOM TO CAUSE SUBSIDENCE, see HALSBURY, Hailsham Edn., Vol. 22, pp. 629, 630, para. 1359; and FOR CASES, see DIGEST, Vol. 34, p. 711, Nos. 961-966.]

C

Cases referred to :

- (1) *Hilton v. Granville* (Lord) (1841), Cr. & Ph. 283; 34 Digest 714, 987; 10 L.J.Ch. 398.
- (2) *Hilton v. Granville* (Lord) (1844), 5 Q.B. 701; 34 Digest 703, 923; 13 L.J.Q.B. 193; 2 L.T.O.S. 419; *subsequent proceedings* (1848), 12 Q.B. 737, n.
- (3) *Love v. Bell* (1884), 9 App. Cas. 286; 34 Digest 708, 947; 53 L.J.Q.B. 257; 51 L.T. 1; *affg.* S.C. *sub nom.* *Bell v. Love* (1883), 10 Q.B.D. 547.
- (4) *Tyson v. Smith* (1838), 9 Ad. & El. 406; 17 Digest 4, 5.
- (5) *Johnson v. Clark*, [1908] 1 Ch. 303; 17 Digest 13, 107; 77 L.J.Ch. 127; 98 L.T. 129.
- (6) *Roubotham v. Wilson* (1860), 8 H.L. Cas. 348; 34 Digest 613, 121; 30 L.J.Q.B. 49; 2 L.T. 642; *affg.* (1857), 8 E. & B. 123.
- (7) *Carlyon v. Lovering* (1857), 1 H. & N. 784; 17 Digest 15, 126; 26 L.J.Ex. 251; 28 L.T.O.S. 356.
- (8) *Broadbent v. Wilks* (1742), Willes, 360; 17 Digest 14, 117; *affd. sub nom.* *Wilkes v. Broadbent* (1745), 2 Stra. 1224.
- (9) *Rogers v. Taylor* (1857), 1 H. & N. 706; 19 Digest 176, 1276; 26 L.J.Ex. 203; 28 L.T.O.S. 275; *subsequent proceedings* (1858), 2 H. & N. 828.
- (10) *Salisbury (Marquis) v. Gladstone* (1861), 9 H.L. Cas. 692; 17 Digest 14, 114; 34 L.J.C.P. 222; 4 L.T. 849.
- (11) *Blackett v. Bradley* (1862), 1 B. & S. 940; 34 Digest 711, 963; 31 L.J.Q.B. 65; 5 L.T. 832.
- (12) *Buccleuch (Duke) v. Wakefield* (1870), L.R. 4 H.L. 377; 34 Digest 704, 927; 39 L.J.Ch. 441; 23 L.T. 102.
- (13) *Consett Industrial & Provident Society, Ltd. v. Consett Iron Co.*, [1922] 2 Ch. 135; Digest Supp.; 91 L.J.Ch. 630; 127 L.T. 383.
- (14) *Bateson v. Green* (1793), 5 Term Rep. 411; 11 Digest 42, 581.
- (15) *Young v. Robertson* (1862), 4 Macq. 337; 30 Digest 187, 547.
- (16) *Mersey Docks & Harbour Board v. Cameron, Jones v. Mersey Docks & Harbour Board* (1865), 11 H.L. Cas. 443; 42 Digest 745, 1706; 35 L.J.M.C. 1; 12 L.T. 643; *on appeal from S.C. sub nom.* *Mersey Docks & Harbour Board v. Jones, Same v. Cameron* (1861), 30 L.J.M.C. 185, 239.
- (17) *Pugh v. Golden Valley Ry. Co.* (1880), 15 Ch.D. 330; 30 Digest 187, 548; 49 L.J.Ch. 721; 42 L.T. 863.

D

E

F

G

H

APPEAL by the first defendants from an order of FARWELL, J., dated May 24, 1939, and reported [1939] 3 All E.R. 190. The facts are fully set out in the judgment of CLAUSON, L.J.

G. P. Slade, K.C., and W. J. C. Tonge for the first appellants.

Sir Herbert Cunliffe, K.C., Hon. Charles Romer, K.C., and A. Andrewes

A *Uthwatt* for the second appellant.

C. E. Harman, K.C., Cyril Radcliffe, K.C., and Wilfrid M. Hunt for the respondents.

Slade, K.C. : The decision in *Hilton v. Granville (Lord)* (2) was based upon a ground which has been overruled. It has never been affirmed
B in any subsequent case. When the matter is examined, upon principle, *Hilton v. Granville (Lord)* (2) is seen to be wrong. When once a custom is proved to exist, it will not be held to be unreasonable if the right alleged to exist would be valid or enforceable if conferred by express grant or reservation. The question is not whether or not the court
C ought to presume an agreement on the part of the colliery owners to subject themselves to the right claimed, but whether or not the right claimed by the copyholder is one which ought not to be enforced against the colliery owners. In the alternative, the true test is as follows. Ought the court, having regard to the nature of the right claimed, to
D presume that the copyholder would have agreed to have been bound by that right. The plaintiff, in order to succeed, must show, not only that the agreement which the court is asked to presume is unlikely, but that it is inconceivable whatever presumption of fact be made. Both of these propositions involve the assumption that at some time
E before legal memory there was some kind of an agreement between the lord and the tenant. On any view of the matter, *o. c.* starts with an assumption which lies at the root of the whole theory of copyhold tenure. The theory is that copyholders were formerly villeins who held their land at the will and pleasure of the lord, without any legal claim or
F right. In course of time, they came to hold as of right that which they had previously held at the will of the lord. The custom to let down the surface at the will of the lord is proved in the best possible manner. The court will never interfere if the custom is found to be based upon principles which the court applies. The burden is upon the copy-
G holder to show that the court would refuse on some ground to enforce the custom. One assumes that the copyholder has certain rights and that the lord has certain rights, and that these rights have existed from time immemorial. Unless some reason can be shown why the lord should not enforce the right, it should be enforced. *Tyson v. Smith* (4) and
H *Johnson v. Clark* (5) indicate the principles applicable when the court is considering whether or not a custom is reasonable. The custom claimed in the present case is claimed only for the purposes of the necessary work, and the mere fact that it may have an injurious effect on the copyholder does not make it contrary to law. The court is entitled to consider that there is a mining industry, and that the right claimed

is for the purpose of enabling the lord to win the minerals, and they could not be properly won without the existence of this right. It is necessary to consider the circumstances at the time when this supposed agreement between the lord and the tenant was made. In *Rowbotham v. Wilson* (6), there was a question of a reservation of this kind in a grant, and the court upheld the reservation. The copyholder's estate is always held subject to the usages of the manor, and the copyholder must be taken to know what those usages are. The court is not precluded from investigating the real question, which is whether or not *Hilton v. Granville (Lord)* (2) was properly decided, as the court is being asked to review the decision of a lower court. The custom of the manor, in the present case, is on all fours with the custom in *Carlyon v. Lovering* (7) and it differs from the custom in *Broadbent v. Wilks* (8). The custom is necessary for the proper working of the minerals. It does not destroy the land, and it is not arbitrary. Notwithstanding the decision in *Hilton v. Granville (Lord)* (2), the usage has continued to the present day. It is a perfectly recognisable right, and the custom is not more unreasonable than was the custom in *Carlyon v. Lovering* (7). When the whole matter is examined, and the true principles which underlie this branch of the law are considered, the decision in *Hilton v. Granville (Lord)* (2) is manifestly wrong. [Counsel referred to *Love v. Bell* (3), *D Rogers v. Taylor* (9), *Salisbury (Marquis) v. Gladstone* (10), *Blackett v. Bradley* (11), *Buccleuch (Duke) v. Wakefield* (12), *Consett Industrial & Provident Society, Ltd. v. Consett Iron Co.* (13), and *Bateson v. Green* (14).]

Romer, K.C.: I adopt what has been said on behalf of the first appellants. The notice of appeal of the second appellant is in a different form. It asks that it may be declared that the custom and prescriptive and other rights alleged are in law possible, and are reasonable and capable in law of being sustained or presumed. *Hilton v. Granville (Lord)* (2) is not merely wrong. It is so wrong that the court is entitled to reverse it, notwithstanding the fact that it has applied for so many years. It is a case which treated as an abstract proposition a subject-matter not susceptible of being so treated. It treated as a matter of theory something which cannot possibly be treated solely as a matter of theory, but which involves in a greater or lesser degree a question of fact. Not only the existence, but also the validity, of the custom and its reasonableness are questions of fact. "Reasonable" is a relative, and not an absolute, term. What would be reasonable in some circumstances would be unreasonable in others. One has to know the facts before deciding whether or not a matter is reasonable. I know no case other than *Hilton v. Granville (Lord)* (2) where the question of reasonableness has been decided *in vacuo* without any evidence on the matter whatever. A question of reasonableness is a question of law which can be determined only by established facts. In *Buccleuch (Duke) v. Wakefield* (12), LORD HATHERLEY, L.C., doubted whether the decision in *Hilton v. Granville (Lord)* (2) was a right one. *Hilton v.*

Granville (Lord) (2) was wrong, and ought to be overruled. The effect of it has not been such as precludes the court from reviewing it. In fact, the authority of that case has not been recognised in this manor, and the custom has been observed.

- Radcliffe, K.C.* : There is no question as to what course the court ought to take in this matter. Some things in the law are not so much a question of logical reason as a question of legal learning. With regard to customs, it is important that it should be known what is a good custom and what is a bad custom according to the judges of the land rather than that such a custom should be open to review from time to time, with new reasoning and new methods applied. In the present case, the court is dealing with a decision made nearly 100 years ago to the effect that persons dealing with land in the manor of Newcastle-under-Lyme could from that time onwards acquire title to the land with the certainty that they were not to be exposed to having their house or factory overthrown by mining operations without their receiving compensation. Under the shelter of that judgment, three generations have lived in that manor and have dealt with their property. The court is bound by a principle which the courts have always recognised. That principle is stated very conveniently in *BEAL ON CARDINAL RULES OF LEGAL INTERPRETATION*, 3rd Edn., p. 16, where the author summarises many cases dealing with this principle. *Hilton v. Granville (Lord)* (2) was decided in 1844, and in 1862 the court in *Blackett v. Bradley* (11) held itself bound by that decision. It was treated in *Salisbury (Marquis) v. Gladstone* (10) in 1861 as being a typical instance of a bad custom. It was expressly approved by *BAGGALLAY, L.J.*, in *Love v. Bell* (3), and from 1883 to this day persons have been entitled to base their rights upon it without question. In *HALSBURY'S LAWS OF ENGLAND*, Halsham Edn., Vol. 22, p. 629, the custom is described as unreasonable and void. That view is based upon *Hilton v. Granville (Lord)* (2). Unreasonableness is a ground for rejecting a custom. The order of *FARWELL, J.*, was right, and the court ought to dismiss this appeal. [Counsel referred to *Young v. Robertson* (15), *Mersey Docks & Harbour Board v. Cameron* (16) and *Pugh v. Golden Valley Ry. Co.* (17).]
- CLAUSON, L.J.* : In 1841, the then Lord Granville was working mines under and within the manor of Newcastle-under-Lyme. The then owner of a house, built upon a copyhold close, parcel of the manor, by bill in equity applied to *LORD COTTENHAM, L.C.*, for an injunction to restrain the working of the mines by Lord Granville, who was working them under some lease or licence from the Duchy of Lancaster. The application—*Hilton v. Granville (Lord)* (1)—came before *LORD COTTENHAM, L.C.*, on June 16, 18, 1841. I ought to have said that some short time before an application for an *interim* injunction had been made to *LORD LANGDALE, M.R.*, and it was renewed by way of appeal before *LORD COTTENHAM, L.C.*, *LORD LANGDALE, M.R.*, having refused the motion.

The matter was canvassed at considerable length, and, after a good deal of discussion in the presence of counsel of the greatest eminence on each side, an order was drawn up giving the plaintiff liberty to bring such action as he might be advised against the defendant touching the working of the mines :

And it is ordered that the defendant do admit, on the trial of such action, for the purposes of such action, that the working by the defendant, his servants or agents, of the mines under the surface near to the plaintiff's houses in the said bill mentioned, hath caused damage to the foundations thereof ; but such admission is not to be used for any other purpose, in this cause or otherwise, and is not to preclude the defendant from insisting, in any other proceeding than such action, that no such damage hath in fact been done. And it is ordered that the motion do stand over until after judgment shall have been obtained in such action, or until the further order of this court. . . .

That was in 1841.

The object of the order made by LORD COTTENHAM, L.C., was, of course, to enable a determination to be obtained from the appropriate court having jurisdiction in the matter as to whether or not the lessee of the mines had a good defence to the action on the ground adumbrated in the arguments of counsel before LORD COTTENHAM, L.C.—namely, that there was a valid custom in the manor which gave the lord and the lessee or licensee, claiming under the lord, the right to mine in such manner as to damage the house of the plaintiff upon the copyhold close. The matter proceeded in due course, and in 1844, three years having elapsed, in which I doubt not there was not a little popular interest in what the result of the litigation might be, the matter came before the Court of Queen's Bench (*Hilton v. Granville* (Lord) (2)) in this way. There had been the usual pleadings, and the defendant, Lord Granville, had pleaded the custom which I have indicated as justifying him in mining so as to damage the plaintiff's house. I do not propose to refer to the details of the pleading, but merely to state that, after a long and elaborate argument—an argument which was conducted by counsel of almost equal eminence among practitioners in the court of common law as the practitioners in Chancery who had appeared before LORD COTTENHAM, L.C., on the previous occasion—the court reserved judgment, and the judgment of the court was delivered by LORD DENMAN, C.J. The effect of his judgment was to determine that the local law, governing in the manor of Newcastle-under-Lyme the relations between the lord and his copyhold tenants, did not enable the lord to mine so as to occasion damage, without paying compensation for it, to the houses on the copyhold tenements of the copyholders. That was in 1844. The ground of the decision, which it will be remembered was on demurrer, was that, assuming such a usage to have been proved as that the lord had been in the habit of so mining, no valid custom had been proved, because the usage was of such a character that it could not be the foundation of a custom to be recognised as valid in the King's courts, because such a usage was, in the opinion of the court, as a matter of law, unreasonable. That, as I say, was in 1844.

In 1938, 94 years thereafter, when three generations had come and gone within the ambit of the manor of Newcastle-under-Lyme, the Newcastle-under-Lyme Borough Council, being then owners of a piece of land—formerly copyhold which under recent legislation had become freehold—it is not suggested that that in any way affects the rights of the parties—finding that the lessees or licensees of the Duchy were mining in such a manner as to endanger the stability of the structure, which appears to be a fire-station of some magnitude and importance, upon the council's piece of land, commenced an action, which is the proceeding which is now before us, claiming a declaration that the defendants—who were not only the mining lessees but also the Attorney-General of the Duchy of Lancaster, as representing His Majesty the King in the capacity of Duke of Lancaster—were not entitled to mine under or near the plaintiffs' hereditament in such a manner as to let down, destroy or injure the surface of the land or the buildings or erections thereon, and asking for consequential relief. Instructed, possibly, by the result of the interlocutory application for an injunction made 94 years before to LORD COTTENHAM, L.C., they do not, so far as I am aware, appear to have asked for an interlocutory injunction, but the pleadings were put in in the usual way and the defendants have pleaded precisely the same plea as that which the mining lessees pleaded 97 years earlier, setting up the same custom as that which was set up in 1844.

By an order made by BENNETT, J., it was ordered that the point of law raised by this reply—that is to say, as the order puts it, “that in any event no such custom or prescriptive or other right as is alleged in the defences could or can be sustained ought to be presumed as the same would be unreasonable”—be set down for hearing in the non-witness list and disposed of before the trial of the action pursuant to R.S.C., Ord. 25, r. 2, a procedure which, of course, replaces what, in 1844, was represented by the demurrer.

Under the terms of that order, the matter came before FARWELL, J., who held that the question of law which was propounded for his consideration—which was, to put it shortly, the question whether the custom, if proved, was reasonable—was a question of law which had been determined three generations earlier by a decision of the then Queen's Bench Court, which must be treated for this purpose as of co-ordinate jurisdiction with the High Court of Justice. He pointed out that exactly the same question came before the court in 1844, and in that case the judgment decided quite clearly that the custom alleged was unreasonable and, therefore, not enforceable. He also took the view that the judgment covered the question as to whether or not a prescriptive right of such a kind as was suggested in the pleading could be upheld. FARWELL, J., pointed out that there was one passage in the judgment of LORD DENMAN, C.J., delivering the judgment of the court, which had not met with the approval of those who subsequently had to consider the matter, but FARWELL, J., held—and, in my opinion, quite

rightly—that that passage, though it furnished a possible ground to support the decision, was not of the essence of the decision, and that the decision was perfectly clear. The decision was binding upon him because, as a court of co-ordinate jurisdiction, he was bound to follow it.

From that decision the appeal now comes to us, and the question before us is not precisely the same question as that which was before FARWELL, J., for, as far as he was concerned, it would have been very difficult for him to express a judgment on the point of law which would contradict that of a court of co-ordinate jurisdiction. Here, in the Court of Appeal, we are in some sense in a more fortunate position. We are not bound as strictly as was FARWELL, J., by that decision, because our jurisdiction is to exercise that which in 1844 would have been exercised in error by the Court of Exchequer Chamber. However, we are faced with the position that all this time ago there was a decision of the proper and competent court which laid down quite clearly what was and what was not the local law governing the relations, in regard to this matter of mining, between the lord and the copyholders. That decision had never been taken to a court of error, and there had been no proceeding since that period in any way challenging that decision. The highest at which the matter can be put is this. It is said that there are indications in some of the cases that some more recent judges, had they had to consider this question of law in 1844, might have been disposed to come to a different conclusion. However, the fact nevertheless stands that no less than 56 years ago in *Bell v. Love* (3), at p. 561, BAGGALLAY, L.J., sitting in this court, expressed the opinion that the decision, apart from the sentence in the judgment of LORD DENMAN, C.J., to which I have referred, was a correct decision, laying down correctly the law upon the validity of a custom of this character. In those circumstances, it appears to me that the question which we have to consider is not whether, if we had sat in 1844 in the Court of Queen's Bench, we should have formed the same opinion as to the law. Personally, I do not find it necessary to commit myself to any opinion on that topic, though I feel bound to say for myself that I see no reason to disagree with the view which BAGGALLAY, L.J., no less than 56 years ago in this court expressed about that decision. The position is this. For three generations this decision has been standing. It has appeared during all that time in the textbooks to which members of the profession turn in matters of this kind for assistance and instruction as representing the decision of the court as to the law dealing with this particular matter. In all this time, it is obvious that many transactions must have taken place in such a populous borough as that of Newcastle-under-Lyme on the footing that the local law in this matter had been settled.

Questions as to how far long-standing decisions ought to be overruled have been considered in many cases, and I do not propose to go through them. They will be found collected in a very convenient form in

BEAL ON CARDINAL RULES OF LEGAL INTERPRETATION, 3rd Edn., p. 16, where the effect of the cases is stated to be as follows :

A The courts should be careful not to overrule decisions which, not being manifestly erroneous and mischievous, have stood for some time unchallenged, and from their nature and the effect which they may reasonably be supposed to have produced upon the conduct of a large portion of the community, as well as of Parliament itself, in matters affecting the rights of property, may fairly be treated as having passed into the category of established and recognised law.

Can this particular decision on the unreasonableness of this custom be said to be manifestly erroneous and mischievous ? To my mind, merely to state the proposition is to answer it. It is quite plain that, though the views of various judges on the matter might differ, the decision in 1844
B cannot be said to have been manifestly erroneous and mischievous. Has the decision stood for some time unchallenged ? A glance at the cases referred to in BEAL will show that in some cases as little as 10 or 12 years has, in particular circumstances, been considered sufficient to justify the view that the decision has stood for some time unchallenged.
C This decision has stood unchallenged for three generations. Can it be reasonably supposed from the nature and effect of the decision to have affected the conduct of a large portion of the community in matters affecting rights of property ? To my mind, it is clear that this decision must have affected the conduct of all those in the community
D within the ambit of the manor of Newcastle-under-Lyme who were concerned with matters of this kind. To suggest to the contrary, it seems to me, would be quite absurd.

In those circumstances, in my view, the duty of this court is plain, and that is, to use the old maxim *stare decisis*, to hold fast to that which
E has been decided for so long to be the local law in this community, and, on that ground, to take the same course which FARWELL, J., has taken, and hold that that case is binding upon us for the purposes of this action.

I have dealt with the matter purely as a matter of custom. In the course of the discussion, something has been said about prescription, but
F little importance has been attached to it, and I do not propose to deal with that aspect of the case beyond saying that FARWELL, J., held—and, I think, quite rightly—that the decision on the point of custom covered the matter of prescription so far as raised by this appeal. In those circumstances, in my opinion, the right order for this court to make is to
G dismiss this appeal, with the usual results.

LUXMOORE, L.J. : I agree, and do not desire to add anything.

GODDARD, L.J. : I agree.

Appeal dismissed with costs.

H Solicitors : *Hancock & Willis*, agents for *Ellis & Ellis*, Burslem (for the first appellants) ; *The Solicitor*, Duchy of Lancaster (for the second appellant) ; *Sharpe, Pritchard & Co.*, agents for *Joseph Griffith*, Town Clerk, Newcastle-under-Lyme (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

BATCHELAR *v.* EVANS AND ANOTHER.

[CHANCERY DIVISION (Farwell, J.), June 30, July 4, 1939.]

Executors—Actions against personal representatives—Judgment by default—Return of nulla bona on execution—Presumption of devastavit—Rebuttal of presumption—Order for administration and appointment of receiver of estate.

The deceased during her lifetime advanced to D. about £2,000 upon a mortgage of certain leasehold property. The mortgagee died in 1931, and the mortgagor, D., died in 1933. The money due under the mortgage had not been paid, and in 1936 the personal representative of the mortgagee obtained judgment against the personal representatives of the mortgagor, the amount of such judgment to be paid out of the effects of the deceased in the hands of her personal representatives, and, in so far as those effects were insufficient, out of the effects of the personal representatives. The action was undefended, and the judgment, therefore, was an admission that assets sufficient to satisfy the claim were in the hands of the personal representatives. Very shortly after this judgment, two of the beneficiaries commenced proceedings for the administration of the mortgagor's estate, and a receiver of that estate was appointed. In due course, the order for administration was made, and at the time of this action that estate was still being administered by the court. In 1937, execution was levied in respect of the above judgment, and a return of *nulla bona* was made. Thereupon, the present action was brought, claiming that the personal representatives of the mortgagor were personally liable to satisfy that judgment as the return of *nulla bona* was evidence of a *devastavit* :—

HELD : the return of *nulla bona* was only *prima facie* evidence of a *devastavit*, and it was open to the defendants to show that assets to satisfy the judgment were no longer in their hands. The order for administration, the appointment of the receiver, and the consequent handing over of the assets to the receiver rebutted the presumption of a *devastavit*, and the action must be dismissed.

[EDITORIAL NOTE.] In the case of a return of *nulla bona* on an execution on a judgment by default against personal representatives, there is a presumption that the personal representatives are guilty of a *devastavit*, and the plaintiff in the action may thereupon apply to issue execution against the personal representatives. The present case shows that this is a rebuttable presumption, and is rebutted by an order for administration of the estate made after the judgment.

AS TO JUDGMENT BY DEFAULT AGAINST PERSONAL REPRESENTATIVES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 437, 438, paras. 832-834; and FOR Cases, see DIGEST, Vol. 24, pp. 744, 745, Nos. 7731-7743.]

Cases referred to :

- (1) *Leonard v. Simpson* (1835), 2 Bing. N.C. 176; 24 Digest 744, 7734; 4 L.J.C.P. 302.
- (2) *Rock v. Leighton* (1700), 1 Com. 87; 24 Digest 744, 7731.
- (3) *Erving v. Peters* (1790), 3 Term Rep. 685; 24 Digest 745, 7738.
- (4) *Re Timms* (1878), 47 L.J.Ch. 831; 24 Digest 778, 8075; 38 L.T. 679.

ACTION against personal representatives to recover from them personally a sum of £2,082 11s. 1d. and costs recovered under a judgment against them in their representative capacity, a return of *nulla bona* having been made upon an execution issued under that judgment. The facts and arguments are fully set out in the judgment.

G. P. Slade, K.C., and E. M. Winterbotham for the plaintiff.

Ronald F. Roxburgh, K.C., and J. Leonard Stone for the defendants.

FARWELL, J. : This action by the administratrix of Hubert Walters Batchelar and the administratrix of one Mrs. Bowen, who died on Dec. 9, 1931, raises a very curious point. The position was this. Mrs. Bowen, the mortgagee of whom I will speak in a moment, died intestate on Dec. 9, 1931, and administration of her estate was granted to Mrs.

A Doreen Clifford Batchelar on Mar. 10, 1932. On Oct. 13, 1933, Doreen Clifford Batchelar died, and administration *de bonis non* was granted to the plaintiff, and, as such, the plaintiff is now suing in this action.

The question arises in this way. The defendants are the executors of Mrs. L. C. Davies, who died on June 9, 1933. The will was proved in

B Jan., 1934, and the defendants are her executors. During her lifetime, Mrs. Bowen had advanced to Mrs. Davies a sum of about £2,000, which was charged upon certain leasehold property which was held by Mrs. Davies for a long term of years. At the date of the death of both these two ladies, that money had not been repaid, and was still owing. The

C plaintiff, after he had become the administrator, proceeded to bring an action against the two defendants in the King's Bench Division claiming payment of the sum of £2,082 11s. 1d., being the amount due under the mortgage, and costs. To that writ the defendants put in no defence. Leave to sign judgment against the defendants was given on Apr. 15,

D 1936. The judgment in the King's Bench Division was, I think, in the ordinary form :

It is adjudged that the plaintiff recover against the defendants the sum of £2,082 11s. 1d. and £12 1s. 6d. costs, such sum of money and costs to be levied of the goods and chattels which were of the deceased at the time of her death come to the hands of the defendants as executors of L. C. Davies deceased, to be administered if they have or shall thereafter have so much thereof in their hands to be administered, and if they have not so much thereof in their hands to be administered, then, as to the costs aforesaid, to be levied out of the proper goods and chattels of the said defendants.

E As I say, no defence was put in to that action, and, as a result of that, the position was that the defendants had admitted by taking no steps F in the judgment and having judgment signed against them, that they had in their hands assets of the deceased sufficient to satisfy the claim.

The next event which happened was this. Very shortly after the judgment, two of the beneficiaries commenced proceedings in the Chancery Division for the administration of the estate, the defendants in this action

G being the defendants in that action. Upon a motion made in that action to this court, a Mr. Morgan was appointed receiver of the estate, and the defendants were ordered as executors to deliver over to the receiver all securities in their hands of the outstanding personal estate, and so on, and there was a direction to give security in the ordinary

H form within due course. The order for administration was made. I think it was made in default of defence on motion for judgment. That was on June 24, 1936. The estate has been, and is now being, administered by the High Court in this Division. On Mar. 25, 1937, the plaintiff issued a writ of *fiery facias* for the purpose of enforcing that judgment, and in due course the sheriff made a return of *nulla bona*. Upon that,

the plaintiff commenced this action on July 20, 1937, claiming payment by the defendants personally of the sum of £2,000 odd owing under the mortgage. An application was made to this court by the defendants to stay those proceedings, and the matter came before CROSSMAN, J. He, however, did not make any order staying the proceedings, upon the plaintiff by his counsel undertaking not to make any claim in the action against the assets of the testatrix's estate, and there was no order made except that the costs should be costs in the action. A

That being so, this action has proceeded, and the way in which the plaintiffs put their case is this. They say, and they say truly, that the fact that the judgment in the King's Bench Division went by default is conclusive evidence against the defendants that at that time they had assets in their hands sufficient to pay the mortgage debt, and by the return, so far as that is concerned, there is no possible doubt that a judgment in that form is conclusive against the defendants, and that they cannot now be heard to say that they had not assets at that date. The plaintiff goes on to say that that return by the sheriff of *nulla bona* is evidence that the defendants have committed a *devastavit*, and on such evidence they are entitled to personal judgment against those defendants. B C

The position, as I understand it, in a case of this sort is this. There is no doubt whatever, as I have said, that the King's Bench judgment is conclusive against the defendants, so far as it goes as an admission of assets, and the return of *nulla bona* by the sheriff raises a presumption that a *devastavit* has been committed by the defendants. The matter was dealt with as follows by TINDAL, C.J., in *Leonard v. Simpson* (1), at p. 179 : D E

The short point in this case is, whether such evidence of a *devastavit* was given at the trial on the part of the plaintiff, as, being unanswered by the defendant, entitles the plaintiff to a verdict ; and we think the evidence was sufficient for that purpose.

Pausing there for a moment, it is quite plain from that statement alone, taken from the judgment of TINDAL, C.J., that there must be evidence of *devastavit* before the plaintiff can get a personal judgment against the defendant, because the whole point which the court was considering in that case was whether there was such evidence, and the court in that case came to the conclusion that there was, the evidence being the return by the sheriff of *nulla bona*. Then TINDAL, C.J., continues as follows, at p. 179 : F G

The judgment by default in the former action is conclusive upon the defendant, that he has assets to satisfy the judgment.

Pausing there again, it is quite plain that what TINDAL, C.J., thought was the effect of a judgment by default in such a case was that that was a conclusive admission by the defendant that he had assets to satisfy the judgment, and that, I think, is in accordance with the contention put forward here by counsel for the plaintiff as to the effect of such a judgment. TINDAL, C.J., continues as follows, at p. 179 : H

This is so thoroughly settled in the case of *Rock v. Leighton* (2), and in other

cases which had preceded it, that it was admitted to be the law by the defendant's counsel in arguing the case of *Erving v. Peters*.

The fact therefore is conclusively established against the defendant, that he has assets of the testator in his hands : and the only question which remains is, what evidence is necessary to show that he has wasted those assets.

A Again I stress it, evidence is necessary to show there has been a *devastavit*. Then TINDAL, C.J., continues as follows, at pp. 179, 180 :

In reason and good sense, very little evidence ought to be necessary for that purpose. It is his duty when called upon by notice, or by a writ of execution, either to satisfy the debt out of the monies of the testator, or to show the assets to the sheriff, that he may make the debt out of them ; and accordingly, very slender evidence has at all times been held to be sufficient to prove the *devastavit*. The issuing of a writ of *feri facias* directed to the sheriff of the county where the action was laid, and a return *nulla bona* thereto, has, for a long time past, been deemed evidence enough. And yet, if the reason of the thing be considered, the suing out and return of such writ unto the county where the action is laid, affords no necessary presumption that the defendant has ever heard of it.

B
C It is plain that in the view of TINDAL, C.J., what was to be presumed from the return of *nulla bona* was a mere presumption, and, like every other presumption, was rebuttable if it could be rebutted. Then TINDAL, C.J., continues as follows, at p. 180 :

D For it is a mere fiction of law to suppose the defendant resident in the county where the venue is laid in a personal action : and even if he be, the sheriff would as a matter of course, return *nulla bona* to the writ, unless authentic information was given to him where the testator's goods were to be found, and they were exposed to his officers. And before the present practice prevailed, of issuing a *feri facias* and returning *nulla bona* thereto, it was usual for the sheriff to summon an inquest of office, and to return a *devastavit* in addition to his return to the writ of *feri facias*, which being an *ex parte* proceeding, gives no notice whatever to the defendant.

E It appears that originally the sheriff summoned an inquest, of which, I suppose, notice was given to the defendant, and returned a *devastavit*, if he was so satisfied, and if the defendant had not put in any sufficient answer at that inquest. Then TINDAL, C.J., continues as follows, at pp. 180, 181 :

F In the present case, the plaintiff sued out a *testatum feri facias* to the sheriff of Litchfield, with a return that the sheriff had caused to be levied the costs *de bonis propriis* of the defendant, and that the defendant had no goods or chattels of the testator in his hands to be administered. Now it must be admitted, that the *testatum feri facias* in this case was irregular, inasmuch as it proceeds upon the suggestion of an award of a writ of *feri facias* to the sheriff of London ; whereas the court must take judicial notice that there are *two sheriffs* and not one only.

G But the *testatum feri facias* is irregular only, it is not a nullity. And if the plaintiff had applied to amend the recital, no doubt such amendment would have been permitted and no objection could have been then taken to the *feri facias*.

H But the question is, as the *testatum feri facias* has been actually issued, and returned, and no objection taken against its irregularity, whether such return, that the sheriff has actually levied the amount of the costs, out of the proper goods of the defendant, and that there are no goods of the testator within his bailiwick, does not afford more satisfactory evidence that the defendant had notice of the claim, so as to call upon him to pay the debt or offer the goods of the testator to the sheriff, than if a *feri facias* had been returned in the ordinary course, *nulla bona*, by the sheriff of the county where the action was brought ? And we feel no doubt that such is the case ; and that the defendant was called upon at the trial after the production of the *testatum feri facias* and return, to show, that he had not wasted the goods of the testator, but was ready to give them to the sheriff, so that it was the sheriff's fault that he did not make the debt out of them ; and as no such evidence was offered by the defendant at the trial, we think the plaintiff's evidence sufficient to establish a *devastavit*.

In my judgment, it is clear from that case that, in the view of TINDAL,

C.J., the sheriff's return of *nulla bona* is not conclusive against the defendants, but it is open to the defendants, if they can, to show why, at the date of the return of *nulla bona*, the assets, admittedly in their hands at the date of judgment, are no longer in their hands and to show that that is not due to any *devastavit* committed by them.

In the present case, the defendants have shown conclusively that, after the judgment, and long before the writ of *fiery facias*, an order had been made by this court appointing a receiver and making an administration order, and that the receiver had been ordered to get in the assets of the deceased. That, it seems to me, must afford a complete rebuttal of the presumption. The defendants were not entitled to disobey the order of the court. They were bound to hand over the assets to the receiver, and the evidence which has been called before me has proved, in my judgment, quite conclusively that they did in fact hand over to the receiver the assets, and that the receiver has since that time administered those assets under the direction of the court. Indeed, that position has been recognised by the plaintiff himself, who, in the administration action, has sold under the power of sale. The mortgage on the property has fetched, I think, £900, and he has put in a proof in the administration for the balance due to him, but, notwithstanding that, he seeks in this action to obtain an order against the defendants personally.

In my judgment, this action must fail, because, although the plaintiff has satisfied the first of the two requirements to get judgment in an action of this sort—namely, has proved conclusively that at the date of the King's Bench judgment the defendants had admitted assets in their hands—he has failed to show that the return of *nulla bona* which the sheriff made was due to a *devastavit* committed by the defendants. In fact, the defendants have shown conclusively, in my judgment, that it was not due to a *devastavit*, but was due to the fact that the Court of Chancery had intervened and had made itself master of the assets.

I was referred to *Re Timms* (4), which was to some extent relied upon, where BACON, V.-C., had refused to stay the proceedings against the executors personally where an administration order had been made. That case differs wholly from this, because there the judgment of the King's Bench Division and the return of *nulla bona* by the sheriff both preceded the administration order, and therefore it was not open to the defendant in that case to show that any intervention of the court was the cause of there being no assets to be found at the date when the sheriff went into possession. That seems to me to be no authority whatever in this case. The truth of the matter is that this sort of action is, of course, very artificial. The defendants may quite well let judgment go by default without really appreciating in the least what they are doing by that act. They may quite well fail to understand that they are in that way admitting assets, and may be making themselves personally liable, and the next step, the return of the sheriff, merely raises a presumption. That is in itself no evidence of a *devastavit*, although it may well be sufficient

evidence if there is no explanation forthcoming by the executors. It is the presumption which the executors can rebut, and will rebut if they can. In my judgment, in this case that presumption has been amply rebutted. The plaintiff has his remedy in the administration action, but he is not entitled, in my judgment, to an order against the defendants

A personally.

I should add that other defences have been raised in this case, and one very technical defence was raised out of the undertaking given by the plaintiff's counsel when the motion to stay the proceedings was before the court. It is said that the form of the judgment in an action of this sort is a judgment against the goods of the deceased in the first instance, and afterwards is a judgment against the executors personally, and that, that being the form of judgment, it would be a breach of the undertaking given to the court if this action were to be maintained and judgment sought, which would be, it is said, necessarily in the first instance, a judgment against the estate itself. Whether or not that be a sufficient ground for dismissing this action, I am not proposing to consider further. It is enough for me to say that, for the reasons I have already given, this action must fail, and must be dismissed with costs.

Action dismissed with costs.

D Solicitors : T. D. Jones & Co., agents for F. N. Powell, Son & Prichard, Llanelly (for the plaintiff) ; R. I. Lewis & Co., agents for Leslie Williams, Llanelly (for the defendants).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

E

BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY v. BORDERS (No. 2).

F [COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Finlay, L.JJ.), July 10, 1939.]

Practice—Appeal—Transcripts of proceedings in court below—Right to bring appeal without providing such transcripts and to rely upon the judge's notes—R.S.C., Ord. 58, r. 11 (b).

G In a case where the appellant can show that for some reason it is not possible to supply to the Court of Appeal a transcript of the proceedings in the court below, he may bring that evidence before the Court of Appeal as best he can. If the material he supplies proves to be inadequate, the appeal must necessarily fail. There is no need for a special application for leave to bring the appeal without providing the transcript of the proceedings below. In such a case, under R.S.C. Ord. 58, r. 11 (b), the judge's notes must be furnished to the Court of Appeal.

H

[EDITORIAL NOTE. A previous application in this matter is reported [1939] 3 All E.R. 29, where the court refused to review a refusal by the trial judge to allow the cost of the necessary transcripts to be defrayed out of public funds. It is understood that a similar application made to the House of Lords was also refused. In these circumstances, the appellant may proceed without supplying the transcripts, and no application to the court is necessary. It may well be that such material

as the appellant has may not be sufficient to substantiate his case before the Court of Appeal, and this is a risk which the appellant must take.

AS TO BRINGING EVIDENCE BEFORE THE COURT OF APPEAL, see HALSBURY, *Hailsham Edn.*, Vol. 26, pp. 123, 124, para. 243; and FOR CASES, see DIGEST, Practice, pp. 798-801, Nos. 3612-3650. See also YEARLY SUPREME COURT PRACTICE, 1939, pp. 1272-1276.]

APPLICATION in an appeal by the defendant for leave to proceed without supplying the court with the transcript of the shorthand note of the proceedings at the trial. The trial was before BENNETT, J., and is reported [1939] 1 All E.R. 481. A previous application had been made that the cost of such transcript might be defrayed out of the public funds, and this application is reported [1939] 3 All E.R. 29.

Hon. Sir Stafford Cripps, K.C., and C. H. A. Lewes for the applicant.

SIR WILFRID GREENE, M.R. [delivering the judgment of the court]: The relevant rule relating to the manner of bringing before this court evidence which was heard in the court below is R.S.C., Ord. 58, r. 11, which provides as follows:

When any question of fact is involved in an appeal, the evidence taken in the court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows.

Para. (b), which is the relevant paragraph, provides as follows:

As to any evidence given orally, by the production of a copy of the judge's notes or such other materials as the court may deem expedient.

The scheme under which official shorthand notes are taken forms no part of the rules of court. It is a scheme formulated by the Lord Chancellor, and it appears in THE ANNUAL PRACTICE, 1939, p. 1276. That scheme is a scheme for guidance, and has no statutory force.

Wherever an appellant is proposing to bring before this court the evidence given orally at the trial by the production of transcripts of the official shorthand note under the scheme, those will normally be the "materials" which this court will use. However, cases may arise when, for some good reason, that is not a possible course. This court, in such circumstances, is thrown back upon the rule, and under the rule there is no obligation on this court to insist upon the production of the shorthand notes. This court must decide in each case whether or not the manner in which it is proposed to bring before it the evidence given orally in the court below is expedient. Of course, in an appeal raising issues of fact, it is for the appellant to satisfy this court that the decision of the court below was wrong, and, if the materials supplied to this court are insufficient to enable it to act, the result will be that the appeal will be unsuccessful. On the other hand, this court is not entitled to refuse to hear an appeal merely on the ground that among the papers furnished to the court there are not present copies of the official shorthand note. The court will naturally expect to have those copies, wherever it is possible, but, if for one reason or another it is not possible, the appellant can bring

the evidence before this court as best he can, and, if the material which he furnishes is inadequate, then, as I have said, the natural result must necessarily follow. There is no need for an application to be made beforehand to this court for leave to bring the evidence before the court in this manner, but, for obvious reasons of convenience, it would be most desirable that any appellant who was proposing to conduct his appeal in that way should indicate in sufficient time to the other side what was the material which he proposed to bring before this court in order to inform it of the evidence given orally at the trial.

One further matter. In such cases, the rule must be observed, and a copy of the judge's note must be furnished, because that is what the rule says. Obviously, under the present system the judge's notes will not be, as a rule, so full as they were before the system was introduced, but, if it is the judge's note which is relied upon, a copy of the judge's note must be furnished in the usual way. The result is that upon this particular application it is not necessary to make any order, because, when the matter comes before this court, whatever material the appellant may have will be placed before it, and, if this court can deal with the issues of fact upon that material, it will do so. If, on the other hand, it cannot, then certain consequences necessarily will follow.

Solicitor : *W. H. Thompson* (for the applicant).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

E CULKIN v. McFIE & SONS, LTD.

[LIVERPOOL SUMMER ASSIZES (Croom-Johnson, J.), **June 26, 27, 1939.**]

Negligence—Degree of care required—Children—Allurement—Child running into highway—Lorry laden with sacks of sugar—Sugar escaping on to highway—Provision of look-out man at rear.

The infant plaintiff, a boy of 7 years of age, ran out from the pavement towards a lorry and trailer, laden with sacks of sugar, for the purpose of catching some of the sugar escaping from one of the sacks. At the time he ran out, the lorry had passed him, but not the trailer. He was injured by the trailer running over his left foot. It was found as a fact that the leakage of sugar was not due to any act of the infant plaintiff or other boys, but was due to damage suffered by the bags either during unloading from the ship or during loading on the lorry. The lorry was proceeding at a reasonable speed, and the driver had kept a proper look-out. There was a look-out man on the lorry, and, while he was in no way negligent, he was not in a position to see the boys approaching the lorry and to warn them to keep away. In the street in which the accident happened, there were three large elementary schools, and the accident happened outside one of them, on a day which was a whole holiday. The practice of the boys to run after such lorries was well-known, and the driver of the lorry had frequently had trouble with the boys. There was an alternative route close by, and the defendants had done nothing to cover or protect the sacks in any way, or to prevent the sugar from escaping on to the roadway :—

HELD : the lorry was an allurement to the infant plaintiff, and a concealed danger to him. The infant plaintiff was lawfully on the

highway, and in collecting the sugar he was merely indulging the natural instincts of a child of his age, and was not guilty of contributory negligence. The defendants had placed a manifest allurement to children upon the highway with an insufficient number of look-out men, and were liable in damages for the injury to the infant plaintiff.

[EDITORIAL NOTE.] When a person places a dangerous thing upon the highway, and that dangerous thing is one with which children are likely to meddle, there is a duty placed upon that person to take a higher degree of care than that which would ordinarily be required. The fact that children have meddled with such things is no defence, because the duty is to guard against such meddling, which is likely to cause injury to the children. The considerations to be applied to such a case are quite different from those to be applied to a case where the injured plaintiff is an adult, for a child is allured by things which may not be an allurement to an adult, and what is an effective warning to an adult may not be a warning at all to a child. A

AS TO STANDARD AND DEGREE OF CARE IN CASE OF CHILDREN, see HALSBURY, Hailsham Edn., Vol. 23, pp. 584-586, para. 836; and FOR CASES, see DIGEST, Vol. 36, pp. 68-72, Nos. 433-472. B

Cases referred to : C

- (1) *Rawsthorne v. Otley*, [1937] 3 All E.R. 902; Digest Supp.
- (2) *Cooke v. Midland Great Western Ry. of Ireland*, [1909] A.C. 229; 36 Digest 70, 450; 78 L.J.P.C. 76; 100 L.T. 626.
- (3) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 36 Digest 38, 223; 82 L.J.K.B. 258; 108 L.T. 4. D
- (4) *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K.B. 101; Digest Supp.; 103 L.J.K.B. 527; 151 L.T. 202.
- (5) *Hardy v. Central London Ry. Co.*, [1920] 3 K.B. 459; 36 Digest 71, 457; 89 L.J.K.B. 1187; 124 L.T. 136.
- (6) *Addie (R.) & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; Digest Supp.; 98 L.J.P.C. 119; 140 L.T. 650. E
- (7) *Excelsior Wire Rope Co., Ltd. v. Callan*, [1930] A.C. 404; Digest Supp.; 99 L.J.K.B. 380; 142 L.T. 531.
- (8) *Mangan v. Atterton* (1866), L.R. 1 Exch. 239; 36 Digest 71, 464; 35 L.J.Ex. 161; 14 L.T. 411.
- (9) *Harrison v. Rutland (Duke)*, [1893] 1 Q.B. 142; 26 Digest 317, 491; 62 L.J.Q.B. 117; 68 L.T. 35. F
- (10) *Bird v. Holbrook* (1828), 4 Bing. 628; 36 Digest 94, 629; 6 L.J.O.S.C.P. 146.
- (11) *Lynch v. Nurdin* (1841), 1 Q.B. 29; 36 Digest 24, 118; 10 L.J.Q.B. 73.
- (12) *Donovan v. Union Cartage Co., Ltd.*, [1933] 2 K.B. 71; Digest Supp.; 102 L.J.K.B. 270; 148 L.T. 333.
- (13) *Clark v. Chambers* (1878), 3 Q.B.D. 327; 36 Digest 22, 103; 47 L.J.Q.B. 427; 38 L.T. 454. G

ACTION by the infant plaintiff, suing by his father, for damages for injuries to his foot. The plaintiff was injured by the defendants' lorry when attempting to obtain sugar escaping from bags loaded upon the lorry. The plaintiff alleged that this escaping sugar was such an inducement to children as to constitute a danger likely to cause injury to them. H

E. G. Hemmerde, K.C., and *R. S. Nicklin* for the plaintiff.

Hartley W. Shawcross, K.C., and *J. Melville Kennan* for the defendants.

His Lordship made the following findings of fact before hearing legal argument :

A CROOM-JOHNSON, J. : This is an action brought by Bartholomew Culkin, an infant, suing by his father and next friend, to recover damages for personal injuries sustained as long ago as May 21, 1936. There is a claim added by the father, in his personal capacity, for various items of special damage, which have been agreed at the sum of £20.

B The statement of claim alleges that this little boy ran into the road-way, and that, as he ran into the roadway, his left foot was crushed by the rear offside wheel of the trailer of a motor vehicle and trailer in St. John's Road, Liverpool, the motor vehicle being driven by a driver of the defendants, a man named James Welsh, who at that time had been driving for them for many years, and was apparently a responsible person.

C The little boy in running to the side of the lorry, started his journey at the moment at which the driver in his cab was passing, or had passed, the spot. Accordingly, the little boy ran to the side of the defendants' vehicle at a moment when it was impossible for the driver to stop, or to do anything to avoid the accident. This particular motor vehicle was laden with bags of sugar. It was a very well-laden vehicle, and was

D being driven at about 6 or 7 m.p.h. . There is no evidence that the driver of the vehicle was, in fact, driving negligently or too fast. Although it is pleaded that the defendants' servants failed to keep a proper look-out, I do not think that, in the special circumstances of this case, I ought to feel satisfied that there was any failure by the driver of the vehicle to keep

E a proper look-out. He looked all round him, and I do not think that it was to be reasonably expected by him that this child would run out after he had passed. I must, therefore, come to the conclusion, having already indicated the facts about the speed at which the vehicle was being driven that day, that I cannot find anything like negligence on the part of the driver of the vehicle.

F How did the little boy come to be there ? In the ordinary way, from what I have said already, there would be judgment for the defendants, but the facts of this case are quite unusual. It appears that the defend-

G ants were accustomed in 1936 to send from the docks at Liverpool to different destinations in Liverpool on this flat lorry with four wheels, and with a trailer attached to it, a number of bags of sugar. Those bags, I was told, and I find, were closely arranged so as to leave no spaces between them. They were bags of Peruvian sugar, unloaded by the stevedores' men and put on the quayside. Having been placed on the

H quayside, they were loaded from there on to the defendants' lorry. There is a large business done in this kind of commodity at the Liverpool docks. When the bags of sugar have been loaded on the trailers or lorry, they are then driven through the streets of the city. It is said that these particular bags were sent off from the docks in perfect condition, with no holes in them.

It is, I think, now an undisputed point that, if there were holes in the bags, while they were being driven upon the road, some of the sugar would escape. It is now upon the evidence reasonably established that in some way or another, from some cause or another, on previous occasions some sugar had come out. On the evidence, I am driven to the conclusion that sugar was leaking from these bags on the day of the accident. I find A that one bag at least, on the side where the little boy ran out, was leaking.

I am satisfied, from the statements made by the driver, that he knew that there was a bag which was leaking. He spoke of it as a burst bag, and I find no satisfactory evidence which I can accept that that was due to deliberate acts by boys cutting the bags on this particular road. B Nobody has suggested, since the very early part of the case, that the infant plaintiff cut these sacks. Therefore, I must deal with the case upon the basis that, by the time these bags reached St. John's Road, at least one of them was leaking, and that the driver knew that it was leaking. The driver used the expression "burst," which, in my judg- C ment, would not be an appropriate word for him to use if, in fact, the bags had been cut by naughty little boys while the bags were upon their journey.

In these circumstances, I can find no other explanation than that these bags had been damaged in the process either of being unloaded from the ship or of being loaded on to the lorry and trailer. I was told that, D in the ordinary case, when that happened, it was the practice to send along a stitcher, who would stitch up the bags. However, there is no evidence before me that any stitcher was, in fact, sent up on this day, or that he had in fact stitched up the bags. Accordingly, I find that these E bags were not stitched. In other words, this was a cargo of sugar from which sugar was leaking, and leaking, as I find, to the knowledge of the defendants by their servant.

There is one other fact—namely, that apparently on this day, and on this journey, according to the evidence of the mate, Frost, he had some F difficulty with boys. Three or four, he said, ran after the lorry and trailer somewhere before St. John's Road was reached, and he shouted at them and tried to get them away from the side of the lorry. There is also the evidence of a witness who spoke to having seen the lorry G after the accident. She said that sugar was coming out of the bags, and she spoke of the warning she gave to the driver—that, if he did not go back and look after the sugar, there would soon be none left—which I do not recollect that the driver specifically denied.

As to the general position, I am not satisfied by the evidence for the defendants—upon whom, I think, the onus must lie—that the reason H for the bags leaking on previous occasions was that boys had cut them with razors. I think that, in general, the holes must have been made when the loading was being done. I am not satisfied that, while the journey is in progress and while the vehicles are running along the road, the little boys come out and cut the sacks.

I think that I have found sufficient facts to enable the matter to be discussed from the point of view of legal liability. I have purposely refrained from saying specifically at this stage whether it is a finding of fact or of law that sacks carried along in that way would be likely to be a danger. I particularly desire to leave that over.

- A I had better dispose of one other matter. It was suggested that this accident might have been due to the negligence of the look-out man, the mate. His job was to sit at the rear of the vehicle on his near side, and, as I understand it, to warn the boys away. I am not satisfied that that was where he was sitting. I know that he said that he was,
- B but the driver, on the other hand, said, as I understood him, that he could see the man from where he was sitting, and I do not think that, if he was sitting at the rear end, the driver could see him. I am judging of that largely from the photographs. I think that it is much more likely that the mate was sitting in the middle, where a witness told
- C me that he saw him, with his back to the driver. I think that in that position the driver probably could have seen him, and could have seen where he was. Whether "in the middle" means right in the centre of the load, or whether it means nearer one side than the other, I do not know, but I should expect him to be in the very middle on the top of the
- D sacks. In those circumstances, I cannot see any negligence on the part of the look-out man in not seeing a little boy who suddenly darts across the street behind the vehicle and catches sugar out of a bag. If the look-out man did not see him, I do not see that he could be expected to see him, and, if he did see him, I am not convinced that the little boy
- E would not have gone out just the same. In other words, so far as the failure to keep a proper look-out is concerned, as is alleged by the particulars of negligence, I cannot see that there was any such failure, and, if there was, I cannot see that it was the cause of this particular accident. I do not propose to say anything more before I hear the legal argument.
- F The following legal argument then took place.

Hemmerde, K.C.: Children were reasonably to be expected to be playing in the street, because the day was Ascension Day, a general holiday for schools in the district. It was within the defendants' knowledge that children made a practice of coming after sugar. There was an alternative

G route close by which their lorry might have followed, but it did not. The defendants offered an inducement or opportunity for children to run into danger. There was a duty upon them, therefore, to prevent such inducement or opportunity from resulting in danger, or a duty to guard against the consequences.

- H *Shawcross, K.C.*: A mere lorry is not an allurement: *Rawsthorne v. Otley* (1). The allurement must be a concealed danger or trap: *Cooke v. Midland Great Western Ry. of Ireland* (2) and *Latham v. Johnson (R.) & Nephew, Ltd.* (3). The plaintiff was not in the roadway for the purpose of passing and repassing, but for some other purpose, and was therefore a trespasser: *Liddle v. North Riding of Yorkshire County Council* (4).

In the circumstances, the defendants owed no duty to the plaintiff to take care, other than a duty not to cause him wilful damage or not to do a wilful act in reckless disregard of humanity towards him: *Latham v. Johnson (R.) & Nephew, Ltd.* (3). The plaintiff knew he was doing wrong, and cannot recover damages flowing from his own wrongful act or contributory negligence. There is no evidence of a concealed trap or danger. There A is nothing about a mechanically-propelled vehicle which a child would not encounter every day. The question of allurement in the case of a child trespasser is one of law. [Counsel referred to *Hardy v. Central London Ry. Co.* (5), *Addie (R.) & Sons (Collieries) v. Dumbreck* (6), *Excelsior Wire Rope Co., Ltd. v. Callan* (7) and *Mangan v. Atterton* (8).] B

CROOM-JOHNSON, J. : I have now considered the arguments addressed to me upon my preliminary findings of fact in this case. It was assented to by counsel on each side that, in giving judgment, I should add findings upon any point with which I had not previously dealt, and I now proceed C to do so.

The day upon which the accident happened was Ascension Day, May 21, 1936. The elementary schools in Liverpool were closed upon that day for a whole holiday. There were three large elementary schools in St. John's Road, and the accident happened outside the gates of one of them. The children were, therefore, reasonably to be expected to be playing in the street at the time. There was no evidence that the infant plaintiff had himself ever been warned, or been present when other children were warned, to keep away from the particular vehicle involved in the accident, or from any other vehicle similarly laden. He had D never previously done what he did on that day, but he stated: "I knew it was wrong. I had been told by my schoolmaster not to run after the sacks." Whether he knew it was wrong because it involved an act of disobedience to his schoolmaster, or because the escaping sugar never previously done what he did on that day, but he stated: "I knew it was wrong. I had been told by my schoolmaster not to run after the sacks." Whether he knew it was wrong because it involved an act of disobedience to his schoolmaster, or because the escaping sugar F

It was the practice of children in this neighbourhood, when a lorry laden with sacks of sugar hove in sight, to raise the clarion cry of "Togy!" and thereupon they descended upon what fell from it as their lawful spoil. The defendants' driver told me that he had frequently had trouble with boys—having to pull up to avoid their getting hurt—that G his mate had chased boys away on other occasions, that there were scores of children in the neighbourhood, and that he had, at some other time, stopped at one of the schools and complained to the master. He said that he had seen children filling their caps with sugar from other vehicles, but not from his. I do not accept that it had not previously happened to H his own vehicle. I cannot believe that these facts had not come to the knowledge of at least one responsible officer of the defendants. They were not new or recent.

There was another and a main alternative route close by. It is remarkable that the defendants, or their driver, who was in control of their

vehicle, with his knowledge of the circumstances I have just indicated, elected to drive this lorry and trailer, with its flat, open, platform laden with sacks leaking sugar into the roadway, by this particular route on this particular day. It is further remarkable that they should have done so without protecting the sacks in any way, and without taking any

A steps to secure that the sugar escaping from the sacks should not fall away from the vehicle into the roadway. No one would expect them to take any elaborate precautions, but I think that quite simple care would have prevented the escape of the sugar. Removable boards round the back and sides of the platform, such as I have seen in other parts of the

B country, would seem to have been at least a possible and simple contrivance to keep the sugar on the platform and out of the reach of the children's hands. I can think of few things more likely to tempt young children from the comparative safety of the footpath (or parapets, as they are commonly called in Liverpool) into the dangers of the roadway,

C and into close proximity to a vehicle bearing so tempting a cargo, than the spectacle of sugar dropping from the vehicle and being abandoned to whomsoever chose to pick it up.

It was not suggested that any attempt was made by anyone on behalf of the defendants to gather up the fallen sugar, and I was satisfied that

D the property in it was abandoned as it escaped and fell. I find that the infant plaintiff was so tempted on the day in question, and succumbed to the temptation for the first time in order to secure some of the escaping sugar for his own immediate consumption. I find that he sustained the injuries complained of by being run over by a wheel of the trailer whilst,

E being so tempted, he was securing some of the sugar referred to.

I have already found that such sugar was escaping to the knowledge of the defendants' driver. Where a person of full age does that which will probably afford an inducement, or an opportunity, for children to run into danger, he is bound to take reasonable pre-

F cautions to prevent such inducement, or opportunity, resulting in danger, or to guard against the consequences : see HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 23, p. 585. I do not think that the defendants or their servants took any effective or reasonable steps or precautions to prevent such an inducement, or opportunity, resulting in the danger I

G have indicated, or to guard against the consequences. Whilst I acquit the defendants' driver and look-out man of any personal negligence in the matter, I think that they were, in all the circumstances, given an impossible task by the defendants, and I cannot acquit the defendants of a breach of duty. One look-out man was not enough. To avoid any

H misunderstanding, I add that I was not satisfied as to the recollection of the police officer called as a witness for the defendants, and I did not accept his evidence.

The arguments for the defendants proceeded upon these lines : (i) a mere lorry is not an allurement : *Rawsthorne v. Otley* (1) ; (ii) the allurement must be to a concealed danger or trap : *Cook v. Midland*

Great Western Ry. of Ireland (2) and *Latham v. Johnson (R.) & Nephew, Ltd.* (3); (iii) the plaintiff was not in the roadway for the purpose of passing and repassing, but for some other purpose, and was, therefore, a trespasser: *Liddle v. North Riding of Yorkshire County Council* (4); (iv) in these circumstances, the defendants owed no duty to the plaintiff to take care other than a duty not to cause him wilful damage or not to do a wilful act in reckless disregard of humanity towards him: *Latham v. Johnson (R.) & Nephew, Ltd.* (3); (v) the plaintiff knew he was doing wrong, and therefore could not recover damages flowing from his own wrongful act or his own contributory negligence; (vi) strong reliance was placed on the decision as to the duty to child trespassers in *Cooke's* case (2): *Hardy v. Central London Ry. Co.* (5), *Addie (R.) & Sons (Collieries) v. Dumbreck* (6), *Excelsior Wire Rope Co., Ltd. v. Callan* (7) and *Liddle v. North Riding of Yorkshire County Council* (4); (vii) it was further submitted (a) that there was no element of a concealed trap or danger, inasmuch as the vehicle was moving at all material times, (b) that there was nothing about a mechanically-propelled vehicle which a child would not encounter every day, (c) that there was no reported case in which it had been held that a temptation to a child to get itself into a position of danger was an allurement or enticement, and (d) that there was no reported case in which the enticement of a child into the street in circumstances such as these had been considered; (viii) reliance was also placed upon the decisions in *Mangan v. Atterton* (8); (ix) the question of whether or not a child trespassing on another person's land had been allured or enticed thereon was a question of law.

Upon these arguments, I come to the following conclusions. (i) This is not a mere lorry, but a species of juggernaut dropping sugar into the roadway as it goes and blinding children of such tender years as the plaintiff's to the danger of too close an approach to it. (ii) The danger in the circumstances to this plaintiff was in effect a concealed one. (iii) The motive which induced the plaintiff to run out into the roadway in the exercise of his lawful right so to do is, I think, immaterial. It is a question of fact whether a person is using a highway as a highway for passing in accordance with reasonable and ordinary user of it for that purpose: *Harrison v. Rutland (Duke)* (9), at p. 156. I come to the conclusion that the plaintiff was not a trespasser upon the highway, and that he was, in all the circumstances, making a reasonable use of it. To hold otherwise would be to turn into a trespasser any child who chased his ball into the roadway or ran across the roadway in play. (iv) To send this moving and attractive vehicle down this street with an insufficient number of look-out men, as I find that the defendants did, was, in the circumstances, to act with a reckless disregard of the consequences. (v) The defendants, having tempted this child into danger, ought not to reproach him for yielding to the temptation. *Bird v. Holbrook* (10) is a decisive authority against the general proposition that misconduct—even wilful and culpable misconduct—must necessarily exclude the plaintiff who is guilty

of it from the right to sue: *Lynch v. Nurdin* (11), at p. 37. The plaintiff was only a little over 7 years of age, and he merely indulged in the natural instincts of a child in chasing this tantalising offer of a free sweetmeat: *Lynch v. Nurdin* (11), at p. 38.

- Applying the tests indicated in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol 23, p. 689, para. 972, I find as a fact that the plaintiff was not guilty of contributory negligence. *Lynch v. Nurdin* (11) has been explained upon the basis that the horse and cart left unattended constituted a nuisance. Without expressly so deciding, I should be prepared to hold that the use of the defendants' vehicle scattering sugar as it went upon the roadway was not a reasonable user by them of the highway, and was capable of at least being a nuisance. In any event, even if the plaintiff was a trespasser upon the highway, that does not relieve the defendants of the duty of taking care towards him. (vi) The cases cited were not in point. The plaintiff was not trespassing upon any property owned or occupied by the defendants. He neither climbed upon nor touched the vehicle or any part of it. There was no evidence that he even as much as touched one of the sacks. It was argued that the sugar was the property of the defendants at the time when the plaintiff caught it in his hands, but I do not find that it was. I know of no authority for the proposition that the defendants owe no duty to a trespasser upon a highway. Quite the reverse. (vii) (a) A moving vehicle may be a dangerous one: see *per* ACTON, J., in *Donovan v. Union Cartage Co., Ltd.* (12), at p. 74. (b) There was something about this vehicle which a child might not encounter every day—namely, its special attraction. (c) and (d) *Lynch v. Nurdin* (11). (viii) *Mangan v. Atterton* (8) was severely criticised in *Clarke v. Chambers* (13), and, having regard to the manifest distinction between the facts of that case and those of the present case, I do not regard myself as being bound by that decision to decide in favour of the present defendants. No property of the defendants was touched or interfered with by the plaintiff. (ix) I accept this proposition, but it seemed to me, having regard to what I have said under heading (vi), not to be in point.

- There is a duty upon every user of the highway to exercise reasonable care for the safety of others. Knowledge that children were likely to meddle with that which the defendants themselves provided, which was dangerous in character and a manifest allurement to children, in my judgment, imposed upon the defendants a relatively higher degree of duty to take care: HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., p. 584, para. 836, and cases there cited. I think that the defendants were wanting in that care, that their defence fails, and that there must be judgment for the infant plaintiff for the sum of £1,250 and for the adult plaintiff for the sum of £20, and in each case with costs.

Solicitors: *Neville, Mullen & Co.* (for the plaintiff); *Rutherfords* (for the defendants).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

STEPHENS v. SNELL.

[CHANCERY DIVISION (Bennett, J.), July 6, 7, 10, 1939.]

Fisheries—Private fisheries—Evidence of title—Several fishery in tidal waters—Necessity to prove existence of grant prior to Magna Carta—Manorial fishery—Boundaries.

The plaintiff claimed a right to a sole and several fishery in the tidal waters of the river A., and brought an action against the defendant, a fisherman, alleging trespass thereon. She based her claim to the right on a grant of the manor of A., together with the fishery, to the then Abbot of Monteburg by "Lord Henry of good memory, formerly King of England," whom she contended was either Henry I or Henry II, and therefore a King who reigned before Magna Carta. After the dissolution of the monasteries, the manor, with the fishery, reverted to the Crown. It was later regranted by Henry VIII, and thereafter the plaintiff's title was clear. The defendant was proved to have fished within the limits of the harbour of A., as defined by statute, and the question arose as to the limits of the plaintiff's fishery, which she herself sought to limit to the harbour of A. :—

HELD : (i) on the evidence, the plaintiff had established that the grant of the fishery had been made prior to Magna Carta.

(ii) the limits of a manorial fishery are determined by the bounds of the manor, which in this case were wider than those of the harbour. The defendant had, therefore, trespassed upon the plaintiff's fishery.

[EDITORIAL NOTE. This case is concerned with the manner of proof of a grant of a several fishery before the time of Magna Carta. Proof of a grant made so long ago is necessarily difficult, but here the court is satisfied that sufficient proof has been adduced. The case is also important on the extent of a grant of a fishery to a manor.

AS TO PROOF OF CROWN GRANTS, see HALSBURY, *Hailsham Edn.*, Vol. 13, pp. 665-667, para. 735 ; and FOR CASES, see DIGEST, Vol. 22, pp. 326-334, Nos. 3223-3319.]

Case referred to :

(1) *Neill v. Devonshire (Duke)* (1882), 8 App. Cas. 135 ; 25 Digest 7, 41.

ACTION for an injunction restraining the defendant from trespassing upon a sole and several fishery claimed to exist in Axmouth Harbour, in the county of Devon. The facts are fully set out in the judgment.

George Pollock for the plaintiff.

J. Lhind Pratt for the defendant.

BENNETT, J. : The defendant to this action is Harry Snell, a fisherman, and it is alleged that he has, with his boat and his nets, trespassed upon the plaintiff's fishery in the harbour of Axmouth.

In order that a right to a sole and several fishery in tidal waters may be established, the person who claims to be the owner of it has to found his claim upon a grant made by the Crown before the date of Magna Carta. By the common law of England, the public has a right to fish in tidal waters, and the claim to a several fishery is a claim to exclude the public from that right, and the prerogative right of the Crown to grant that right is taken away by the provisions of Magna Carta. That I understand to be the law, and I think it is accepted to be the law by counsel for the defendant.

In support of his case that the plaintiff has this sole and several right of fishery, the plaintiff's counsel founds himself upon the charter roll of 1331, the fourth year in the reign of King Edward III. The first relevant entry in that charter roll is an entry, as I understand it, made by, or at the instance of, an officer of the Crown who had the duty of inspecting
A charters granted by the Crown, and the roll contains a record of the inspection of two charters granted by a person described in the one case as "Lord Henry of famous memory, formerly King of England," and in the other as "Lord Henry of good memory, formerly King of England," and, as well as recording that the officer or officers inspected those two
B charters, it records the confirmation and re-grant by King Edward III in favour of the Abbot of Monteburg.

It is necessary to consider the terms of one of the *inspeximus* charters and the charter confirming the grant to be found in the *inspeximus* charter. The first of the three documents on the charter roll by Lord Henry of
C famous memory, formerly King of England, is a grant freeing from toll, passage-money and custom the gear, clothing and belongings of the monks of Monteburg, and it is, apparently, a grant made for the Abbot of Monteburg, an abbey in Normandy. The first charter or grant is stated to have been witnessed by Thomas, Earl of Gloucester, at St. Leofric's
D Cross. The second document on the roll, as I understand it, is properly called an *inspeximus* charter by Lord Henry of good memory, formerly King of England. It is a grant :

... to the Abbey of St. Mary of Monteburg, and to the abbot and monks, the place in which the abbey is situated, and the town of Monteburg [of certain rights in the King's forest].
E

In addition, it is expressed in the following words :

I grant also and confirm to the above-mentioned Abbey of Monteburg and the monks in England, a certain manor which is called Lodors in Dorset, with the church of the same manor and the chapel of Bolemerston, and all appurtenances ; and another manor which is named Auxemud in Devon, with the church of the same manor, and a fishery, and two draughts which are there, to drag with nets.
F

There is no question but that Auxemud and Axmouth are the same place. Then the roll records a grant by Edward III in these terms :

We, moreover, for us and our heirs, as much as is in us, grant and confirm, as the charters and writings aforesaid witness, to our beloved in Christ the now Abbot of Monteburg and the convent of that place, and their successors, the gift, grant, confirmations, and acquittances aforesaid ; and the grant and confirmation which Baldwin, late Earl of Exeter, made by his charter to God and the Abbey of St. Mary of Monteburg and the monks serving God in the same place, of all gifts which Richard de Revers, father of the aforesaid Earl Baldwin, made to the same abbot and monks in England, free and quit altogether of all things belonging to the same Baldwin and his heirs—which gifts were, a manor in Devon, in the bishopric of Exeter, which is called Auxemud, free and quit, with all appurtenances, and with the church of the same manor, and a fishery, and two draughts which are there, to drag with nets.
G
H

Those are the documents upon which the plaintiff relies as establishing that there was a several fishery granted to her predecessors in title in the tidal waters of the River Axe before the date of Magna Carta. The question depends, in my judgment, upon whether or not it is a proper

inference to draw that Lord Henry of good memory, formerly King of England, was either Henry I or Henry II, and not Henry III. Either Henry I or Henry II would be good enough, because both of those Kings of England reigned before Magna Carta.

The entries of the charters—that is to say, the two *inspeximus* charters and the charter of Edward III—upon the charter roll are in the same hand. A Thomas, Earl of Gloucester, witnessed the first *inspeximus* charter, and it has been proved that no Earl of Gloucester living in the reign of Henry III bore the Christian name of Thomas. It would follow, therefore, that the first of the *inspeximus* charters must have been granted either in the reign of Henry I or in the reign of Henry II, and it B could not have been granted in the reign of Henry III. It is almost inconceivable that the clerk making the entries in the charter roll would have made two entries relating to two separate and distinct charters, both made by a Lord Henry, King of England, and would have failed, if the charters had been granted by different Henrys, to have made some C record of the fact that they had been so granted. I think that one should also act upon the footing that Henry III, who came to the throne so soon after Magna Carta, would not have violated the provisions of that document, and I think one should therefore presume that the *inspeximus* charter was granted by a King who had the right to grant it. Thus, D I come to the conclusion that the *inspeximus* charter was granted either by King Henry I or by King Henry II, and that it granted a sole and several fishery to the Abbot of Monteburg in the manor of Axmouth.

It would seem that at a later date the manor of Axmouth got back into the possession of the Crown, probably as a result of the dissolution E of the monastery, because it appears that the manor was settled by King Henry VIII upon Katherine Parr, his wife, for her life. That appears from a document to which I shall presently refer.

The law is that, once there is proof of the grant of the several fishery before Magna Carta, there is no merger of it if, after that date, it gets F back into the possession of the Crown. The law is that it can be regranted by the Crown. That seems to me to be well settled, and is so stated by LORD BLACKBURN in a passage in his opinion in *Neill v. Devonshire (Duke)* (1), at p. 180, where he adopts as his own a statement by the Master of the Rolls in Ireland in these terms : G

“It is not law, and this can never be too often repeated, that the Crown cannot grant a several fishery in tidal waters since Magna Charta. Such a statement is illusory and contrary to law. It can grant a several fishery in such waters since Magna Charta, if that fishery existed before Magna Charta. If a tidal river in which there was *primu facie* a right in the public to fish was appropriated by an individual or by the Crown before Magna Charta, that individual or the Crown, if the Crown has got it back, can grant it after Magna Charta. That is a settled principle on H which every one of the cases connected with several fisheries in tidal rivers have been adjudicated upon in this country. . . .”

With that passage in mind, although the plaintiff has not shown any title between the date of 1331 and the date of the document to which I am now about to refer, she has in her possession, as one of her title deeds,

letters patent dated July 11, 1552, by King Edward VI, whereby he grants the lordship and manor of Axmouth to one Walter Earle, together with "fisheries, fishings, woods," and so forth, appertaining thereunto. It is those letters patent which show that King Henry VIII had granted the manor to his wife, Lady Katherine, late Queen of England, and it was
A on her death, seemingly, that the manor and lordship of the manor reverted to the Crown. That is simply a matter of historical interest.

The next document of title which the plaintiff has is letters patent by Philip and Mary, King and Queen of England, France, Naples, Jerusalem, and Ireland, and, according to the title in the letters patent :

B Princes of the Spains and Sicily ; Archdukes of Austria ; Dukes of Milan, Burgundy, and Brabant ; Counts of Hapsburg, Flanders, and Tyrol.

They confirm the grant of the manor and of the fishery to their :

... beloved servant Walter Earle, esquire, one of the gentlemen of our Privy Chamber of the said lady [Queen Mary].

C From then, there is a good paper title, and also this fact admissible in evidence of the possession by the lord of the manor of Axmouth for the time being of the fishery in question. The evidence is the record of an action tried at the Devonshire Assizes at Exeter in the reign of George III
D between Sir William Templer De La Pole as defendant and the then lord of the manor of Axmouth, Richard Hothersall Hallett, who seems to have been a parson. He sued Sir William Templer De La Pole for trespass upon his several fishery, and, after trial before a jury, a verdict was given in favour of the plaintiff. That fact is admissible in evidence, and estab-
E lishes that at that date the owner of the lordship of the manor of Axmouth was possessed of the several fishery which the plaintiff claims. Her title is traced from one of the Halletts, who was lord of the manor of Axmouth. Mortgagees of his, exercising their powers of sale, conveyed the fishery, along with the lordship of the manor, to the plaintiff's father
F by a deed dated Feb. 2, 1891, the material part of the conveyance being as follows :

G All that the honour hundred manor and lordship of Axmouth in the county of Devon with its rights members and appurtenances and all the manor or reputed manor of Stedcombe in the same county and all that the sole and exclusive right of fishery and fishing in the River Axe in the same county from the bridge over the said river known as Axo Bridge to the sea.

The plaintiff's title to the fishery is as tenant for life under the will of her father, who died in Aug., 1910, and a vesting deed in her favour was executed on May 27, 1926, so that I have no doubt that the plaintiff has established her title to a sole and several fishery in the tidal waters
H of the River Axe.

The defendant has been proved to have fished from a boat with nets from a point just east of what might popularly be described as the mouth of the River Axe. It is between highwatermark and lowwatermark that his boat is proved to have been at the time when he put out his net and spread it across the mouth of the river, and the only question which

I think is of difficulty is the question of whether or not the defendant, when he fished, was fishing within the limits of the plaintiff's several fishery. There has been no definition of the limits of the fishery granted before Magna Carta until an attempt to define the limits was made in the conveyance of Feb. 2, 1891. The plaintiff in her statement of claim has sought to limit the fishery to the harbour of Axmouth, and has taken the limits of that harbour from the provisions of an Act of Parliament, passed in the eleventh year of the reign of George IV, for the purpose of maintaining and governing the harbour of Axmouth. Sect. 3 provides as follows :

That the extent and boundary of the said harbour of Axmouth next the sea shall be deemed and is hereby declared to be from the boundary-post on the beach, which divides the parishes of Axmouth and Seaton, extending down to lowwater-mark, on the west, to the eastern extremity of the cliff commonly called or known by the name of Haven Cliff, extending down to lowwatermark, on the east (the whole of the property of the shore between these two points being part of the manor of Axmouth); and that the extent and boundary of the said harbour within the said River Ax shall be deemed and is hereby declared to be to the south point of a piece of land commonly called or known by the name of The Slime, nearly opposite the village of Axmouth, the whole of the lands on both sides of the River Ax from the mouth to the said point of land called the Slime being the property of the said John Hothersall Hallett; and the said harbour, so bounded, shall be called Axmouth Harbour.

The boundary-stone or boundary-post on the beach, which is the boundary-mark between the parishes of Axmouth and Seaton, is shown on the Ordnance survey map. I have the survey made in 1887, revised in 1933, the scale being 25 ins. to the mile. It is difficult to determine on this map what is described in the Act as "the eastern extremity of the cliff commonly called or known by the name of Haven Cliff," but the fact is quite clear that it would be to the east of the point at which it has been proved that the defendant was fishing, and I think that that is all which it is necessary for me to say as regards the statutory definition. It is also clear, however, that the foreshore which is owned by the lord of the manor extends to the east of the eastern extremity of Haven Cliff.

I have to determine whether or not where the defendant fished was within the fishery of the plaintiff. It plainly was within Axmouth Harbour as defined by the Act of Parliament. What are the limits of the plaintiff's fishery, a fishery granted in a manor? It is stated in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 15, p. 54, that the extent in length of a fishery, in the absence of evidence to the contrary, is determined, in the case of a manorial fishery, by the bounds of the manor. There is no authority, so I am told, which supports that proposition, but I think that it is a proposition which must be true. A several fishery granted by the Crown is granted in tidal waters. The fishery cannot be above highwatermark of ordinary tides. It cannot be the bed of the river at low water, because it is in tidal waters, and, as soon as the tide begins to flow, the boundaries of the fishery—the limits of it—become impossible of identification. The only other limit which,

as it seems to me, can be placed upon it is the limit which is stated as the limit in HALSBURY'S LAWS OF ENGLAND—namely, the bounds of the manor. In this case, those are outside, so far as the defendant is concerned, the place at which proof has been given that he did fish, and it would seem from the conveyance of Feb. 2, 1891, to extend right up to

A the adjoining parish.

On the facts established in this case, the plaintiff, in my judgment, has established that the defendant has trespassed upon her several fishery, and there must be an injunction granted to restrain him from repeating the acts which he has been proved to have committed. I

B think that the limits of the plaintiff's fishery are wider than the limits of the harbour of Axmouth as defined by the Act of Parliament, and the injunction to which she is entitled is an injunction to restrain the defendant, his servants and agents from fishing within the tidal waters in the boundary of the manor.

C Solicitors : *Gedge, Fiske & Co.* (for the plaintiff) ; *Hancock & Willis*, agents for *Cecil Forward*, Axminster (for the defendant).

[*Reported by MAURICE SHARE, ESQ., Barrister-at-Law.*]

D HAMPTON & SONS, LTD. v. GEORGE.

[KING'S BENCH DIVISION (du Parcq, L.J., sitting as an additional judge),
July 5, 6, 1939.]

E *Agency—Commission—Agent prevented from earning—Sole agent—Sale effected through another agent after termination of his authority—Damages—Assessment of damages.*

On Dec. 18, 1936, one M., since deceased, appointed the plaintiffs sole agents for the sale of the lease of a hotel of which he was lessee. No agreement was made as to the amount of the plaintiffs' remuneration, nor as to the event in which it was to be paid, but the plaintiffs gave to M. a printed scale of charges made for various cases. Prior to instructing the plaintiffs, M. had, to the knowledge of the plaintiffs, put the property in the hands of A. & Co., a firm of brokers dealing almost entirely with licensed premises, but he terminated their authority on Dec. 19. On this date the plaintiffs wrote to M. confirming their appointment, and on the same day wrote to A. & Co. advising that they had been appointed sole agents and that the letter was to be treated as a cancellation of any previous instructions received by A. & Co. On or about Dec. 10, a Mrs. S. had, through A. & Co., offered £2,500, which was not then accepted. At a later date, and after A. & Co.'s authority had been terminated, she again approached them, and renewed her previous offer, which was this time accepted. The plaintiffs commenced action against the defendant as sole executor of M., claiming commission on the sale of the property :—

H HELD : (i) the appointment of the plaintiffs as sole agents terminated the agency of A. & Co.

(ii) the plaintiffs were entitled to damages for the loss of the opportunity of earning their commission, but, in all the circumstances of the case, they were not entitled to the full amount of commission as damages.

[EDITORIAL NOTE. The position of a sole agent for the sale of property is perhaps a little bare of authority. From the present case it is clear that the sole

agent is not entitled to his full commission in any event, if the property is sold during his agency. The judgment also investigates the position where negotiations for a sale by other agents are nearly complete at the time the sole agency is granted, and also the effect of the creation of the sole agency as a determination of a previous agency.

AS TO SOLE AGENTS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 256, 257, para. 431; and FOR CASES, see DIGEST, Vol. 1, pp. 559, 560, Nos. 2081-2083.] A

Case referred to :

- (1) *Bampton (Ronald) & Partners v. Garner (D.) & Sons, Ltd.*, [1937] 3 All E.R. 438; Digest Supp.

ACTION claiming commission on the sale of the lease of a hotel, the property of G. A. Mallows, deceased. On Dec. 18, 1936, Mallows verbally appointed the plaintiffs sole agents for the sale of the property, and on the following day the plaintiffs wrote to him confirming that he had agreed to leave the sale solely in their hands. They also stated that they had written to Abb & Co., who had previously been agents for the sale of the property, and that they enclosed a copy of that letter. The letter to Abb & Co. stated that Mallows desired to leave the sale solely in the hands of the plaintiffs, and asked them to take that letter as a cancellation of any instructions they had received. The letter concluded by saying that the plaintiffs would be pleased to co-operate with Abb & Co. if the latter had any likely applicants with whom the plaintiffs had not been in direct or indirect touch. B C D

N. A. J. Cohen for the plaintiffs.

Frederick Wishart for the defendant.

Cohen : Even if it is right that the first agents were entitled to a commission, it does not follow that the plaintiffs are not entitled to one if the deceased allowed other agents to intervene in the matter. Messrs. Hamptons are entitled to the full commission. Alternatively, they are entitled to damages. They could have done what the other agents did, or they might have got more, if they had been given an opportunity. E

Wishart : The defendant is entitled to judgment because of the previous transaction. It makes no difference that the offer was at one time refused, if it eventually fructified. Negotiations were still proceeding, until eventually the contract of sale was signed. Everything was done to earn the commission before the contract with the plaintiffs was made, because the sale eventually went through. If the plaintiffs are entitled to anything, it is damages, which will amount to little or nothing. This chance of finding a purchaser who would give £4,000 or thereabouts was very remote. F G

Cohen, in reply, referred to *Bampton (Ronald) & Partners v. Garner (D.) & Sons, Ltd.* (1). H

DU PARCQ, L.J. : The first question is this. What was the contract, if any, made in Dec., 1936, between the plaintiffs and Mr. Mallows? I have no doubt that there was a contract, and, looking at the correspondence, and particularly at the unanswered letter from Messrs. Hamp-

- tons to Mr. Mallows, I have no doubt that he agreed, using their words, to leave the sale solely in Messrs. Hamptons' hands. The sale to which I am referring is the sale of the lease of the Dumb Bell Hotel. I am sure that at the interview no very great detail was gone into. Certainly no detail at all was gone into as to what the remuneration of the plaintiffs
- A was to be, nor was that later discussed, nor, I think, was any precise language used as to what exactly was to be the event in which Messrs. Hamptons were to have their remuneration. It may be patent that they were to have remuneration if they introduced a purchaser. As to the scale, the scale of charges was handed to Mr. Mallows, who put it in his
- B pocket. I should think it is highly probable that he never read it, and, if he ever read it, I am not at all sure that he would have understood it, because it has taken me some time to find out from counsel, and counsel do not agree, under what head the charges ought to be fixed. I am bound to say that I think that, without some explanation, it would be very
- C difficult for Mr. Mallows to be at all sure what he would have to pay. I must not construe this too much in favour of Messrs. Hamptons, who put forward what appears to me to be a somewhat ambiguous document. I think that, if they had succeeded in introducing a purchaser, what they would have been paid would have been £104, accepting the statement—
- D which is hardly contradicted—that, on a profit of £200 per annum for the last 3 years, £600 would have represented the goodwill. It is said that Messrs. Hamptons have lost that sum, and that they ought to have that by way of damages. Before Mr. Mallows went to Messrs. Hamptons, he had already put this property in the hands of Messrs. Abb & Co.,
- E who are brokers dealing almost entirely with licensed premises, and Messrs. Hamptons knew that. It was plain that Messrs. Abb & Co. were entitled to find a purchaser down to the moment when their authority was determined—namely, on Dec. 19, when it was properly determined. If Mr. Mallows had kept his contract, he would have had no more to do
- F with Messrs. Abb & Co. He ought then to have looked entirely to Messrs. Hamptons to act as his agents until he came to the conclusion that he would determine their authority as he had determined that of Messrs. Abb & Co., and, of course, he might have done it at some later time. In the meanwhile they would have had an opportunity of finding a purchaser.
- G I think that, if they had sought to produce Mrs. Shuttleworth as a purchaser, they would have been in difficulties. Mrs. Shuttleworth, I must explain, is the lady who had already been to Messrs. Abb & Co. on Dec. 10 and had offered £2,500, which Mr. Mallows had refused to accept. Later on, Mrs. Shuttleworth repeated her offer and she again dealt through
- H Messrs. Abb & Co. This time, Mr. Mallows accepted her offer of £2,500. Counsel for the plaintiffs says that, when Mrs. Shuttleworth renewed her offer Mr. Mallows ought to have said: "If you want to deal with me, you must go to Messrs. Hamptons." I am not sure that Mrs. Shuttleworth would have gone to Messrs. Hamptons. One could not drive her there, and, if she had gone to Messrs. Hamptons and said, "Well, I repeat

to you what I said to Messrs. Abb & Co. £2,500 is my price, and not a penny more. Take it or leave it," and they had said, "We will take it," I think that it would be very difficult for them to say that they had introduced Mrs. Shuttleworth, or negotiated a sale with Mrs. Shuttleworth. However, counsel for the plaintiffs truly said that the persuasive powers of Messrs. Hamptons might have been such that Mrs. Shuttleworth would have been persuaded to give more than £2,500, and they have lost that chance. They have also lost the chance of finding somebody else who might have given more than, or, at any rate, as much as, £2,500. I think that I have to assess the value of that chance. There are various things to take into account. I take into account, on the one hand, that Messrs. Hamptons are experienced and efficient people, but are not specialists in this particular class of business. Their branch dealing with licensed premises was a small one. There were difficulties in this case. The brewers were not easily satisfied, and they were quite right, for reasons into which I need not go. They were very much inclined to jump at Mrs. Shuttleworth, to use an expression which was used in this case, and they might have been much less inclined, having once heard the name of Mrs. Shuttleworth, to accept anyone else. However, they would have acted reasonably, no doubt, and they might have accepted somebody else, and it might have been possible for Messrs. Hamptons to find somebody. They might even have got more than £2,500, and they might have done it within a reasonable time, so that Mr. Malloes would not have determined their agency. However, all this is, of course, in the region of speculation, and I have to do the best I can and estimate what their chance of earning the commission of £104 was. I award £80 damages, and I think that the costs should be on the High Court scale.

Judgment for the plaintiffs for £80 with costs on the High Court scale.

Solicitors: *Edward Betteley, Smith & Stirling* (for the plaintiffs); *Pownall & Co.* (for the defendant).

[Reported by C. ST J. NICHOLSON, ESQ., Barrister-at-Law.]

TURK GEMI KURTAMA v. ITHAKA (OWNERS). THE ITHAKA.

[COURT OF APPEAL (Scott, MacKinnon and Finlay, L.JJ.), July 4, 1939.]

Arbitration—Restraint of arbitration—Arbitration under salvage agreement—Action in Turkish courts to set aside salvage agreement.

The steamship *Ithaka* grounded in the Dardanelles, but only so lightly that by the removal of part of her cargo she could have been refloated by her own power. The exclusive control of salvage work in those waters was, under the law of Turkey, in the hands of a salvage company. The master of the ship was consequently unable to hire lighters otherwise than from that company, and for that purpose the company required him to enter into a salvage agreement in the ordinary Lloyd's form. That form provides for an arbitration in England, and

an arbitrator had been duly appointed. The owners brought proceedings in Turkey to set aside the salvage agreement, on the ground that it was obtained by duress. Thereupon they applied to the Admiralty Court in England to stay all proceedings in the arbitration pending the decision of the action in Turkey. The court refused the application, whereupon this appeal was brought:—

- A HELD: the prosecution of the action in Turkey, in the circumstances, did not justify the staying of the arbitration proceedings. The owners of the ship were bound by the salvage agreement.

[EDITORIAL NOTE. The court in this case have regarded the salvage agreement as a binding agreement, although proceedings had been commenced in the Turkish courts to obtain a declaration that it was void. It should be noted that the arbitrator would have full power in his award to do justice between the parties, and

- B possibly to give effect to the fact that the ship was bound to employ the salvage company.

AS TO STAYING ARBITRATION PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 630, 631, para. 1077; and FOR CASES, see DIGEST, Vol. 2, pp. 377-381, Nos. 412-427.]

- C Case referred to:

(1) *Logan v. Bank of Scotland* (No. 2), [1906] 1 K.B. 141; 11 Digest 477, 1310; 75 L.J.K.B. 218; 94 L.T. 153.

APPEAL by the defendants from an order of BUCKNILL, J., dated May 22, 1939. The facts are fully set out in the judgment of SCOTT, L.J.

- D H. G. Willmer, K.C., and J. B. Hewson for the appellants.
G. St. C. Pilcher, K.C., and Owen L. Bateson for the respondents.

SCOTT, L.J.: In this appeal from an order made by BUCKNILL, J., the appellants ask us to reverse the order which he made. That order

- E was made in rather exceptional proceedings, and upon an application of an exceptional kind. It related to a claim for salvage of the German ship *Ithaka* in the Hellespont, in Turkish territorial waters, where, under the law of Turkey, the only salvors allowed to effect salvage are a company with limited liability, registered under the law of Turkey, in which the
F Turkish Government have an interest as, I take it, shareholders. The vessel was on a voyage to Istanbul with a cargo destined for Istanbul. She took the ground on a sandy bottom in the Hellespont, and could not get off with her own engine action. The control of lighters in the Hellespont is entirely in the hands of this Turkish salvage company,
G under the law of Turkey, passed in recent years, relating to salvage. In consequence, the master of the ship was unable to hire lighters, and, in the circumstances, he had no option but to ask the salvage company for lighters. They carry on their salvage business by a method of taking agreements of Lloyd's standard form of salvage agreement, well-known
H in this country, which provides that salvage shall be paid on a "no cure, no pay" basis, in the event of success the amount being unspecified, and the agreement containing a provision for arbitration as to the amount.

In this particular case, the master, according to the evidence, made an oral protest against being asked to sign a salvage agreement, because he said that it was quite easy, by lightening the ship, to get the ship off, and

that that was all he wanted, and that there was no cause for salvage. However, he could not get his lighters unless he signed the agreement, for the reasons I have mentioned, and he consequently signed an agreement. Then, pursuant to the agreement, an arbitrator was appointed in this country, and a bankers' undertaking was obtained for security for the claims against the ship, freight and cargo, which was arranged A
by, and at the expense of, the owners of the ship, in a total amount of £12,000 sterling, through a bank in London. Mr. Carpmael, K.C., was duly appointed arbitrator by the committee of Lloyd's under that agree-
ment. However, the owners of the ship took advice, and thought that they were likely to be prejudiced if the arbitration under Lloyd's salvage B
agreement was allowed to proceed. They took the view that, in the circumstances of the case, they had been forced, as it were, by duress to sign the agreement. They thereupon instituted proceedings in Turkey with a view to a declaration that that agreement was obtained by duress, and was, therefore, invalid. They then came to the Admiralty Court C
and asked that proceedings before the arbitrator should be indefinitely postponed pending the decision of the action in Turkey, on the ground that in that action they hoped to obtain judgment, the result of which would be to invalidate the agreement under which the arbitration was to take place. BUCKNILL, J., who dealt with the application, held that he D
could not grant it, and he gave a judgment, of which we have the transcript of the shorthand note. He stated the facts as I have stated them, but in rather greater detail, and in the course of the judgment he pointed out that there was no protest against the agreement recorded on the document, and he stated—inaccurately, according to the affidavit E
evidence tendered by the owners of the ship—that no oral protest was made at the time. Apart altogether from that question of protest or no protest, the judge points out that apparently in the agreement itself the captain accepted that agreement as the condition of being given the assistance which he desired, and that consequently it would be unfair to F
the salvage company if the arbitration were postponed for an indefinite period of time, with the possible result that, if the plaintiffs' proceedings succeeded in Turkey, there would be no security for the salvors. He held, in the circumstances, that the owners of the *Ithaka* were estopped from setting up that they were forced by duress of circumstances to sign G
an agreement which they did not really mean to sign, and that by their conduct they had precluded themselves from saying that the agreement was an improper agreement obtained in circumstances which rendered it invalid. The judge added that, so far as he could see, there was no ground for upsetting it. I think that that sentence may, as counsel for H
the appellants has pointed out, be misunderstood in the Turkish court as an expression of opinion that the action in Turkey is obviously a mistaken view of the rights of the owners of the *Ithaka*, and that there is no ground for the Turkish proceedings. I do not so read it for one moment. All I think that the judge meant by that was that, on the facts stated in the

affidavits in the proceedings here, there was no sufficient ground for the court here to say that the agreement was one which could not be treated here as an agreement accepted by the owners of the Ithaka. I agree with counsel for the appellants that, if that phrase were to be read by the Turkish court as meaning that the action brought in Turkey was mis-

- A conceived, it would be unfair to his clients. However, as I have said, I do not think that the judge used the phrase in that sense at all. I think that his intention was to leave the owners of the Ithaka to prosecute their action in Turkey, and that he did not in any way desire to impair the case which they might there present. What he did feel was that, B having actually signed an agreement the captain, however little he wanted to sign the agreement, did so with his eyes entirely open, and that, in the circumstances, there was no ground for the Admiralty Court here, intervening in its equitable jurisdiction, to say that one particular clause of the agreement—namely, the arbitration clause—should be treated as C ineffective.

In those circumstances, therefore, he quite properly, in my view, refused to make any such order as that which he was asked to make, which was an order in these terms :

- D Take notice that the court will be moved for an order that the appointment of the arbitrator appointed herein by the committee of Lloyd's in pursuance of an agreement on Lloyd's standard form of salvage agreement dated Nov. 25, 1938, may be revoked and that the submission to arbitration contained in the said agreement shall cease to have effect, or that the said arbitrator may be restrained from proceeding with the said arbitration thereunder, or for such further or other order as to the court may seem just.

- E Before us, counsel for the appellants said that he would be content with an order postponing the arbitration proceedings until after the action in Turkey had been concluded. He also offered, in order to compensate the salvors for any loss they might suffer through standing out of the salvage money by that delay in the determination of their rights, to pay F interest at any rate which the court thought right, for whatever time was necessary. He further offered, in answer to questions by the court, to agree that the bankers' guarantee of the amount of £12,000 sterling should remain available even if the action in Turkey succeeded, and the agreement was set aside, pending any proceedings which might be taken G by the salvage company for obtaining salvage in any court. That was a reasonable offer, but that does not, in my view, remove the fundamental difficulty in which he is.

- In my view, in the circumstances in which the captain entered into the agreement, this court ought not to treat it as inoperative, or to H suspend the operation of the arbitration under it. On Dec. 31, Messrs. Wendt & Co., agents of the owners of the Ithaka, with their authority addressed to the committee of Lloyd's a request that they should act upon the salvage agreement. It was in the following terms :

We duly received your letter of the 5th instant for which we thank you, and pursuant to cl. 6 of Lloyd's form of salvage agreement [which had been signed during November by the master] we hereby give you notice that it is the desire

of our principals that this matter should proceed to arbitration. In the arbitration proceedings Messrs. Bentleys, Stokes & Lowless will act on our behalf.

It was pursuant to that request that the arbitrator was appointed and that the arbitration proceedings in that sense started, and in my view it would be unfair to the Turkish salvors, in those circumstances, to say that the arbitration should not go through. Counsel for the appellants says that, if the view of the facts which he is instructed to put forward is well-founded, there was no salvage in the true sense here, that it was merely work and labour, and that, under the arbitration agreement, there is an admission that the services were salvage services. That may be, but it will not prevent the arbitrator from doing effective justice when he comes to make his award, because, if he thinks that there was a slight aspect of salvage in it, he will make his award accordingly. I therefore do not think that the owners of the Ithaka will really be prejudiced by the arbitration proceedings being held, and that, on the other hand, it would involve an unfairness to the salvage company if the arbitration proceedings were held up indefinitely. As they are business people, it must be a matter of importance to them that the arbitration proceedings under Lloyd's agreement, which we understand is the method by which they carry on the whole of their business, should not be unduly postponed. In those circumstances, I think that the appeal ought to be dismissed.

MACKINNON, L.J.: I agree. I think that this was a hopeless application before BUCKNILL, J., and there are a great many reasons why it should have failed. I mention only two of them. The parties entered into an agreement on Nov. 25, 1938. On Dec. 31, pursuant to cl. 6 of the agreement, the owners of the Ithaka gave notice to the committee of Lloyd's that they desired to claim arbitration. An arbitrator was appointed, solicitors were appointed to appear before him for the Ithaka, and more than one meeting took place. Suddenly, on Mar. 22, 1939, the owners of the Ithaka moved to stop further proceedings in the arbitration, upon the ground that they were not bound by the agreement under which it took place. To that claim, as a matter of fair play and common sense, the most obvious and complete answer is: "You cannot be allowed to assert that that agreement does not bind you. We had a lien on your ship and on the cargo. In pursuance of this agreement, you gave security for the fulfilment of the obligation under this agreement, and, upon your giving that security, we released this ship and cargo, on the faith of your having entered into the agreement and acted upon it. If you now deny that it is a valid agreement, we, the salvors, shall be grossly damnified, because we shall lose the ship and cargo which we were entitled to retain, and we shall lose the security which you gave, treating the agreement as a valid one. In those circumstances, you must not be allowed in this court to claim to stop the carrying on of this arbitration upon the ground that you are not bound

by this agreement to arbitrate." That is one aspect of it, and I call it common sense and elementary fair play.

The other aspect of it seems to me to be this. This is an application by motion under the equitable jurisdiction of the court to stop legal proceedings being pursued in this country. It is an application to stop
 A an arbitration which is, on its face, perfectly valid and proper, and within the jurisdiction of the arbitrator. I think that one should refer to the powers of the court to stop an action which has been started within the jurisdiction, the parties having been properly served within the jurisdiction. The grounds on which such action will be taken by the court are
 B set out in the headnote in *Logan v. Bank of Scotland (No. 2) (1)* as follows :

The court will stay an action, brought within the jurisdiction, in respect of a cause of action arising out of the jurisdiction, if satisfied that no injustice will be done thereby to the plaintiff, and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression . . .

C Thus, here, if one seeks to stop this arbitration, I think that one can do so only if one satisfies the court that these salvors will not suffer any injustice thereby, and that the owners of the Ithaka will be subject to injustice in defending the proceedings in the arbitration. Neither of these conditions can possibly be satisfied in this case. For that, and
 D for the other reason I have mentioned, and others into which I need not go; BUCKNILL, J., was perfectly right and this appeal fails.

FINLAY, L.J. : I also agree that BUCKNILL, J., was perfectly right, and I do not desire to add anything to what has been said.

E *Appeal dismissed with costs.*

Solicitors : *Bentleys, Stokes & Lowless* (for the appellants) ; *Middleton, Lewis & Clarke* (for the respondents).

[*Reported by C. ST. I. NICHOLSON, Esq., Barrister-at-Law.*]

F

HOLT v. DAWSON.

[COURT OF APPEAL (Scott, Clauson, and du Parcq, L.JJ.), **July 17, 1939.**]

G *Landlord and Tenant—Rent restriction—"Actual possession" by landlord—Key handed over to landlord's agent—Premises let to new tenant at increased rent—Application to register house as decontrolled—Error in filling in form—Wrong date inserted—Whether application valid—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 2—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 2 (2).*

H The tenant of a controlled house, which was let at a weekly rent of 14s. 2½d., gave notice to terminate her tenancy on Mar. 12, 1938, and suggested to the landlord's agent that her nephew should be accepted as a new tenant. The agent agreed, on condition that the house should be decontrolled and the rent increased to 15s. 6d. per week. The outgoing tenant handed over the key to the landlord's agent, who, shortly after, handed it to the new tenant. The landlord applied to register the house as being decontrolled, but, by an error, described on the form of application the date on which he regained possession of the house as

being in June. The new tenant applied to have the rent fixed, contending (i) that the landlord had never regained "actual possession" of the house within the meaning of the Rent and Mortgage Interest Restrictions Act, 1923, s. 2, and (ii) that the error in filling in the form rendered the application to register invalid:—

HELD: (i) the symbolic act of handing over the key to the landlord's agent was sufficient, on the facts of this case, to give the landlord actual possession within the meaning of sect. 2 of the 1923 Act. A

(ii) the error as to date was not a material error or a material departure from the requirements of the Act. The essential feature was that the landlord should make a claim that the house was decontrolled.

(iii) the house had, therefore, become decontrolled, and the higher rent was validly due.

[EDITORIAL NOTE. This decision, so far as it deals with "actual possession," has been the subject of previous decisions, which, however, were not altogether consistent. It would seem now to be settled, on this point, that possession of the key is "actual possession" in the absence of special circumstances leading to a contrary conclusion. The case is one of first impression on the point raised upon the form of the application for registration as a decontrolled house. There is nothing imperative in the requirements as to the form of such application, and, if an application is made at the proper time, immaterial error in the form is of no legal consequence. B

AS TO DECONTROL, see HALSBURY, Hailsham Edn., Vol. 20, p. 318-320, paras. 378-380; and FOR CASES, see DIGEST, Vol. 31, pp. 585, 586, Nos. 7349-7361.] C

Cases referred to:

- (1) *Thomas v. Metropolitan Housing Corpn., Ltd.*, [1936] 1 All E.R. 210; Digest Supp. D
- (2) *Hall v. Rogers* (1925), 133 L.T. 44; 31 Digest 558, 7049.
- (3) *Caledonian Heritable Estates, Ltd. v. Methven*, [1927] S.C. 39; Digest Supp.
- (4) *Peizer v. Federman* (1921), 38 T.L.R. 54; 31 Digest 569, 7164.
- (5) *Barton v. Fincham*, [1921] 2 K.B. 291; 31 Digest 579, 7280; 90 L.J.K.B. 451; 124 L.T. 495. E

APPEAL from a decision of His Honour JUDGE LEIGH, given at the Manchester County Court, dated Feb. 6, 1939. The facts of the case are fully set out in the judgment of SCOTT, L.J.

J. Dill Smith for the appellant. F

J. C. Jolly, K.C., and *J. L. Elson Rees* for the respondent.

Dill Smith: The effect of the landlord having put in a wrong date is that the registration was void. Where a statute gives a person a right provided that he complies with a certain condition, if he fails to comply with it, he loses that right. Sect. 4 (1) of the 1938 Act says that a landlord shall apply in the prescribed form. This application was not in the prescribed form, because there was an error of substance. [Counsel referred to MAXWELL ON THE INTERPRETATION OF STATUTES, 8th Edn., p. 321, and *Peizer v. Federman* (4).] The only person who can give a new tenant possession is the landlord. The mere handing over of a key does not give possession to a landlord when it is immediately handed over to a new tenant. An outgoing tenant can only hand over the key to a new tenant by the consent of the landlord, and, therefore, for a moment he is the landlord's agent. Therefore, in every case of a change of tenancy, the landlord would get possession for a moment, and that G

cannot possibly be right. There must be a substantial period of time in between the two tenancies, otherwise it is merely a change of tenancy by consent. Where there is only an insignificant period during which the key is in the hands of the landlord, that will not give him possession.

A party cannot contract out of the Rent Acts : *Barton v. Fincham* (5).

- A [Counsel referred to *Caledonian Heritable Estates, Ltd. v. Methven* (3) and *Thomas v. Metropolitan Housing Corpn., Ltd.* (1).]

Jolly, K.C. was not called upon.

SCOTT, L.J. : This is an appeal from a decision of His Honour JUDGE

- B LEIGH given at the Manchester County Court on Feb. 6, 1939, on a question arising under the Rent and Mortgage Interest Restrictions Acts. Like most of the cases arising under those Acts, it has *prima facie* some aspects which are puzzling, but in our view the questions are simple when they are understood, and in the result we agree with the careful judgment
C of the county court judge, in which he analysed the position and came to the conclusion that the landlord had had the actual possession in the premises which is required under the Act, in order that the house should be decontrolled within the 1923 Act, and that the house thereby became a house to which the Acts no longer applied.

- D There is a subordinate point raised by the appellant—namely, that, although the Act said that the premises were decontrolled, yet under the Act of 1938 the provision that premises, although decontrolled, should still be deemed to be controlled, unless the landlord applied that the house should be put on the register of decontrolled houses, prevented this
E house from escaping from the ambit of the Acts, because the form of application used departed in one particular from the prescribed form.

Those two points were considered by the judge. On the first point, the question was whether the premises ever came into the actual possession of the landlord within sect. 2 of the 1923 Act, which by subsect. (1)

- F provides as follows :

- Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house : Provided that, where
G part of a dwelling-house to which the principal Act applies is lawfully sublet, and the part so sublet is also a dwelling-house to which the principal Act applies, the principal Act shall not cease to apply to the part so sublet by reason of the tenant being in or coming into possession of that part, and, if the landlord is in, or comes into possession of, any part not so sublet, the principal Act shall cease to apply to that part, notwithstanding that a subtenant continues in, or retains, possession of any other part by virtue of the principal Act : Provided also that, where a land-
H lord comes into possession under an order or judgment made or given after the passing of this Act, on the ground of non-payment of rent, the principal Act shall, notwithstanding anything in the foregoing provisions of this subsection, continue to apply to the dwelling-house.

Subsect. (3) provides as follows :

For the purposes of this section, the expression "possession" shall be construed as meaning "actual possession," and a landlord shall not be deemed to have come into possession by reason only of a change of tenancy made with his consent.

The facts of the case were stated by the county court judge in his judgment as follows. Prior to Mar., 1938, the house was let to a Mrs. Donaldson at a weekly rent of 14s. 2½d. She decided to leave the house, and suggested to the landlord's agent that her nephew should be accepted as a tenant. The landlord's agent said that he was willing, but only if the house became decontrolled and the rent raised to 15s. 6d. per week. A Mrs. Donaldson gave notice to terminate the tenancy on Mar. 12, 1938. On that date she came to the agent's office and handed the key to the agent. After the key had been handed over, the nephew came in a moment or two later, and the agent, who had already intimated the position which he took up on behalf of the landlord, handed the key over to the nephew. B The question is whether or not that transaction gave the landlord actual possession. In my opinion, it did, and the reason why I say that is that handing over a key is a symbolic act, which at common law carries with it possession of that to which the key is the means of access, and, where the key is handed over, its possession carries with it C the possession of the thing or house of which it is the key. If the symbolic act is one which, on the facts of the case in evidence, is shown quite clearly to be an act in which the key is intended to carry possession, then it is impossible to treat the handing over of the key as anything but the handing over of possession. D Where a tenancy comes to an end, whether it be by the effluxion of time or because it is surrendered to the landlord and the tenant brings the key and hands it over, the presumption is that the key is handed over in order to give the landlord possession. That was what happened in this case. It is argued that in fact the new tenant came in a very short time afterwards, and that a new tenancy on different E terms was entered into when he came in. However short the time was, I cannot see that there was any evidence at all to take away from the act already accomplished its character of a transfer to the landlord of actual possession within the meaning of sect. 2 (3) of the Act of 1923. Therefore, there was actual possession within the meaning of the section, F and the house became decontrolled.

The matter is not free from authority. There was a case before this court of *Thomas v. Metropolitan Housing Corpn., Ltd.* (1). In that case, a tenant had handed over to the landlord's agent the key of some premises, and the premises were unoccupied for one or two days. The G question was whether actual possession was handed over. SLESSER, L.J., quoting SCRUTTON, L.J., in *Hall v. Rogers* (2), at p. 45, says, at p. 214 :

"I think Parliament in using the phrase 'actual possession' intended to reject the legal right to possess and to require actual control or apparent dominion in fact."

H I pause to observe that "apparent dominion in fact" exactly describes the possession of the key when one has that one fact and nothing else in evidence. SLESSER, L.J., held that, the key being in the possession of the landlord's agent for a day or two, the landlord had had actual possession, and I agreed, and so did EVE, J., with a reservation as to

the scope of the phrase "actual possession." Counsel for the appellant cited *Caledonian Heritable Estates, Ltd. v. Methven* (3), where, upon different facts, the Court of Sessions, LORD BLACKBURN dissenting, held that a landlord had not come into actual possession. However, that was a case in which the tenant of the house gave notice, on a date
A in February, of his intention to remove on Whitsunday, and thereafter in the next month the landlord relet the house to a new tenant. The old tenant went and the new one came in, and the new tenant subsequently sought the protection of the 1920 Act.

These cases as to actual possession must be decided on the facts of
B each case, and the fact that judges have taken one view as to the meaning of that phrase in one case as a rule is very little guide as to whether or not another case is within that expression. In my view, here the fact that the landlord's agent explained to both tenants that he was taking the key on the terms of the house becoming a decontrolled house clothes
C the symbolic act with evidence of intention which is unanswerable.

The other point in the case is that, under the 1933 and 1938 Acts, if a landlord desires the benefits of decontrol, he must make an application to the local authority to have his claim that his house is decontrolled registered. Unless he does that, and the house is so registered, the two
D Acts provide that his premises shall be deemed to be still controlled. The 1938 Act provides that the registration must be effected within 3 months and the decontrol then continues for 4 years. The point is that the Acts and the regulations made under the Acts by the Minister provide that the application shall be made in a certain form, and the
E form provides, *inter alia*, that certain particulars shall be mentioned—namely, the address and the rateable value of the premises in Apr., 1931, if then separately rated, the occurrence which produced decontrol, and the date of that occurrence. In this case, the date in fact was Mar. 12, 1938, but the landlord put in the form a date in June. That
F fact became known to the tenant, through his going to look at the register and finding a reference to that date. The solicitors advising him decided that he should take the point that the registration had not been in accordance with the Act, because it did not state that date accurately, and therefore the whole registration fell to the ground and
G the house was still controlled. That argument cannot be accepted because, under the provisions of these Acts, the essentially important thing is the making of the application to a local authority by a landlord. That is contained in sect. 4 of the 1938 Act and sect. 2 (2) of the 1933 Act, which latter section reads as follows :

H If the landlord of any dwelling-house let as a separate dwelling immediately before the passing of this Act, being a dwelling-house of which the rateable value on the appointed day did not exceed the respective amount mentioned in the last foregoing subsection, claims that by virtue of the provisions of the said sect. 2 of the Act of 1923 the principal Acts had ceased to apply to the dwelling-house before the passing of this Act, he shall within 3 months after the passing of this Act make to the council of the county borough or county district in which the dwelling-house is situated application in the prescribed form for the registration

of the dwelling-house, and if in any proceedings with respect to any dwelling-house which is, or immediately before the passing of this Act formed part of, such a dwelling-house as aforesaid, it is proved that but for the provisions of the said sect. 2 of the Act of 1923 the principal Acts would have applied to the dwelling-house and that no such application has been made by or on behalf of the landlord within the time aforesaid, the dwelling-house shall, subject as hereinafter provided, be deemed to be a dwelling-house to which the principal Acts apply . . .

That section is amended and continued under the 1938 Act without **A** any alteration of its substance, and it is to be noted that the essential features are a claim by the landlord that the house has become decontrolled and an application to the local authority for registration. Those features were preserved by the 1938 Act, and there is nothing in the regulations or the form itself which touches those provisions. That **B** being so, I think that the error in the date in the form itself does not prevent the application made from being one for the registration of the claim that the premises are decontrolled. To hold otherwise would be to read into the Act a provision similar to that contained in the Bill of Sales Amendment Act, 1882, providing that, unless a particular form **C** is followed faithfully, the result will be the total avoidance of a form as an effective instrument. There is nothing of that sort here. There is nothing in the Act which shows that these details in the form are anything more than directory, and therefore I hold that this error as to the date on which the landlord obtained possession is not a material error, **D** and is not a material departure from the requirements of the Act. It therefore does not invalidate the registration.

I therefore am of the opinion that this house was a decontrolled house, and that the provisions as to registration in the Acts of 1933 and 1938 were complied with. Therefore the new tenancy granted on Mar. 12, **E** 1938, was a decontrolled tenancy, in respect of which the increased rent was valid. The appeal must be dismissed.

CLAUSON, L.J. : I agree.

DU PARCQ, L.J. : I agree. **F**

Appeal dismissed.

Solicitors : *V. M. Lawson*, agent for *Albert Aboudi*, Manchester (for the appellant) ; *Johnson, Weatherall, Sturt & Hardy*, agents for *Martin & Co.*, Manchester (for the respondent). **G**

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

B. SUNLEY & CO., LTD. v. CUNARD WHITE STAR, LTD.

[KING'S BENCH DIVISION (Hallett, J.), July 3, 5, 6, 1939.]

Damages—Measure of damages—Breach of contract—Deprivation of use of chattel—Machine let on hire for short periods—Machine idle for one week through delay in transit.

A The plaintiff company secured a contract in Nov., 1937, to level the site of the new aerodrome in Guernsey. For the performing of such work it was necessary to remove a tractor and a scraper from a site at Doncaster to the site in Guernsey. The defendants contracted to collect the machine at Doncaster on Nov. 10, 1937, and to transport it to Guernsey, where it should have arrived on the morning of Nov. 15.

B The defendants failed to carry out this contract as arranged, and the machine did not reach Guernsey until Nov. 22. The result was that the machine was kept idle at Doncaster for a week. The machine had been procured from America at a cost of £4,500, and, at the time of the above events, there were only very few such machines in England. The plaintiffs claimed damages in respect of the machine being kept idle, and the defendants contended that they were entitled to only nominal damages and interest on the cost of the machine and overhead charges:—

C

HELD: the proper measure of damage was not based on interest on purchase price and depreciation, but was the amount the plaintiffs would have made by the use of the machine during the period it was idle.

D **[EDITORIAL NOTE.** The question here is purely one of the measure of damages. Any unusual advantage or loss arising from a breach of contract is not generally a matter for damages unless notice thereof is given to the other contracting party. Thus, the special damages arising from the special features of the machine in this case appear too remote, but, in dealing with a commercial concern and an object of commercial utility, the loss of hire of the machine is a matter to be taken into account. The damages will not be the whole loss of hire, but the true value to the plaintiffs of the use of the machine for the time during which they were deprived thereof.

E

AS TO DAMAGES FOR BREACH OF CONTRACT, see HALSBURY, Hailsham Edn., Vol. 10, pp. 97-102, paras. 122-127; and FOR CASES, see DIGEST, Vol. 17, pp. 86, 87, Nos. 53-58.]

- F** Cases referred to:
- (1) *Mediana (Owners) v. Comet (Owners, etc.), The Mediana*, [1900] A.C. 113; 17 Digest 79, 9; 69 L.J.P. 35; 82 L.T. 95.
 - (2) *The City of Peking v. Compagnie des Messageries Maritimes, The City of Peking* (1888), 14 App. Cas. 40; 41 Digest 702, 5373; 58 L.J.P.C. 64; 61 L.T. 136; subsequent proceedings (1890), 15 App. Cas. 438.
 - (3) *No. 7 Steam Sand Pump Dredger (Owners) v. Greta Holme (Owners), The Greta Holme*, [1897] A.C. 596; 41 Digest 808, 6689; 66 L.J.P. 166; 77 L.T. 231; *revsg. S.C. sub nom. The Emerald, The Greta Holme*, [1896] P. 192.
 - (4) *Clydebank Engineering & Shipbuilding Co. v. Yzquierdo y Castaneda (Don Jose Ramos)*, [1905] A.C. 6; 12 Digest 434, 3514; 74 L.J.P.C. 1; 91 L.T. 666.
 - (5) *Mersey Docks & Harbour Board v. Marpessa (Owners)*, [1907] A.C. 241; 17 Digest 86, 54; 97 L.T. 1; *sub nom. The Marpessa*, 76 L.J.P. 128; *affg. S.C. sub nom. The Marpessa*, [1906] P. 95.
 - (6) *Admiralty Comrs. v. S.S. Chekiang*, [1926] A.C. 637; 41 Digest 805, 6663; 95 L.J.P. 119; *sub nom. The Chekiang*, 135 L.T. 450.
- G**
- H**

- (7) *Admiralty Comrs. v. Susquehanna (Owners), The Susquehanna*, [1926] A.C. 655; 41 Digest 802, 6624; 95 L.J.P. 128; 135 L.T. 456.
- (8) *The West Wales*, [1932] P. 165; Digest Supp.; 101 L.J.P. 92; 148 L.T. 80.
- (9) *Liesbosch (Dredger) v. Edison (S.S.)*, [1933] A.C. 449; Digest Supp.; 102 L.J.P. 73; *sub nom. The Edison*, 149 L.T. 49.
- (10) *Re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560; 36 Digest 29, 151; *sub nom. Polemis v. Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154. A
- (11) *Hadley v. Baxendale* (1854), 9 Exch. 341; 17 Digest 93, 101; 23 L.J.Ex. 179; 23 L.T.O.S. 69.

ACTION to recover £577 10s. and interest thereon on account of the loss of the use of a tractor and a scraper by reason of a breach of contract by the defendants. The facts are fully set out in the judgment. B

G. R. Blanco White, K.C., and *E. Holroyd Pearce* for the plaintiffs.

A. J. Hodgson and *W. J. Kenneth Diplock* for the defendants.

White, K.C.: The machine was worth so many pounds *per diem*, and the plaintiff company is entitled to have that number of pounds by way of compensation for being deprived of the use of the machine for a week by the defendants' breach of contract, subject always to such deductions by way of mitigation as may be necessary in order to allow for the expenses which the plaintiffs have been saved. The plaintiff company would not have used this expensive machine had it not been worth to them at least something in the nature of £30 per 8-hour shift. When they were deprived of the machine, it may therefore be presumed that they suffered a loss in the neighbourhood of £30 per every 8-hour shift for which they would have used it, less any sums saved through the machine standing idle. These would naturally be in the contemplation of everybody, and certainly within that of the defendants. The plaintiffs rely upon the principles expressed in *The Mediana* (1). They are entitled to recover from the defendants, not only the out-of-pocket expenses, but also substantial damages for the loss of the machine's services during that one week. However, the principle expressed in the *Chekiang* case (6), foreshadowed in *The Greta Holme* (3), and followed in *The Susquehanna* (7), cannot apply to the present case, because here the plaintiff company required the machine for profit-making purposes. All these rules are rules to assist the court in answering the real question of fact, which is the amount of damage the plaintiffs have in fact suffered through the breach, excluding, of course, any damage too remote under the second rule in *Hadley v. Baxendale* (11). The hire of the machine is an indication to the court of what it is worth to the plaintiffs. The damage actually suffered by a contractor in Guernsey through the performance of his contract being delayed is always a difficult matter to arrive at. The plaintiffs put forward the hire rate as the simpler means of answering the question. The method of arriving at the measure of damages by reference to the market price obviously cannot apply, because of the special nature of this machine. C D E F G H

Diplock: The true measure of damages flowing from a breach of contract is the loss to the plaintiff capable of assessment in money,

disregarding any circumstances peculiar to himself. When it is plant used for work, the measure of damages is the loss due to disturbance—namely, overhead charges, expenses of staff, and equipment thrown away: *Liesbosch (Dredger) v. Edison (S.S.)* (9). In so far as cost of hire of substitute is suggested, it is contrary to the decision in *The Greta Holme* (3), where the hire would have been the sum of £1,500, but the sum of £500 was awarded. The matter was also discussed in *The Susquehanna* (7). The decision in *The Mediana* (1) does not say, as was said by LORD SUMNER in a later case, *Admiralty Comrs. v. S.S. Chekiang* (6), at p. 643, that juries must find a figure as best they can, and escape criticism by being anonymous and dumb, and accordingly proof against anything but perversity. In the *Chekiang* case (6), the decision as to the measure of damages was that that measure must be the loss of interest over a period of 20 days. In *The Susquehanna* (7), the claim was on commercial value if the ship had been let out on hire, but the court held that the damages ought not to be assessed on the footing that the P., a naval oil-tanker, should be treated as a ship to be let out on a mercantile charter, but should be assessed on the principle of *The Greta Holme* (3), with such rates of interest and depreciation as the evidence might justify. In the present case, the measure is the damage actually proved, and thus the only damages which can be recovered, are (i) loss of interest for one week, which is so small that it is a waste of time to calculate the amount, and (ii) overheads, wages of drivers for one week less 2 days. No sum is recoverable for depreciation, because the evidence is that the machine depreciates only while working, and the result of its week's idleness was to add another week to the length of its working life.

HALLETT, J.: In this case, the amount at issue is not very large, since the claim originally amounted to only £577 10s., and counsel for the plaintiffs has conceded, in the course of his argument, that the sum which is found to be recoverable will be something substantially less than the full amount originally claimed. It appears to me, however, after having had the advantage of very careful argument by counsel both on the facts and on the law, that the case does involve a question of considerable difficulty, and, it may be, of considerable importance. Having regard to the admission of liability which was forthcoming from the defendants' counsel during the course of the hearing, I need only state the facts, in so far as they are relevant to the question of damage which has remained for my decision.

The plaintiffs are a firm of public works contractors who, in October and November, 1937, were securing, and ultimately did secure, a contract from the states of Guernsey to level the site of the new aerodrome. For the performing of such work the plaintiffs owned certain machines. I need not describe them in any detail, but it is sufficient to state that each unit consisted of a tractor and a scraper, both of them very heavy

and bulky machines, which at that time were procured from America at a cost of about £4,500 for the whole unit. There appear to have been only a few of them in England at the time with which this case is concerned, of which most were owned by the plaintiffs. I think that there were altogether then only 5 owned by the plaintiffs. However, they now have 19, and there are now some 200 of them in this country. At the time in question, it was a type of equipment of which there were very few in this country. A

At the time when the plaintiffs secured this contract in Guernsey, they were using one of their scraper-and-tractor units to perform some levelling work at Doncaster as subcontractors to a company called Frank Haslam, Ltd., who are also public works contractors, and who had a contract with the Doncaster Corporation. Accordingly, it was necessary for the plaintiffs to have the tractor and scraper moved from the site at Doncaster to the site at Guernsey, and it became known to the defendants, the well-known shipping company, through, I think, their agent in Guernsey, that the plaintiffs had secured this contract in Guernsey, and that, as a result of having secured the contract, the plaintiffs might well wish some transport to be provided between England and Guernsey. Accordingly, negotiations were opened between the defendants and the plaintiffs with a view to the defendants providing the necessary transport for the tractor and scraper with which I am concerned in this case. Originally, there was a dispute between the parties as to the terms of the contract which was ultimately arrived at, but, having regard to the admission which has since been made on the part of the defendants' counsel, I do not think that it is necessary for me to go into the question as to those exact terms. I think that it is sufficient to summarise the essential features of them by saying that under the contract, as I think it is now conceded, and as, in any event, I hold, the defendants undertook to collect the machine at Doncaster on Nov. 10, 1937, to have it conveyed to Liverpool, and thence to carry it to Guernsey on the steamer Staghound, sailing from Liverpool on Friday, Nov. 12, and arriving in Guernsey in the ordinary course some time on the morning of Monday, Nov. 15, at latest. So far as the marine portion of the transport is concerned, the defendants were going to do it by means of their vessel the Staghound, as I have said, but, as far as the land portion of the transport—namely, from Doncaster to Liverpool—was concerned, the defendants employed subcontractors. Unfortunately, when Nov. 10, which was a Wednesday, arrived, and the subcontractors attended at Doncaster with the vehicle or vehicles for the purpose of giving the transport, it turned out, for reasons into which I need not go, that it was impossible to load the tractor and scraper on to the vehicles provided. The defendants were informed of that fact, and they did their very best, undoubtedly, to find some other means of getting the tractor and scraper to Liverpool in time to catch the Staghound, but unfortunately they failed. As I B C D E F G H

- have said, this was a very bulky piece of equipment, and I dare say that it was not very easy to find in a moment anyone who was willing and able to transport it. The defendants' view of the next best thing they could do, which they in fact did, was to arrange for the tractor and scraper to be conveyed to Liverpool in time to catch the Beryl,
- A the next boat on that service, which left exactly a week later, on Nov. 19, from Liverpool, and accordingly in the ordinary course would deliver the tractor and scraper, as it in fact did, in Guernsey on the morning of Monday, Nov. 22. The result was, to put it quite shortly, that the tractor and scraper were kept at Doncaster for a week and delivered
- B in Guernsey exactly a week late, and it is said, and now admitted, that, by their failure to convey the tractor and scraper at the earlier date, the defendants committed a breach of contract. It was admitted that some damages must be paid by them, but the question which I have to determine is how those damages should be arrived at, and what should
- C be their amount. I should perhaps here definitely add that, the defendants having done their very best, as appears from the correspondence, to mitigate the breach by providing some other means of transport earlier than the Beryl for the machinery, and having failed, it is not altogether surprising that there is no suggestion on their part that there was any-
- D thing which the plaintiffs could reasonably have done in order to mitigate the loss which they say that they have sustained.

- I am satisfied that the machine was standing idle at Doncaster by reason of the breach of contract on the part of the defendants. I have also to examine how far the machine would have been employed at
- E Guernsey if it had been transported there by the defendants in due performance of their contract. It is said that it would have done work on the first Sunday, and I think that it quite properly would, but it turns out that, after the machine had once been worked on the Sunday—which, as it happens, was in the week ending Dec. 1—the authorities
- F in Guernsey objected to Sunday working, and it was not allowed to work on Sunday again. Therefore, inasmuch as it had its first Sunday without interference, although it had it a week late, it seems quite clear that I cannot allow for any Sunday work in arriving at what it would have done during the first week in Guernsey, because it did work on the
- G Sunday in the second week, and it would not have worked in the second week if it had worked in the first week. Then there is the question of the time it would have worked, and counsel for the plaintiffs put it on the basis that this machine was employed by other people for $22\frac{1}{2}$ hours per day, and its value was put by the plaintiffs on the basis of a unit
- H of 8 hours. Some information has been put before me which shows that on certain occasions the machine did work on some similar work certainly for $22\frac{1}{2}$ hours per day, and on a certain occasion, especially at Minchinhampton, it worked as much as 24 hours per day, which was not possible on certain shorter days, when time was taken for servicing the machine. It also appears that in Apr., 1938, with this very contract at Guernsey,

the machine was working day and night, and a period of something like $22\frac{1}{2}$ hours out of the 24 was worked. There is no evidence, however, that the machine worked the double shift day and night in November or December at Guernsey. It is said that that was due to the weather, as the week which the machine missed through being delayed was a very fine week, and that, although for the first week they could work during the day only, in fact in the second week what had been done during the first week would have enabled them to have a double shift. It was said that in fact they could work only single shifts in the second week because of the absence of that preliminary work in the first week which would have enabled them to work a double shift in the second week. Therefore, in effect they have lost a double shift, it is said. On the other hand, the view might be taken that it would have worked, say, $11\frac{1}{2}$ to 12 hours per day, which is what it seems to have worked normally during a single undertaking. On the whole, I am not satisfied that it would have worked, on an average, a double shift, but I find, having regard to all the circumstances, that it might have worked somewhat in excess of the time it did in fact work, and the sum at which I arrive, if I can go on that basis, is somewhere midway between those amounts.

I now come to consider the question of law in this difficult and interesting matter. Counsel for the plaintiffs has relied in the main upon certain principles which he asks me to discern in the well-known case of *Mediana (Owners) v. Comet (Owners, etc.)*, *The Mediana* (1). He says that the compensation to which his clients are entitled should be arrived at by calculating as best I can what will express in terms of money the value of the use of this machine. In this case, there was no question of hiring substitutes, and there is no evidence that the performance of the contract was delayed by the absence of this machine for a week in such a way as to produce any specific pecuniary loss to the plaintiffs. Counsel for the plaintiffs takes his stand by saying: "We submit that the machine was worth so many pounds, and I ask your Lordship to accept it, and, therefore, I am entitled to have that number of pounds by way of compensation for being deprived of the use of the machine by this breach of contract, subject always, of course, to such deductions as may be necessary in order to allow for the expenses which I have also been saved." The figure which he puts forward is the gross figure of £30 per 8 hours, reduced to £22 10s. by the saving of certain expenses, which, according to the evidence, amount to £7 10s. As regards the deduction of £7 10s., I say offhand that I accept that, because those figures were not challenged. With regard to the £30, the way in which counsel for the plaintiffs seeks to establish that figure is as follows. In the first place, he says, and he has proved by his evidence, that, in quoting the machine for hire, the plaintiffs at the material time quoted £30 per 8 hours for the use of the machine in question, and he says, as I understand it, that, inasmuch as they were prevented from letting out on hire this machine, they want £30 compensation for 8 hours,

and that affords some guide by which I can arrive at the compensation which ought to be allowed to-day if they are compulsorily deprived of the use of the same machine. Secondly, he points to the fact that, under the contract with Messrs. Haslam, the amount to be paid by Messrs. Haslam, if the machine is left idle through no fault of the plaintiffs

- A —which means, of course, if it is left idle by the defendants—is to be £30 per 8-hour day. He says that there again they are stipulating what they are to be paid if they are deprived of the use of their machine through Messrs. Haslam's fault, and that that ought to afford some indication of what they ought to be paid if they are deprived of the use
- B of their machine through the fault of the defendants, and I think it is really on those two pieces of material that he bases his figure of £30. I ought to mention that counsel for the plaintiffs brought out very properly that, as the number of machines had increased, the hire which could be asked for such machines, or the demurrage, if I may use that expression, which was claimed in respect of them, had fallen very greatly,
- C until recently, when it again went upwards, and indeed went up above £30. I do not think that either of those circumstances is of very great importance. Indeed, to me they appear to be of no importance at all, as there are special considerations which may well account for it, and
- D the drop is only what one would expect when the number of machines increases, as it did, from only a few to something like 200 at the present time. There is some relevance, however, in the fact that, according to the evidence, a statement of the sums which the machines were able to earn if let on hire in Dec., 1937, is no real evidence of what they would
- E be able to earn if they were let on hire at a much later date. That is a consideration which may be of some importance in connection with one of the arguments addressed to me by counsel for the defendants.

- Counsel for the plaintiffs then claims that his clients are entitled to obtain by way of compensation a sum arrived at by taking £22 10s.
- F per 8 hours and deciding how many hours were wasted because the machine was not at Guernsey by the contract time. For instance, he says that, if one arrives at the conclusion that during that wasted week the machine would have worked 80 hours, then one should give the plaintiffs ten times £22 10s., whatever that figure in pounds may be,
- G and it is upon that basis he invites me to assess the damages. Counsel for the defendants, on the other hand, contends that that is altogether a wrong basis, and that damages should be either nominal or so small as to be practically nominal, because they should be arrived at, according to his argument, in another way, which will in fact produce practically
- H nominal results.

I have to decide which of those two views is right, and, in so deciding, I am not directly, it seems to me, assisted by the authorities. I have already mentioned that counsel for the plaintiffs relies primarily on *The Mediana* (1), which is one of a series of cases to which I think I ought to refer. The first of the series which I need mention at all is

The City of Peking (2), and, having regard to the observation of LORD MACNAGHTEN in *The Mediana* (1), at p. 120, upon the decision in *The City of Peking* (2), to which he was a party, I do not think I need say anything more about *The City of Peking* (2) except that it appears to have depended upon the special circumstances in that particular case. The first case after *The City of Peking* (2) which appears to require A notice is *The Greta Holme* (3), another very well-known case. Then after that comes *The Mediana* (1), to which I have already referred. I need not mention all the cases, but only those I have found of some assistance. The next is *Clydebank Engineering & Shipbuilding Co. v. Yzquierdo y Castaneda (Don Jose Ramos)* (4). Then come *Mersey Docks & Harbour Board v. Marpessa (Owners)* (5), *Admiralty Comrs. v. S.S. Chekiang* (6) and *The Susquehanna* (7). Then comes *The West Wales* (8), which I do not think has been examined by counsel, and finally there comes *Liesbosch (Dredger) v. Edison (S.S.)* (9), which I mentioned to counsel during the argument. All those cases, C with the exception of *The West Wales* (8), I think have been carefully examined by counsel, and I have read them all myself, and, looking at them as a whole, I think that there are two features which at once attract one's attention. The first feature is that, with the exception of the *Clydebank* case (4), about which I shall have something more D to say, they are all cases where the action is founded on tort. The second feature which strikes one is that, including the *Clydebank* case (4), they are all cases where the subject-matter was some piece of property owned by a body which did not use that piece of property for profit or personal profit. The nature of the property varies. It was a dredger E in the case of *The Greta Holme* (3), a lightship in the case of *The Mediana* (1), some torpedo destroyers in the *Clydebank* case (4), a dredger again, in *Mersey Docks & Harbour Board v. Marpessa (Owners)* (5), belonging to the Mersey Docks and Harbour Board, a light cruiser in *Admiralty Comrs. v. S.S. Chekiang* (6), and, in the case F of *The Susquehanna* (7), what the Admiralty lost was the use of the services of an oil-tanker. The property in the *Edison* case (9), on the other hand, which I should have excepted in my list, did not belong to public owners. The claimants were a trading company who used the subject-matter referred to for a profit, and I should therefore have G excepted that case from the general description which I gave of the other cases. Finally, in *The West Wales* (8), the subject-matter which was used was partly a British battleship and partly a naval drydock which was occupied by that British battleship whilst under repairs. So, with the exception of the *Edison* case (9), in every case the claiming owners H were not people who used the subject-matter for the purpose of putting money into their pockets. What I have to consider, then, are these two questions. First of all, I have to consider whether the principles applied to *The Mediana* (1) and other similar cases have any application at all where the claim is founded upon contract, and not upon tort.

I rather think that, in answer to some observations of mine at an earlier stage, counsel for the plaintiffs suggested that there was no distinction in the two cases, but, if he did so, I am quite sure that he meant only that there was no distinction for the present purpose. Of course there is no doubt whatever that there are distinctions in the rules applicable to

A damages in contract, on the one hand, and in tort, on the other hand, and the two distinctions relevant for me to bear in mind for the present purposes, it seems to me, are these. In the first place, in many actions founded on contract, compensation may be awarded for a loss or damage which is not of a financial character at all. For instance, in an action

B founded upon negligence, compensation is awarded for pain and suffering, and in libel or slander compensation is awarded for loss of character and in breach of promise it is awarded for injuries to feelings. In a case of breach of contract, however, the only kind of loss, as I understand it, which is a subject for compensation is a financial loss. I take the

C well-known rule, by way of illustration, that, in a case of wrongful dismissal by reason of improper notice, no damages are obtainable for the circumstances attending the dismissal, although they may have greatly aggravated the mental suffering and injury to reputation which may have been caused by the dismissal. That is one matter I have to

D bear in mind, because, this being an action founded on contract, I take the view that it is only in so far as financial loss has been incurred that I am entitled to award compensation to the plaintiffs. Counsel for the plaintiffs says: "This is financial loss. This is a deprivation by the defendants, at the expense of my clients, of some article which is of

E financial value to my clients." Indeed, I think that he might perhaps rely upon the very case upon which counsel for the defendants has been relying, *The Susquehanna* (7), and particularly on the opinion of LORD BLANESBURGH, where the distinction is drawn adversely to the plaintiffs in that case between subject-matter owned by a non-profit-making concern

F and subject-matter owned by a profit-making concern. I need not refer in detail to the opinion of LORD BLANESBURGH, but it will be observed that the distinction was present to his Lordship's mind, and in that case he seems to have been drawing it adversely to the claimants.

The other great distinction which exists, and is relevant to the present

G case, between damages in contract and damages in tort is that, in the case of damages in tort, as is generally now thought to have been decided by the well-known case of *Re Polemis & Furness, Withy & Co.* (10), the damages in fact flow from the tortious act, and it does not matter if that particular kind of damages was not in the contemplation of

H either party at any previous time. On the other hand, in contract it is not sufficient to show that the damages flowed from the breach of contract if they are damages of what I will call for the moment a peculiar kind (although the word "special" is a better word), because then it is necessary in a court of law to show that they were within the contemplation of the other contracting party. I have a little hesitation

in using the word "special" because that has acquired a particular meaning, but I may use the word "special" if it is understood that I use it in the colloquial or usual sense of the term, rather than in the technical sense in which it is often used for legal purposes. What counsel for the plaintiffs will say, I understand, in regard to the second distinction is this: "In this case, I am not claiming special damages in the sense in which they have just been described. What I am claiming are only damages which would naturally be in the contemplation of everybody, and certainly within that of the defendants, which flow from the deprivation of the use of this article for a week—namely, the value of that use expressed in terms of money." Further, he says that the question of remoteness of damages does not arise here at all. I am with him on the facts to the extent that it is quite plain from the correspondence that the defendants knew perfectly well that this machinery was required in Guernsey for the purpose of working on a contract which the plaintiffs had secured to level the site of an aerodrome, and that they knew that it was wanted to be used in that way and on the date when it was to be sent there, because there was in the early stages some question as to whether it would do if it were sent a week later by the Beryl, which had better capacity for carrying this machinery, and it was made plain that, whatever the reasons might be, the plaintiffs wanted it to go by the earlier steamer. Therefore, up to a point, there is no doubt that they knew what was likely to be the consequence of holding back this machine for a week, which would deprive the plaintiffs of the use of the machine which they intended to work, and the use for profit-making purposes in the sense that it was to be used for the purpose of carrying out the profit-making operations of the plaintiff company, more particularly in connection with the preliminary work for the aerodrome site.

In considering what are the two main distinctions between the rules for the assessment of damages in contract and those for the assessment of damages in tort, I have to make up my mind whether I can discard the line of cases of which *The Mediana* (1) is an example as relevant to this action, being an action founded on tort. On the whole, I think that it would be wrong to do so, and I think that I get some slight support for my view from the *Clydebank* case (4), to which I have already referred. In the *Clydebank* case (4), which was an action founded upon contract, there was a contract in which there was a provision whereby a stated sum of £500 per week was to be paid in respect of each of 4 torpedo destroyers which were being built for the Spanish government if they were not delivered by the contractors within the contract time. There was a breach of the contract, and the Spanish government claimed—and in the first instance secured—damages which amounted to £67,500 with interest. In that case, it is to be observed that there was no question of quantifying the damages in the first instance, because the damages had been quantified by the penalty clause in the contract.

A question arose as to whether that sum could be recovered at all, it being argued for the defendants that it was in the nature of a penalty. In support of that argument, it was urged that damages of that character could not be recovered at all, and the EARL OF HALSBURY, L.C., discusses and considers that argument and says, at p. 12 :

- A If it was an ordinary commercial vessel capable of being used for obtaining profits, I suppose there would not be very much difficulty in finding out what the ordinary use of a vessel of this size and capacity and so forth would be, what would be the hire of such a vessel, and what would therefore be the equivalent in money of not obtaining the use of that vessel according to the agreement during the period which had elapsed between the time of proper delivery and the time at which it was delivered in fact. But, says counsel, you cannot apply that principle to the case of a warship because a warship does not earn money. It is certainly a somewhat bold contention. I should have thought that the fact that a warship is a warship, her very existence as a warship capable of use for such and such a time, would prove the fact of damage if the party was deprived of it, although the actual amount to be earned by it, and in that sense to be obtained by the payment of the price for it, might not be very easily ascertained—not so easily ascertained as if the vessel were used for commercial purposes and where its hire as a commercial vessel is ascertainable in money. But, my Lords, is that a reason for saying that you are not to have damages at all? It seems to me it is hopeless to make such a contention, and although that would not in itself be a very cogent argument because the law might be so absurd, yet it would be a very startling proposition to say that you never could have agreed damages for the non-delivery of a ship of war although, under the very same words with exactly the same phraseology in the particular contract, you might have damages if it was a vessel used for commercial purposes; so that you would have to give a different construction
- D to the very same words according to whether the thing agreed to be built was a warship or a ship intended for commercial purposes. My Lords, I think it is only necessary to state the contention to show that it is utterly unsound.

Then he goes on to deal with a bolder contention.

- I hope I have made it plain that I quite realise the distinction between
- E the *Clydebank* case (4) and this case. Indeed, there is more than one distinction between the *Clydebank* case (4) and the case which I have to consider. I think, however, that it does afford some ground for the view which I take that the doctrine to be found in *The Greta Holme* (3) and *The Mediana* (1) and other cases to which I have referred is not
- F limited to a case of a claim founded upon tort, and, if, instead of the claim by the Admiralty in some of the cases I have cited being founded on tort, as it was, it had been founded on contract, I do not think that the cases would, for that reason, have been inapplicable.

- That disposes of the first of the two main questions I have put to
- G myself, but it still leaves the second, and it is the second which has caused me the greater difficulty of the two. The second question is as to whether or not this line of authorities has any application at all where the plaintiff is a person or a commercial concern using the thing in question for the purposes of putting financial gain into the pocket of the plaintiff.
- H That seems to me to be a very difficult question. I have already corrected my error when I said that the *Edison* case (9) was in the same position as were the other cases. It is not. In the *Edison* case (9), the owners were contractors who were doing dredging work for the Patras Harbour Commission. They were people who were owning the dredger and using the dredger for the purpose of profit. Therefore, it is very natural that

counsel should have emphasised that the *Edison* case (9) is one from which I should derive assistance. In fact, although I have perused the *Edison* case (9) hopefully, I doubt very much whether I can get much assistance from the opinion of LORD WRIGHT in that case, for the simple reason that what was being decided there was a question of what the owners ought to get by way of compensation for being deprived once and for all of their dredger. The case is rather complicated, but the substance of the matter was that the owners lost the *Liesbosch* once and for all. The *Liesbosch*, I gather, was at the bottom of the sea, and it was that capital loss, if I may put it in that way, which was the subject of the claim for compensation, and what their Lordships were concerned with in the *Edison* case (9) was the way in which a proper sum could be arrived at in respect of the valuation of that capital loss. If here Cunard White Star, Ltd., instead of delaying the machine a week, had dropped it overboard on the journey, then very likely the *Edison* case (9) would have been a very great authority as to how I should approach the question of valuing the capital loss which the plaintiffs had sustained. However, the defendants in this case did nothing of the kind, and I am not at all sure that the law in this most valuable decision on the question of estimating the capital loss in that case really assists me to determine the method of evaluating the loss in this case, which is the matter with which I have to deal.

In the other cases, as I have said, the plaintiffs were not people who were using the subject-matter for profit-making purposes, and I should hesitate very considerably before coming to the conclusion which I have finally reached—namely, that none the less the pleading, for which counsel for the plaintiffs contends, can be regarded as sound—if I were not somewhat assisted in coming to that conclusion by a consideration of other matters. The argument of counsel for the defendants in substance is that the only damages which can be recovered by the plaintiffs in the event which has happened are damages in the sense which I have mentioned. That is, supposing that it could be shown that the completion of the contract was delayed by a week, and that that resulted in penalties becoming payable by the plaintiffs, then I think that, as far as that goes, that is the sort of item I could take into account. However, having said that it is only “special” damages, or, as I would rather say, peculiar damages, which I am entitled to take into account, he comes forward with his second argument, which would appear to be that, if such damages followed, none the less they could not be taken into account, on the ground of being too remote, because, as regards the special damages, there is no evidence that the defendants would have sufficient notice. Thus one gets to the position that the only thing, according to the argument of the defendants, which the plaintiffs can recover is special damages, and all the special damages of which one can speak in that sense would probably be too remote. That argument results in this position. Here are the plaintiffs, who have lost the use of a very

valuable piece of plant, worth £4,500, which they wanted in connection with their business. They have lost it for a week, and I distinctly feel that any argument which produces the result that for that they are to get nothing but nominal compensation must be wrong, because I do not think the result of such an argument can be right. Counsel for

- A the defendants, however, seeks to avoid that position by saying: "I do not say that they can recover only nominal damages. I say that they can recover something more than nominal damages, but one must arrive at it on a very different basis from that which counsel for the plaintiffs claims." He says that one must give them only the third head of damages
B mentioned in the opinion of LORD WRIGHT in the *Edison* case (9), at p. 468:

... compensation for disturbance and loss in carrying out their contract over the period of delay between the loss of the *Liesbosch* and the time at which the substituted dredger could reasonably have been available for use in Patras, including in that loss such items as overhead charges, expenses of staff and equipment, and so forth thrown away, but neglecting any special loss due to the appellants' financial position.

- C
Giving the matter the best consideration I can, I regard that head of loss which was approved of as one of the three heads of loss by LORD WRIGHT as quite inapplicable to the present case. I do not think that
D it fits the circumstances here at all, and I do not feel at all compelled to direct myself as a jury, as counsel for the defendants says that I ought to do, that that is the loss which I have to find. On the other hand, I recognise that in *The Greta Holme* (3) the full amount of hire was not in that case taken as the proper measure of loss, because in that case the
E full amount of hire would have amounted to £1,500, and the amount which was actually awarded was, I think, only £500. Nevertheless, I think that here, where I am dealing with a commercial concern and an object of commercial utility, the hire is a matter which I ought to bear in mind.

- F I find in *The West Wales* (8) a very valuable view of the matters which are relevant for my purpose, and in particular I would like to refer to where BATESON, J., is dealing with some of the earlier cases, and says, at p. 170:

- G With regard to the law on the matter, I think that it is necessary to follow the decision in *Admiralty Comrs. v. S.S. Chekiang* (6), which really sums up the other cases as well. LORD SUMNER, in his speech, says: "*The Marpessa* (5) was a decision which was consequent on *The Mediana* (1), and *The Mediana* (1) professed to follow the 'principle' of *The Greta Holme* (3). The only principle as to this measure that I can find there stated is in LORD HERSCHELL'S words"; and then he cites the words: "'How can they the less be entitled to damages because, instead of hiring a dredger, they invested their money in its purchase? The money so invested was out of their pockets, and they were deprived of the use of the dredger, to obtain which they had sacrificed the interest on the money spent on its purchase. A sum equivalent to this, at least, they must surely be entitled to.' To this I would add LORD LOREBURN'S words: 'Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation.'"

I do not think that mere interest on the money plus mere depreciation is necessarily the limit of what they can recover. I think that what

they can recover is the true value to them, as best I can ascertain it, as a jury, of the use of this machine as it could have been used at Guernsey during the week in question, and, if they have been deprived of that use by a breach of contract, they are entitled to compensation expressing in money as near as possible the value of that use of which they have been wrongfully deprived. I arrive at that conclusion, having looked at these cases and having formed the further conclusion that, upon the whole, they do afford me assistance, notwithstanding the distinctions of which I am fully conscious and to which I have referred in a summary fashion. It seems to me that, at the same time, I must say that the case is a complicated one, and not, as I think, covered by any authority greatly in point. A B

The next question, and the last question, which arises in this long judgment is as to the figure at which I arrive taking that view, and, upon the whole, I feel that the lump sum figure at which I ought to arrive is £250. That is a lump sum figure arrived at in consideration of all the circumstances, and any attempts to analyse it by an analytical process will, I think, be doomed to failure. There will be judgment for the plaintiffs for £250 and costs. C

Judgment for the plaintiffs for £250 and costs.

Solicitors: *Munton, Morris, King & Co.* (for the plaintiffs); *Hill, Dickinson & Co.* (for the defendants). D

[Reported by CHARLES NEWTON, ESQ., Barrister-at-Law.]

JOHNSON v. CARTLEDGE AND MATTHEWS (MATTHEWS, THIRD PARTY). E

[NOTTINGHAM SUMMER ASSIZES (Cassels, J.), July 3, 1939.]

Estoppel—Res judicata—Two actions in respect of same street accident—One for personal injuries, other for damage to car.

Tort—Joint tortfeasors—Contribution—Party found not negligent not a tortfeasor—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (1) (c). F

The plaintiff was a passenger in a car driven by the first defendant, C., and was injured in a collision between that car and a taxi-cab driven by a servant of the second defendant, M. He sued both defendants, and recovered judgment against C., whose negligence, the judge found, was the sole cause of the accident. In third-party proceedings attached to the action, C. claimed an indemnity from M. under the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c), on the ground that in a previous action in the county court, in which M. had sued C. for the damage to his taxi-cab caused in the same collision, the county court judge had found the negligence of M. to be the sole cause of the accident, and that the matter was, therefore, *res judicata* :— G H

HELD (i) as the defendant M. had not been negligent, he was consequently not a tortfeasor, and therefore the defendant C. could not recover indemnity or contribution from him.

(ii) this was not a case of *res judicata*, as the damage in the two cases was different.

[EDITORIAL NOTE.] Upon the question of *res judicata*, the judge has seen his way to distinguish this case from that of *Marginson v. Blackburn Borough Council* (1). Upon the question of contribution or indemnity under the Law Reform (Married Women and Tortfeasors) Act, 1935, it is held that, where a party is found not to have been negligent, he is not a tortfeasor, and, therefore, no question of contribution or indemnity can be raised.

- A AS TO CONTRIBUTION BETWEEN TORTFEASORS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 190, 191, para. 284; and FOR CASES, see DIGEST, Vol. 42, pp. 979, 980, Nos. 95-108.]

Case referred to :

- (1) *Marginson v. Blackburn Borough Council*, [1939] 1 All E.R. 273; Digest Supp.; 160 L.T. 234.

- B THIRD-PARTY PROCEEDINGS in an action for damages for personal injuries sustained in a road accident. The facts are fully stated in the judgment.

Richard Elwes for the plaintiff.

- C *W. K. Carter* for the first defendant.

Arthur Ward for the second defendant.

- D *Carter* : In any proceedings between Cartledge and Matthews, Matthews cannot be heard to say that Cartledge is to blame, because he has already been found not to blame by the county court judge in proceedings between himself and Matthews. Therefore, although, in proceedings brought by the plaintiff against Cartledge and Matthews, Cartledge was found to be negligent, and could be so found because the parties were not the same, in these third-party proceedings, where the parties are the same as they were in the county court, Matthews cannot
E be heard to say that Cartledge was negligent.

Ward : Before the question of *res judicata* can arise, the parties, the damage, and the issues of law and fact must all be the same. Here the damage, at least, is different.

- F CASSELS, J. : These are third-party proceedings attached to, and forming part of, the proceedings between the plaintiff, Mr. Johnson, and Mr. Cartledge and Mr. Matthews as the defendants. In effect, in these third-party proceedings Mr. Cartledge is really in the position of plaintiff and Mr. Matthews is in the position of defendant. Indeed, he was in the
G position of one of two defendants in the proceedings by the original plaintiff. In other words, Mr. Cartledge is seeking to obtain from Mr. Matthews in these third-party proceedings a complete indemnity for the damages and costs which he will have to pay to Mr. Johnson, the plaintiff.

- H On Oct. 11, 1938, motor vehicles belonging to each of these parties in these third-party proceedings, going in opposite directions, came into collision with each other upon a wide road. It is a matter for reflection that that incident has led to five different sets of proceedings in courts of law, and the result has not always been the same. Mr. Cartledge was driving his own car. A servant or agent of Mr. Eric Matthews was driving

Mr. Eric Matthews' taxi-cab. A court of summary jurisdiction has found Mr. Cartledge to blame for the accident. A court of summary jurisdiction has dismissed a summons against Mr. Eric Matthews in respect of responsibility for the accident. The county court judge in proceedings between Mr. Cartledge and Mr. Matthews has found Mr. Matthews solely to blame by reason of the negligence of his servant or agent, and I, sitting here in proceedings brought by a perfectly innocent passenger against both parties, Mr. Cartledge and Mr. Matthews, have come to the conclusion, upon the evidence, that Mr. Cartledge was solely to blame, and that Mr. Eric Matthews was not to blame at all. In consequence of that, I have given judgment for the plaintiff, Mr. Charles Johnson, against Mr. Cartledge solely.

Mr. Cartledge now seeks, by reason of his having obtained the county court judge's judgment against Mr. Eric Matthews, to pass on the burden of his liability in respect of these proceedings, and the damages which he has to pay and the costs which he has to pay to Mr. Johnson, to Mr. Eric Matthews, and it is urged upon his behalf that this is *res judicata*, and that this matter has already been settled as between the two of them. Indeed, so firm is the foundation upon which his claim in this matter rests that it is said that Mr. Eric Matthews cannot even be heard to contend otherwise than that, inasmuch as the county court judge held him liable once to Mr. Cartledge, he remains liable for all time, and in all circumstances and in all proceedings arising out of this accident I am not able to come to that conclusion.

Mr. Cartledge rests his case upon the provisions—and, indeed, can only rest his case upon the provisions—of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) which provides as follows :

Where damage is suffered by any person as the result of a tort (whether a crime or not) . . . (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage . . .

By reason of those words, Mr. Cartledge seeks to recover from Mr. Matthews, not only contribution—he does not limit himself to that, although the principle upon which he is proceeding is the same—but complete indemnity, though the result would have been the same if he had been seeking contribution.

The first difficulty which Mr. Cartledge has in this matter is that in these proceedings, and in respect of this damage to Mr. Charles Johnson, Mr. Eric Matthews is not a tortfeasor. I have held that the only tortfeasor in these proceedings was Mr. Cartledge. Mr. Matthews is not a tortfeasor, and, further, this is not the same damage, and, in looking at *Marginson v. Blackburn Borough Council* (1), I think that I can distinguish that case by saying that it is quite clear that the parties must be the same and the damage must be the same and the issues of law and of fact must be the same before the question of *res judicata* can be successfully raised.

The point was certainly one of interest. It would seem almost to add a new terror to litigation which may arise out of a collision between vehicles upon the highway. Whether or not steps will be taken to prevent a multiplicity of cases arising out of the same incident I do not know, but it seems lamentable that it should be possible for so many different A courts to be engaged at different times in different places considering the unfortunate results of the negligent driving of a motor car. Upon these third-party proceedings, I give judgment for the third party with costs.

Solicitors: *Browne & Rosenberg* (for the plaintiff); *John Barkers* (for B the first defendants); *Walter West*, agents for *Stanley & Co.* (for the second defendants).

[Reported by W. WOODROW HARDING, ESQ., Barrister-at-Law.]

C *Re* RIALI, WESTMINSTER BANK, LTD. v. HARRISON AND OTHERS.

[CHANCERY DIVISION (Simonds, J.), June 18, 1939.]

Wills—Construction—Gift to tenants in common for life—Gift over on death of all tenants in common—Implication of cross-remainders.

D The testatrix directed her trustees, after payment of certain legacies, to divide the balance of her residuary estate into two equal parts and to pay the income from one moiety to one of her two sisters for life, and, after her death, to pay the income of that moiety to that sister's husband (who, however, predeceased the testatrix). The income of E the other moiety was given to her other sister for life. On the death of the last survivor of the life tenants, the residuary estate was to be divided among a number of charitable institutions. The trusts of the first moiety having determined on the death of the first sister, the question arose whether cross-remainders could be implied so as to entitle the surviving life tenant during the remainder of her life to the income to which the deceased life tenant had been entitled, or whether F during this period such income passed to the charitable institutions or passed as on an intestacy:—

HELD: the income ought to be paid to the surviving life tenant during the remainder of her life.

[EDITORIAL NOTE. Where life interests are given to several persons in a fund or the residue of an estate, and there is a gift over only after the death of the last survivor, the survivors or survivor take estates for life. This is an implication of G law made in order to give effect to the intention of the testator. It will be noted that under the will in this case the capital was divided into equal moieties, and it was argued that the testatrix, having divided her estate in two separate parts, there was no reason for the implication to be made. This view was not, however, taken by the court, and the case has been treated as similar to that of *Re Ragdale*, H *Public Trustee v. Tuffill* (1).

AS TO IMPLICATION OF CROSS LIFE INTERESTS, see HALSBURY, 1st Edn., Vol. 28, Wills, p. 848, para. 1508; and FOR CASES, see DIGEST, Vol. 44, pp. 1212-1215, Nos. 10480-10506.]

Cases referred to:

- (1) *Re Ragdale, Public Trustee v. Tuffill*, [1934] Ch. 352; Digest Supp.; 103 L.J.Ch. 181; 150 L.T. 459.

- (2) *Armstrong v. Eldridge* (1791), 3 Bro.C.C. 215; 44 Digest 1212, 10481.
 (3) *Re Stanley's Settlement, Maddocks v. Andrews*, [1916] 2 Ch. 50; 40 Digest 563, 1016; 85 L.J.Ch. 809; 114 L.T. 933.
 (4) *Re Telfair, Garrioch v. Barclay* (1902), 86 L.T. 496; 44 Digest 1215, 10503.
 (5) *Re Hobson, Barwick v. Holt*, [1912] 1 Ch. 626; 44 Digest 1205, 10426; 106 L.T. 507.
 (6) *Sarel v. Sarel* (1856), 23 Beav. 87; 44 Digest 1214, 10496. **A**
 (7) *Stevens v. Pyle* (1860), 28 Beav. 388; 44 Digest 1160, 10045.

ORIGINATING SUMMONS to determine whether, on the true construction of the will and codicil of the testatrix, and in the events which have happened, the income of the moiety of the residuary estate of the testatrix whereof Louisa Caroline Alford was tenant for life ought as from her death to be paid to the defendant Mary Emma Harrison during the remainder of her life or whether the income during this period passes under the gift to the charitable institutions named in cl. 9 of the will or whether it passes on an intestacy, or how otherwise, and whether the income of the moiety of the proceeds of sale of a dwelling-house known as St. Anne's, Higher Woodfield Road, Torquay, in the county of Devon, whereof Louisa Caroline Alford was tenant for life, ought as from her death to be paid to the defendant Mary Emma Harrison during the remainder of her life or whether the income during this period passes under the gift to the charitable institutions aforesaid or whether it passes on an intestacy or how otherwise. **B** **C** **D**

J. B. Richardson for the plaintiffs.

Roger W. Turnbull for the defendant Mary Emma Harrison.

Wilfrid M. Hunt for the defendants The National Lifeboat Institution.

J. H. Sparrow for the defendants The British Empire Cancer Campaign. **E**
Meyrick Beebee for Stuart Carnegie Knox.

Ian Campbell for Margaret Ellen Banks, Miriam Frances McSwiney, and the trustee of the property of Robert George Banks, a bankrupt.

J. A. Reid for Sir Holbert Waring, treasurer of The Imperial Cancer Research Fund. **F**

Turnbull: One must read into cl. 8 an implied trust to pay income to my client for life, or, if I am wrong, there is an intestacy. *Re Ragdale, Public Trustee v. Tuffill* (1) is in distinguishable from the present case. [Counsel referred to *Armstrong v. Eldridge* (2), *Re Stanley's Settlement, Maddocks v. Andrews* (3) and *Re Telfair, Garrioch v. Barclay* (4).] **G**

Hunt: 'This is not a case where there are life interests given under cl. 8. There is no room for an implication, and, on the death of these persons, each moiety goes out of cl. 8 and is held on the trusts in cl. 9. [Counsel referred to *Armstrong v. Eldridge* (2) and *Re Hobson, Barwick v. Holt* (5).] There is no room for any joint tenancy. The testator has divided the estate into two parts. **H**

Sparrow adopted *Hunt's* argument.

Campbell: There is a hiatus in respect of a certain portion of the income: THEOBALD ON WILLS, p. 581. The question of implied interests is considered in *Re Hobson, Barwick v. Holt* (5). [Counsel referred to

Sarel v. Sarel (6), *Stevens v. Pyle* (7) and THEOBALD ON WILLS, p. 196.]

SIMONDS, J. : In this case, the testatrix made her will on Dec. 15, 1933, and a codicil thereto on Feb. 22, 1934, and she died on Mar. 28, 1935. By her will she appointed the plaintiffs to be executors and trustees thereof, and, after bequeathing certain pecuniary and specific legacies, and devising her freehold house known as St. Anne's, Higher Woodfield Road, Torquay, upon the trusts therein set out, devised and bequeathed all her residuary estate both real and personal to her trustees upon trust for sale and to hold the proceeds of sale, after payment of her debts, funeral and testamentary expenses, the legacies and duties on such legacies as were given free of legacy duty, and two further legacies, upon the following trusts :

8. After payment of the legacies bequeathed by cl. 7 of this my will I direct my trustees to hold the balance of my residuary estate upon trust to divide the same into two equal parts and to hold one such equal part thereof upon trust to pay the income thereof to my sister the said Louisa Caroline Alford for her life and from and after her death upon trust to pay the income thereof to my said brother-in-law the Rev. William Powell Alford for his life and from and after his death to hold the same upon the trusts declared concerning the same in cl. 9 of this my will and as to the other such equal part thereof to hold the same upon trust to pay the income thereof to my sister the said Mary Emma Harrison for her life and from and after her death to hold the same upon the trusts declared concerning the same in cl. 9 of this my will.

9. Subject to the trusts declared in cl. 8 of this my will I direct my trustees to stand possessed of my residuary estate upon trust after the death of the last survivor of my said two sisters and my brother-in-law and after payment thereof of all proper and due expenses attending the administration of such trust to pay a further legacy of £200 free of legacy duty to the said Cecil Charles Langley and to divide the balance thereof equally between the following charitable institutions . . .

Then there followed a list of the charitable institutions which the testatrix wished to benefit. Then by the codicil the testatrix revoked the devise of her freehold house known as St. Anne's contained in her will, and substituted therefor the following provision :

I devise my said freehold dwelling-house known as St. Anne's aforesaid unto my trustees upon trust to sell the same as soon as conveniently may be after my death and after payment thereof of the costs and any other necessary and proper expenses incidental to such sale to invest the net proceeds thereof in their names in any of the investments authorised by law for the investment of trust moneys and to stand possessed of such investments upon trust to divide the same into two equal parts and to hold one such part thereof upon trust to pay the income thereof to my sister the said Mary Emma Harrison for her life and from and after her death to hold the same as to both capital and income thereof upon the trusts declared in my said will concerning my residuary estate and as to the other such equal part thereof upon trust to pay the income thereof to my sister the said Louisa Caroline Alford for her life and from and after her death upon trust to pay the income thereof to my brother-in-law the said Rev. William Powell Alford for his life and from and after his death to hold the same as to both capital and income thereof upon the trusts declared in my said will concerning my residuary estate.

William Powell Alford, the brother-in-law, died on Oct. 8, 1934, predeceasing the testatrix. Both of the sisters survived the testatrix, and one of them, Louisa Caroline Alford, died on Oct. 30, 1938. The other sister, Mary Emma Harrison, still survives and is a defendant to this summons. The question therefore arises as to who is entitled to

the income of the moiety which, in the events which had happened, was payable to Louisa Caroline Alford. The summons asks whether the income of this moiety is to be paid to the surviving sister, Mary Emma Harrison, during the remainder of her life, whether it passes to the charitable institutions, or whether there is an intestacy in respect of that income during this period. I have been referred to a number of authorities upon the construction of this will, and in my view the position here is governed by the decision in *Re Ragdale, Public Trustee v. Tuffill* (1). Reading the will as a whole, I think that it is clear that it was not the intention of the testatrix to benefit the charities until after the decease of all three tenants for life. Her intention was that those tenants for life should receive the whole income from the residuary estate until the death of the last survivor of them and that only then should the charitable institutions mentioned in the will become entitled to their shares in the capital of the residue. I therefore declare that the income of the moiety of the residuary estate of which Louisa Caroline Alford was tenant for life ought as from her death to be paid to the defendant Mary Emma Harrison during the remainder of her life, and I make a similar declaration in respect of the income of the moiety of the proceeds of sale of the freehold property.

Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of the estate.

Solicitors : *Woodcock, Ryland & Parker*, agents for *Hooper & Wollen*, Torquay (for the plaintiffs and for the defendant Mary Emma Harrison) ; *Clayton, Sons & Fergus* (for the defendants, the Royal National Lifeboat Institution) ; *G. & G. Keith* (for the defendant, the British Empire Cancer Campaign) ; *Hall, Brydon & Chapman* (for Stuart Carnegie Knox) ; *Andrew, Purves, Sutton & Creery*, agents for *Newman & Bond*, Barnsley (for Margaret Ellen Banks, Frances McSwiney, and the trustees of the property of Robert George Banks, a bankrupt) ; *Wilde, Sapse & Co.* (for Sir Holbert Waring, treasurer of the Imperial Cancer Research Fund).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

LUCAS v. POSTMASTER-GENERAL.

[COURT OF APPEAL (Scott, MacKinnon and Finlay, L.JJ.), July 7, 17, 1939.]

Workmen's Compensation—Accident arising out of and in the course of the employment—Boy employed to repair telephone apparatus—Condition of employment that he should attend gymnasium class—Accident while attending class.

The applicant was employed by the Post Office to repair telephone and other apparatus. One of the conditions of employment was that he should "attend educational classes provided by the department normally for 8 hrs. weekly, of which 5 hrs. will be in the department's time, and 3 hrs. in [his] own time." On Oct. 5, 1938, the applicant's

work had ended at 5.45 p.m., but, under the terms of the above condition, he was attending a gymnasium class from 6.15 p.m. to 7.15 p.m., when he fell and sustained an injury:—

HELD: this was not an accident arising out of and in the course of the employment.

London & North Eastern Ry. Co. v. Brentnall (1) distinguished.

- A** **[EDITORIAL NOTE.** In *London & North Eastern Ry. Co. v. Brentnall* (1), a railway company required their engine-drivers coming off duty in a town where they were not residing, to stay at a hostel provided by the company, unless they obtained permission to stay elsewhere. An accident having occurred to an engine-driver while he was in the hostel, it was held that that accident occurred in the course of the man's employment. The Court of Appeal have here held that the
- B** facts of that case are distinguishable from the facts in this case.

As to COMPULSORY USE OF PREMISES, see WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 33, 34; and FOR CASES, see DIGEST, Vol. 34, pp. 277, 278, Nos. 2341-2349.]

Case referred to:

- C** (1) *London & North Eastern Ry. Co. v. Brentnall*, [1933] A.C. 489; Digest Supp.; 102 L.J.K.B. 438; 148 L.T. 530; 26 B.W.C.C. 225.

- D** APPEAL by the applicant from a decision of His Honour JUDGE EARENGEY, K.C., at the Clerkenwell County Court, dated May 3, 1939. The facts of the case are fully set out in the judgment of the court delivered by FINLAY, L.J.

Graham Brooks for the appellant.

J. Alun Pugh and *Martin Jukes* for the respondent.

- E** FINLAY, L.J. [delivering the judgment of the court]: In our opinion, this appeal must be dismissed. We should be prepared to rest our conclusion upon the careful and admirable judgment of the county court judge, but, out of respect for the arguments which were addressed to us, we add a few sentences. The facts, which were not in dispute, are stated in detail by the county court judge. The appellant
- F** was a boy employed in the Post Office stores department, his work being in connection with the repair and so on of telephone and other apparatus. He was employed on certain conditions, the most material of which was in the following terms:

- G** All boys until they reach 18 years of age are required, as a condition of their employment, to attend educational classes provided by the department normally for 8 hrs. weekly, of which 5 hrs. will be in the department's time and 3 hrs. in their own time.

- Among the classes the appellant was required to attend was a gymnasium class conducted by an employee of the London County Council at a
- H** London County Council school. On Wednesday, Oct. 5, while attending this class, which was held from 6.15 p.m. to 7.15 p.m., the appellant fell and sustained an injury which, though not very serious, was such as to entitle him to compensation if the accident arose "out of and in the course of the employment." The appellant's work had ended that day at 5.45 p.m., and he duly clocked out at that hour.

It seems to us to be impossible to contend that this accident arose out of and in the course of the plaintiff's employment. The plaintiff was employed to repair telephone apparatus. It is quite true that, as a condition of obtaining the employment, he was required to attend, among other classes, this gymnasium class. When performing gymnastic exercises, however, he was not doing the work which he was employed A to do—namely, repairing telephones. Various analogies may be put, and were put—the governess required as a condition of being employed to attend the parish church, the employee required to join a particular Territorial battalion, and the like. On the other hand, variations in the facts were suggested to us, as, for example, where, during working B hours, technical instruction by way of lectures was given to employees. We do not discuss the analogies nor the variations of facts. It has been pointed out by very great authorities that what is to be desired is not any survey of different facts and various analogies, but rather the application of the words of the section to the particular facts in C hand. For much the same reason, we do not discuss the authorities. We merely observe that *London & North Eastern Ry. Co. v. Brentnall* (1), on which much reliance was placed both before us and in the court below, is plainly distinguishable. In our opinion, the judgment of the county court judge was perfectly correct, and this appeal must be dis- D missed with costs.

Appeal dismissed with costs.

Solicitors : *Darling & Taylor* (for the appellant) ; *Sir Raymond Woods* (for the respondent).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.] E

K.B.D.]

OWENS v. SCOTT & SONS, LTD.

663

OWENS v. THOMAS SCOTT & SONS (BAKERS), LTD., AND
WASTALL.

[LIVERPOOL SUMMER ASSIZES (Stable, J.), June 28, 1939.]

Negligence—Property adjoining highway—Forecourt indistinguishable from pavement—Duty to repair forecourt—Liability to passer-by.

A *Landlord and Tenant—Lease—Extent of demise—Appurtenances—Forecourt—Law of Property Act, 1925 (c. 20), s. 62.*

In or about 1908 the owner of the freehold of certain houses with gardens in front of them converted those houses into shops. The walls enclosing the gardens were taken down and the land which had constituted the gardens was thrown into the pavement though it was at no time dedicated to the public. Some part of that land was flagged but the land immediately in front of the property here in question was asphalted. In 1919 one of the shops was let to the first defendants by the predecessor in title of the second defendant, the then owner of the freehold. The parcels in the tenancy agreement were "all that messuage or dwellinghouse and shop known as No. 92 St. John's Road Waterloo with the appurtenances thereto." The plaintiff on the night of Aug. 26, 1937, when walking on the asphalted land in front of those premises fell and was injured by reason of the want of repair of the asphalt in which there were shallow cavities. The plaintiff was not going to or coming from the shop let to the first defendants or any of the converted premises. The reason for the accident was that the surface of the asphalt was different from, and worse than, the surface of the surrounding pavement and there was nothing to indicate that there was any difference between the two :—

HELD : (i) the tenants were not liable, since the asphalted land was not, upon a proper construction of the tenancy agreement, included in the land demised thereby.

(ii) the freeholder had failed in her duty to keep the property safe for persons using the highway and was liable in damages to the plaintiff.

E **[EDITORIAL NOTE.** There are two points in this case, the first being one only of the construction of the tenancy agreement. The second and more important point is the duty of the owner of property adjoining the highway to persons using the highway where a part of their property is indistinguishable from the highway. The circumstances here are the common case where, on the conversion of a private house into a shop, the front garden becomes a forecourt of the shop. Generally, the owners do not desire to dedicate that forecourt to the public, as it may be of considerable value for the exhibition of goods. If the forecourt appears to a passer-by to be all one with the highway, then it appears that the owner of the property, or the occupier if there has been a demise of the forecourt, is under a duty to keep it in such a state of repair that it is not a danger to a passer-by, who would be unaware that he had passed from the highway on to private property.

G AS TO DUTY TOWARDS PUBLIC OF OWNER OF PREMISES ADJOINING PUBLIC PLACE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 619-621, para. 870 ; and FOR CASES, see DIGEST, Vol. 26, pp. 416-419, Nos. 1356-1380.]

Cases referred to :

- H (1) *Lister v. Pickford* (1865), 34 Beav. 576 ; 17 Digest 377, 1867 ; 34 L.J.Ch. 582 ; 12 L.T. 587.
(2) *Harrold v. Watney*, [1898] 2 Q.B. 320 ; 7 Digest 286, 155 ; 67 L.J.Q.B. 771 ; 78 L.T. 788.

ACTION for damages for injuries received by the plaintiff when she was passing in front of the shop occupied by the first-named defendants

on a piece of ground once a garden of those premises, but, at the time of the accident, one with the pavement, except that at the material place it was covered with asphalt, and not with flags. The second-named defendant was joined as owner of the fee simple.

G. J. Lynskey, K.C., and F. J. Nance for the plaintiff.

S. Scholefield Allen for the first defendants.

William Gorman, K.C., and J. Fraser Harrison for the second defendant.

Gorman, K.C., referred to the Law of Property Act, 1925, s. 62, and to *Lister v. Pickford* (1) and *Harrold v. Watney* (2).

STABLE, J. : This is a case, in my view, of considerable difficulty, which raises a question of principle of importance. The plaintiff, Mrs. Owens, has sued a limited company, Thomas Scott & Sons (Bakers), Ltd., and, by an amendment, has added as defendant a Mrs. Wastall, and she claims from one or other of these defendants that they are under a legal obligation to compensate her for the injury she sustained on the night of Aug. 26, 1937, when she fell and injured her right knee and her left ankle. The company are the lessees of a shop which is known as No. 92, St. John's Road, Waterloo, and the claim against them is based on the allegation that they were the occupiers of the particular piece of land on which Mrs. Owens was walking at the time when she fell and sustained those injuries. Alternatively, she says, if Scott's were not in occupation of this land, Mrs. Wastall, who is the owner of the fee simple, was. The company and Mrs. Wastall each say that the other is in occupation.

The position is this. The fee simple is in Mrs. Wastall, and, unless she parted with the possession of this particular land to the company, there is no suggestion that she has parted with the possession of it to anybody else. The only evidence before me is a memorandum of an agreement made on Nov. 26, 1919, between the agents of her deceased husband, her predecessor in title, and Messrs. Lunt & Co., Ltd., a company which has since changed its name to Thomas Scott & Sons (Bakers), Ltd., the first defendants. Under that agreement, it was agreed as follows :

... the landlord agrees to let and the tenant agrees to take all that messuage or dwelling-house and shop known as No. 92 St. John's Road Waterloo with the appurtenances thereto for the term of a quarterly tenancy from Dec. 1, 1919, subject to the rent and the covenants contained in the agreement.

The history of the property, so far as it is material and before me in evidence, is this. At some time or another prior to 1909, this particular property was one of a row of houses, and in front of the houses was a row of small gardens separated from the highway by some sort of wall or fence, and no doubt separated one from the other by a wall or fence. At some date, which I cannot fix with precision on the evidence, but which was subsequent to 1908, and prior to Nov. 26, 1919, Mrs. Wastall's predecessor in title converted the property, and what was a row of houses

became a row of shops, and in the course of this conversion the little gardens which lay in front of the houses, separated from the highway by the wall, were for all practical purposes obliterated. The wall was pulled down. Shop fronts were put in, and the area of land which unquestionably belonged to Mrs. Wastall, and which had constituted the gardens, was, A so far as mere physical appearance goes, thrown into the pavement. I do not mean that it was dedicated as a highway, or became the highway. It was thrown into the pavement, and it was covered with asphalt, and I think in some cases actually with flags. No doubt, as appears from the correspondence, the part which was covered with flags was the part B belonging to adjacent owners who dedicated their land as a public highway, and consequently transferred the obligations and burden of repair to the highway authority.

The particular piece with which I am concerned, however, was covered with asphalt, so that it presented a slightly different appearance from the C rest of the pavement, although I do not think that any stranger (by stranger, I mean anybody who was not conversant with the legal and other history of this property) who happened to be walking along that road would have had the slightest conception that, at some point or another, he was stepping off the pavement on to somebody's private D garden.

That was the position as it existed in 1919. To all outward appearance, the old garden had become part of the pavement, and in those circumstances this lease was executed. It is now being suggested that I ought to hold that the words "messuage or dwelling-house and shop with the E appurtenances thereto" operated as a demise to the tenant of the shop of a considerable area of land which had been the garden years before, but which in 1919, for all practical purposes, was part of the pavement. It seems to me that it is quite impossible to come to such a conclusion. There is not the slightest evidence here that the agreement comprised F this forecourt, as I will call it. There is no evidence before me that it was ever brought to the attention of the lessee that part of the land leased to him consisted of this particular piece of land which might entail somewhat peculiar obligations. There was no evidence before me that the limited company who took the lease, or the agreement, in 1919 had the G remotest conception that in 1909 the pavement immediately in front of, and adjoining, the shop had consisted of a private garden.

In those circumstances, it seems to me to be stretching the words of the agreement to an extent which they cannot possibly bear to say that the words "messuage or dwelling-house and shop with the appurtenances H thereto" comprise this area of what, for all practical purposes, was nothing more nor less than part of the pavement. I think that we can dismiss the word "appurtenances" from the argument. In *Lister v. Pickford* (1), SIR JOHN ROMILLY, M.R., said, at p. 580:

... it is settled by the earliest authority, repeated without contradiction to the latest, that land cannot be appurtenant to land. The word "appurtenances"

includes all the incorporeal hereditaments attached to the land granted or demised, such as rights of way, of common, of piscary, and the like, but it does not include lands in addition to that granted.

It may be—and I think that it is so—that in subsequent cases the somewhat restricted meaning which SIR JOHN ROMILLY, M.R., says must invariably and inevitably be attached to the word “appurtenances” is extended somewhat, but there has never been a decision, so far as I know, which has said that the addition of the word “appurtenances” operates so as to grant land which, apart from the word “appurtenances,” is not already included in the grant.

My attention has been called to the Law of Property Act, 1925, s. 62. That section is a statutory statement of the law, but that does not throw any light on the matter at all. It provides as follows :

(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land [the land conveyed], all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof. . . .

In other words, where one has a conveyance of a piece of land, the conveyance operates to convey with the land the various things which are set out in the section. The section does not say that, when one conveys land A, it operates to convey land B. The section continues as follows :

or, at the time of conveyance, demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

There was absolutely no evidence before me that, when this agreement was made, this piece of land which looked like a pavement was enjoyed with the shop, or was reputed to be part of the shop, or anything of the kind. I think that, if one had asked anyone what it was, they would have said that it was part of the pavement. I think that the company entered into an agreement in respect of the shop, and that is all. No doubt they have some rights over this piece of pavement as between them and their landlord. If the landlord put an iron railing round it so that the servants of the company could not get out and the customers could not get in, I am sure that the company would have something to say, but exactly what those rights are is not in issue here. I have to decide whether or not I am satisfied that this agreement operated as an agreement to demise this particular area of land. I am quite satisfied that it did not. The result of that is that the first defendants are not concerned with this matter, and the duty, if duty there be, is a duty which falls on the second defendant, owner of the fee simple, who is, in my judgment, the occupier of this land.

The existence of a duty seems to me to be plain enough. The difficulty arises in defining the extent and scope of the duty—where it begins and where it ends. The facts are these. Mrs. Owens, when she fell over the broken bit of asphalt, was not visiting Scott's shop. She was not visiting any of the adjacent property. She was an ordinary member of the public who thought she was walking down the public highway, and so,

to an extent, she was, because, so long as she kept on the flagged part, she was on the highway. If she put her foot on the asphalt, however, she went off it, but there was absolutely nothing to indicate to her what was highway and what was not.

- The first question which I have to ask is whether or not she was there
- A as a matter of right, which she could have asserted and enforced as against the owners of this particular piece of land (by which I mean the offending piece of asphalt). I have come to the conclusion that she was not. I have no doubt that the public had been walking upon it and treating it like a pavement for something like 30 years, but no rights had been
- B acquired, so that, strictly speaking, Mrs. Owens was there as a licensee. There was no express licence, but there was, in my judgment, most certainly an implied licence, and I think the fact that the barriers had been removed by the owner, the walls pulled down, and all traces obliterated, so that to the passer-by there was nothing whatever to indicate
- C when and where she or he stepped off the highway, constitutes the plainest possible licence, until it is revoked and the pavement walled off.

- If Mrs. Owens was simply in the position of a licensee, and the obligation of the owner and occupier was to warn or protect her against what is sometimes called a trap—which I understand to mean some
- D hidden danger which was known, or which should have been known, to the owner or occupier, and was unknown to the person complaining—if that was the full extent of the complaint, then, in my judgment, the plaintiff would fail. Counsel for the plaintiff has not satisfied me that here was anything in the nature of the trench which was dug in one case,
- E the pit which was dug in another, and, even if there had been, there is no evidence that Mrs. Wastall knew about it, and I see no conceivable reason for saying that, in the absence of the wider obligation to repair, she ought to have known about it. If she was under an obligation to repair, then, *cadit questio*. If she was not, how can it be said that she
- F ought to have known? How can it be said that she owed a duty to know when the asphalt got worn? There was no manifest hidden danger, in the form of a pit, or hole, or large cavity, present in this asphalt, but what there was, and what constituted the danger, was this. The asphalt was considerably worn. It was broken. The surface was extremely uneven.
- G There were cavities, not very deep and not very big, and, if the whole area had been in that condition, I do not think that to walk across it without falling would have presented any formidable difficulty to anyone. The real danger was that the surface was different from, and worse than, the surface of the surrounding footpath, and there was absolutely nothing
- H to indicate to anyone that there was any difference between the two. The result was that Mrs. Owens, as, indeed, would be the case with anyone else who was walking along, coming along the footpath, suddenly found herself in an area of ground where the surface was much rougher than, and quite different from, the surrounding surfaces, and it was that change, that deterioration, of the surface, without any sort of warning of what to

expect, which, in my judgment, constituted the danger and caused the accident.

What is the obligation of the defendant? I think that the principle is exactly stated and completely covered by *Harrold v. Watney* (2), and more particularly in the judgment of VAUGHAN WILLIAMS, L.J. This is, in my judgment, a case *a fortiori*, because, in *Harrold v. Watney* (2), A the property adjoining the highway was a defective fence. It was perfectly apparent to everybody that the fence was not part of the highway, and for a little boy, or for anybody, to climb up the fence and put his foot on it might almost be said to constitute a trespass, whereas B here the property—namely, the asphalt pavement immediately adjoining the highway—bore no sort of indication to anyone that it did not form part of the highway itself. VAUGHAN WILLIAMS, L.J., says that there is an obligation on the owner of the fence to maintain the fence so as not to be a nuisance to the people using the highway. It must not be a danger, and it seems to me that it makes no difference in principle that C here, instead of the property being a fence adjoining the highway, it is, in fact, an asphalt pavement which adjoins, and appears to be a part of, the highway. I think that that asphalt pavement was dangerous, and I think that the danger was twofold. First of all, the pavement was rough and broken, and, secondly, it was quite different—different D in surface, and in the degree of smoothness—from the rest of the pavement, and there was no indication whatever to the passer-by that suddenly he or she was going to pass from reasonably kept pavement on to rather rougher territory. It may be said that the duty is not an absolute duty to repair, and I think that that is right, although it may come to E very much the same thing. It is true that the defendant owes no contractual duty to Mrs. Owens to repair. She does not owe a duty to anyone to repair. She can, if she likes, fence off this part of the old garden and prevent people from traversing it as they go up and down the street. If she does that, then there is no obligation to repair. The F obligation is an obligation to keep the property safe, to render it not dangerous, for people who are using the highway, and that obligation, which, in my judgment, the law imposed on Mrs. Wastall, was an obligation which she failed to perform. There will be judgment against Mrs. Wastall for the sum of £120. G

Solicitors : *G. L. Greene* (for the plaintiff) ; *Buckley, Pidgeon, Watson & Blackwood* (for the first defendants) ; *Wood, Lord & Co.* (for the second defendants).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

BOND v. NOTTINGHAM CORPORATION.

[CHANCERY DIVISION (Simonds, J.), July 19, 1939.]

Easements—Support—Interference—Demolition of adjoining house by corporation in pursuance of clearance order—Liability of corporation—Housing Act, 1936 (c. 51), ss. 13, 26.

A The plaintiff was entitled to an easement of support in respect of his premises from the premises of one N., and it was agreed that, if the premises of N. were demolished, there would be a serious danger of the plaintiff's premises collapsing. N. was ordered, by a clearance order made by the local authority and confirmed by the Minister of Health, to demolish his premises. N. having failed to demolish his premises as provided for in the order, the defendant corporation, in pursuance of their statutory duty under the Housing Act, 1936, intimated their intention to demolish N.'s premises without providing support for the plaintiff's property. Thereupon the plaintiff brought this action to restrain the defendant corporation from demolishing N.'s premises without providing adequate support for his, the plaintiff's, property :—

B
C **HELD :** although the Housing Act does not provide for compensation for any damage done to neighbouring premises by a local authority in exercise of its statutory duty of entry and demolition of a building, there was nothing in the Act which justified the local authority in depriving the plaintiff of his easement of support.

[EDITORIAL NOTE. In the previous proceedings it was held that the owner of the house to be demolished was bound to have regard to the right of support vested in the adjoining owner. The question here is whether the local authority was under a similar duty when exercising their statutory power to enter and demolish the property included in the clearance order. It is held that the local authority must have regard to the easement of support, and, if they proceed to demolish the premises in accordance with the order and their statutory powers, they must provide equivalent support for the plaintiff's building.

E **AS TO INTERFERENCE WITH EASEMENT OF SUPPORT,** see HALSBURY, Hailsham Edn., Vol. 11, pp. 368, 369, paras. 647, 648; and FOR CASES, see DIGEST, Vol. 19, pp. 173, 174, Nos. 1230-1233.]

Cases referred to :

- F (1) *Geddis v. Bann Reservoir Proprietors* (1878), 3 App. Cas. 430; 38 Digest 25, 137.
(2) *A.-G. v. Horner* (1884), 14 Q.B.D. 245; 42 Digest 743, 1679; 54 L.J.Q.B. 227; on appeal (1885), 11 App. Cas. 66.
(3) *Public Works Comr. (Cape Colony) v. Logan*, [1903] A.C. 355; 11 Digest 109, case k.

G **MOTION** for an injunction to restrain the defendant corporation from demolishing adjoining premises belonging to the plaintiff without providing proper support for the plaintiff's property. This matter was before the court on Apr. 21 and May 4, 1939, and the proceedings on those days are reported [1939] 2 All E.R. 610. By consent the hearing of this motion was treated as the trial of the action. The plaintiff owned certain
H premises known as Aspley House, Alperton Road in the city of Nottingham. One Norman owned premises immediately adjoining Aspley House known as Aspley Place. There was uncontradicted evidence that the wall of the plaintiff's premises, where it abutted on Norman's premises, had for 50 years or more been supported by those premises, and that if

they were demolished there would be considerable danger of a collapse of the plaintiff's premises unless some equivalent support was provided. Norman's premises became the subject of a clearance order made by the council of the county borough of Nottingham under the authority of the Housing Act, 1930 and confirmed by the Minister of Health. Norman failed to demolish the premises within the specified time, and it then became the duty of the local authority under the Housing Act, 1936, s. 26 (4) to enter and demolish the premises. It was conceded that the plaintiff was entitled to an easement of support in respect of the premises to be demolished, but the local authority proposed to demolish the premises without providing an equivalent support, contending that they were exercising a statutory duty, and that provided they exercised this duty without negligence, were under no obligation to the plaintiff to maintain the support of his premises.

E. J. Rimmer and A. J. Irvine for the plaintiff.

Wilfrid M. Hunt for the defendants.

SIMONDS, J. : The duty of the corporation arises under the Housing Act, 1936, s. 26. They have made, and the Minister of Health has confirmed, a clearance order ordering the demolition of the buildings in question. The order having become operative and the owner, Norman, having failed to demolish the buildings, it is their positive duty under sect. 26 (3) to "enter and demolish the buildings, and sell the materials thereof." Subsect. 4 of the same section provides that the provisions of sect. 13 (2) to (5) of the Act shall apply in relation to any expenses incurred by the authority under the last subsection and to any surplus remaining in the hands of the authority with the necessary modifications. No provision is made by the Act for compensation for any damage done to neighbouring buildings by the authority in the exercise of its statutory duty of entry and demolition of the buildings subject to the clearance order. It is in these circumstances that the question arises whether the authority is authorised by the Act to do that which Norman could not do, namely, to deprive the plaintiff of the support afforded by the condemned building without providing equivalent support.

The case for the defendant corporation is simply put. For them it is contended that they have an absolute and unqualified duty and if, in the course of performing it, they let down a neighbouring house, that is no affair of theirs and it is immaterial whether or not, as between the owners of the demolished and the neighbouring house, there was any easement of support. They concede, I think, that they must perform their statutory duty without negligence, but say that their duty being merely to demolish, they are not guilty of negligence in the performance of it, if they do not, by means of shores or otherwise, provide support for this house, which the demolished house previously supported.

For the plaintiff it is contended in the first place that apart from the easement of support, to which he is entitled, the defendant corporation

has no right so to perform its statutory duty of demolition as to let down his house—in brief, demolition is negligent demolition, if it is so carried out as to damage premises outside the clearance area. It is urged that it is an ordinary incident of the work of demolition to shore up the buildings which the demolished building has supported, and that to
 A demolish without that precaution is in effect to choose a mode of performing a statutory duty which is injurious to a third party, when a method of performing it without such injury is available. The principle laid down in *Geddis v. Bann Reservoir Proprietors* (1), is thus invoked. Secondly, it is urged that, whatever may be the position where there is
 B no easement of support, the Act cannot be interpreted as authorising the defendant corporation to deprive the plaintiff of his easement, for so interpreted it would take away the plaintiff's proprietary rights without compensation. It is true that no compensation is provided for him whose house is demolished, but that, it is said, is the penalty of owning
 C a house which has become unfit for human habitation or dangerous or injurious to the health of the inhabitants of the area, and no such consideration applies to him whose house is outside the area and who is in no degree responsible for the condition of any house within it. It may be observed that if the defendants are right, the result is that they, whose
 D right of entry and demolition only arises in substitution for Norman, yet can do that which he could not do, namely, deprive the plaintiff of his easement of support; on the other hand, if the plaintiff is right in his larger proposition that, even if he had no easement, the defendants could not demolish in such manner as to let down his building, then he is in a
 E better position than he would be if Norman complied with the demolition order, for it has not been suggested that Norman, apart from the easement, could not, in the course of demolishing his own house, let down the plaintiff's house also.

In the view which I take of this case it is unnecessary for me to determine the correctness of the plaintiff's wider proposition, which may
 F affect many interests outside this case. For I think that, in his narrower proposition, he is clearly right. He has a valuable proprietary right, which the law recognises, an easement of support from his neighbour's house. If that right is to be taken from him, it must be by plain enactment or necessary intendment. In *A-G. v. Horner* (2), SIR WILLIAM
 G BRETT, M.R., said, at p. 257 :

... it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it.

H Again, LORD DAVEY, in the course of delivering the judgment of the Privy Council in *Public Works Comr. (Cape Colony) v. Logan* (3), said, at p. 363 :

... the effect of the appellant's construction would be to take away the respondent's property without any compensation. Such an intention should not be imputed to the legislature unless it be expressed in unequivocal terms.

Applying this principle, I can find nothing in the Housing Act, 1936, which justifies the defendants in depriving the plaintiff of his right of

property. It is urged by counsel on their behalf that it does not lie within their knowledge whether the premises, which it is their statutory duty to demolish, are subject to any servitude, and that it imposes a heavy burden on them if they must ascertain whether it is so subject, or, without ascertaining it, run the risk of making themselves liable to the neighbouring owner. I see little force in this contention. The possibility in fact of the neighbouring house being damaged and the possibility in law of the damage being an injury to the neighbouring owner are equally patent. If the defendants choose to ignore or to challenge the one or the other, they must do so at their own risk. Their difficulty, if any, affords no reason why the plaintiff should suffer.

In this case it is conceded that the plaintiff is entitled to an easement of support from the house which is to be demolished. The defendant corporation must, accordingly, be restrained from demolishing it without providing an equivalent support.

Injunction restraining the defendant corporation from demolishing the premises without providing equivalent support.

Solicitors: Peacock & Goddard, agents for Hunt, Dickins & Willatt, Nottingham (for the plaintiff); Sharpe, Pritchard & Co. (for the defendants).

[Reported by F. HONIG, ESQ., Barrister-at-Law.]

ANGFARTYGS A/B HALFDAN v. PRICE & PIERCE, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Finlay, L.JJ.), July 14, 17, 1939.]

Shipping—Charterparty—"Full and complete cargo"—Timber shipped in bundles—Custom to bundle—Stowage place completely filled but cargo short of carrying capacity—Dead freight.

By a charterparty in the Baltwood form the defendants chartered from the plaintiffs a steamship of the carrying capacity of about 750 standards of timber, which was to be loaded with a full and complete cargo of timber. The ship was loaded with about 727 standards. She was well stowed, and fully loaded in the sense that she could not hold any more timber or any more broken stowage. The composition of the cargo was: shipped loose, 325 standards, slatings, 77 standards, laths, 30 standards, weatherboards, 119 standards, and sawn boards, 175 standards. The weatherboards and the sawn boards were bundled. It was contended that the bundling of the weatherboards and the sawn boards was contrary to the provisions of the contract. It was also contended that there was an overriding duty to deliver a full and complete cargo, and that the bundling of the timber had prevented the cargo from being a full and complete one. The claim was for dead freight in respect of about 30 standards:—

HELD: (i) the charterparty dealt with a full and complete cargo of specified goods, and what, with relation to those goods, would be "a full and complete cargo," was a question to be determined when the nature of those goods was ascertained and the usual methods of loading them established.

(ii) where, in relation to a particular class of goods, there is more than one usual method of loading, and the obligation is to load a full and complete cargo, it is open to the charterers to load in either of the

ways in question, and if the shipowner wishes to exclude the charterer from using a particular method, he must do so in express language.

(iii) if one finds what is the usual method of stowage, the words "a full and complete cargo" do not prevent the charterers from adopting that usual method, and the fact that there is more than one usual method of stowage does not affect the result.

(iv) a full and complete cargo had been delivered within the meaning of the charterparty.

Decision of ATKINSON, J. ([1939] 1 All E.R. 322) affirmed.

[EDITORIAL NOTE.] The obligation to ship a full and complete cargo is satisfied by filling the whole cargo space in the ship, and, so long as the stowage or the packing or preparation of the goods for shipment is done in the customary way, no complaint can be made. The real issue in the present case is that certain timber was specified in the charterparty to be bundled, and, in fact, much more was bundled than that specified. The objection, founded upon this, however, was overruled as soon as it was shown that it was the custom of the trade to bundle timber of the kind that was shipped in bundles. There is no right, apart from special provision in the charterparty, to have the cargo prepared in other than the usual way for the purpose of saving space.

AS TO AMOUNT OF CARGO, see HALSBURY, Hailsham Edn., Vol. 30, pp. 304-306, para. 497; and FOR CASES, see DIGEST, Vol. 41, pp. 340, 341, Nos. 1915-1922.]

Cases referred to:

(1) *Cuthbert v. Cumming* (1855), 11 Exch. 405; 17 Digest 66, 700; 24 L.J.Ex. 310; 25 L.T.O.S. 234.

(2) *Hunter v. Fry* (1819), 2 B. & Ald. 421; 41 Digest 323, 1818.

(3) *Mikkelsen v. Arcos, Ltd.* (1925), 134 L.T. 92; 41 Digest 340, 1920.

(4) *Cole v. Meek* (1864), 15 C.B.N.S. 795; 41 Digest 343, 1942; 33 L.J.C.P. 183.

APPEAL by the plaintiffs from a judgment of ATKINSON, J., dated Jan. 25, 1939, and reported [1939] 1 All E.R. 322. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R., and in the judgment of ATKINSON, J.

Sir Robert Aske, K.C., and *A. W. Roskill* for the appellants.

Gordon Alchin and Patrick H. Dean for the respondents.

Aske, K.C.: There is an obligation on the part of the charterer to load a full and complete cargo, which has been held to mean that he must load as much cargo as the ship can safely carry. If the charterer loads timber of the specified kind, but bundled so that the ship does not carry so much as it could carry if the timber were loaded loose, there is not a full and complete cargo. That principle can only be modified if there is a custom at the port of loading that the cargo may be packed in containers or in a special way and that, when loaded packed in that way, there is a full and complete cargo. In the absence of proof of such a custom, the charterer does not fulfil the obligation to load a full and complete cargo unless he loads as much as the ship can carry. There is no proof of such a custom in the present case. A ship carries 10 per cent. less timber if it is made up in the manner this cargo was, than if it had been packed loose. In this case the bundles were small, and consequently the ropes occupied substantial space. If the wood had not been in bundles, more could have been put on board, and thus a full and complete cargo could have been loaded. It was laid down in

Hunter v. Fry (2) that a full cargo meant as much as the ship could carry. *Cutnbert v. Cumming* (1) was decided on custom. In that case, it was held that the custom was reasonable and good in law. If there is no stipulation that the goods should be shipped bundled, they are shipped unbundled, but that is a matter as between buyer and seller. The ship will take 800 standards of timber if it is shipped loose, and only 720 standards if it is shipped bundled. Can the charterers therefore say that they have shipped a full and complete cargo? There still remains the question as to what is a full and complete cargo. I know of no decision on that point in the circumstances of this case. [Counsel also referred to *Mikkelsen v. Arcos* (3), and to *Cole v. Meek* (4).]

Roskill: The expression "full and complete cargo" is a contractual obligation and every one of the articles in question can be shipped loose. If it were possible to say that any one of them could only be shipped bundled, the position would be different. Unless one specifies "bundled," the boards come loose, and the position as between buyer and seller should not be different from what it is as between shipowner and charterer. *Hunter v. Fry* (2) indicates quite clearly the nature of the obligation to ship a full and complete cargo. Sawn timber is sometimes loaded bundled and sometimes it is loaded loose. It should have been loaded loose in the present case or the charterparty was not complied with. To ship bundled, the charterers must show a custom at the port of loading and they have not done so.

Counsel for the respondents were not called upon.

SIR WILFRID GREENE, M.R.: This appeal from a judgment of ATKINSON, J., raises a short question of construction upon a charterparty in the "Baltwood" form. The appeal arises out of a claim by the shipowners to be entitled to what is curiously called "dead-freight," which is really a claim for damages for breach of contract by reason of the charterer having failed to ship the requisite quantity of goods as required by the charter. The goods with which we are concerned in this case are timber goods shipped at a port in Finland, and the relevant words of the charter, describing the nature of the cargo, are as follows:

a full and complete cargo of mill sawn red and/or white firwood deals and/or battens and/or boards and/or scantlings and/or slatings in bundles and/or laths in bundles . . . and/or planed boards and/or floorings . . . the quantity of slatings to consist of about 80 standards, the quantity of laths to consist of about 30 standards . . . ("about" within this bracketed clause being read as meaning 10 per cent. more or less) with a sufficient quantity of ends . . . for broken stowage only.

I need not read any more from the charter than that.

The charterers provided for the vessel a cargo consisting of timber which, except for timber of one particular type, namely, weather boards, as to which there was a dispute, admittedly fell within the meanings of the various descriptions of the cargo to be shipped as set out in the charterparty. Moreover, the vessel, when so loaded, was, as a matter of

fact, loaded with a full and complete cargo in the sense that her accommodation for cargo was filled by the goods tendered by the charterers to the shipowners.

The controversy in this case arises in these circumstances. It appears that in dealing with timber goods of the description in question, if they
 A are stowed in bundles (which are roped together), about 10 per cent. of the stowage space is lost in the sense that, if the timber had been stowed loose and not in bundles, there would have been that much more cargo within the capacity of the vessel.

In the present case, a certain proportion of the cargo was loaded
 B bundled, and as to part of it, namely, slatings and laths, no question arises, because the charterparty in terms uses the words "in bundles" in connection with those two descriptions of goods. However, in addition to those goods, there were loaded weatherboards and three categories of sawn boards, all in bundles, and it is said with regard to
 C those goods that, in so far as stowage room was wasted by reason of the bundling of those goods, the shipowner has a claim for dead freight. The question is really one of the construction of a few words in this charterparty, but before I come to examine those words, I should refer to the crucial findings of fact of the judge in the court below. First of
 D all, he found that weatherboards come within the description "boards or planed boards" in the charterparty. He also found with regard to weatherboards that the universal practice is to ship them bundled. With regard to sawn boards, he found that

boards $\frac{5}{8}$ in. and $\frac{3}{4}$ in. thick by 4 ins. are often bundled and that $1\frac{1}{4}$ ins. by 3 ins. are practically always bundled.
 E

Those are the three categories of sawn boards with regard to which the controversy arises in this case. It will be seen, therefore, that out of the four categories of boards, namely, weatherboards and the three types of sawn boards, the judge finds with regard to one of them, namely,
 F weatherboards, that they are always shipped bundled, and with regard to sawn boards he finds that boards in two of those categories are "often" bundled and that boards in the third category are "practically always" bundled.

Sir Robert Aske has referred us to the evidence given before the judge
 G below with a view to persuading us to differ from his findings of fact. Speaking for myself, I am quite unable to do that, because it seems to me that the evidence is not only sufficient to justify those findings, but establishes them as quite unimpeachable. This case, therefore, must be approached on the basis of those findings of fact.

Now, bearing in mind those findings of fact when approaching the
 H construction of the charterparty, it is argued, on behalf of the appellants, that it is not open to the charterer under this charterparty to fulfil his contract by loading on the ship any of the specified goods in bundles other than those with regard to which bundles are expressly mentioned, namely, slatings and laths. The argument is shortly this—that the

obligation is to load a full and complete cargo, which means that every available bit of space in the vessel must be filled with the specified cargo, and that if, as was the case here, more cargo could be stowed unbundled than bundled, the charterer is precluded from loading bundled goods. Now that really comes to this—that with regard to certain of the goods falling within the description mentioned (and I take one example, A namely, weatherboards) it is not open to the charterer to load those goods under this charterparty at all, because, if he were to tender, for instance, weatherboards in bundles, according to this document he could be told : “ Although the charterparty entitles you to load weatherboards ”—(because the judge finds on the facts that weatherboards B come within the description named)—“ nevertheless that right is taken away from you by the words ‘ full and complete cargo ’ since if you load weatherboards in the natural method of loading them, namely, bundled, you will not get as full and complete a cargo as you would if you loaded them loose.” That is the argument put before us, and the basis of that C argument is to be found in what, in my opinion, is a wrong emphasis placed upon the words “ a full and complete cargo.” It is said that those words have some definite and final meaning as a matter of law and that once they appear everything else in the contract must yield to them. In my opinion, that is not the correct method of construing the relevant D parts of this charterparty. This charterparty deals with a full and complete cargo of specified goods, and what, with relation to those goods, will be “ a full and complete cargo ” is a question which must be determined when the nature of those goods is ascertained and the usual methods of loading them are established. E

The argument put forward on behalf of the appellants is, if I may summarise it, that, if in a case such as this the charterer finds that the specified goods can only be loaded if bundled, he cannot load them at all—and *a fortiori* where he finds that according to the custom of the port they are sometimes loaded unbundled and sometimes bundled, the F charterparty constrains him to adopt the unbundled method of loading to the exclusion of the bundled method of loading ; in other words, that he is by this form of words precluded from adopting any usual method of loading bundled at the port of loading and is confined to the method of loading unbundled, and further that where bundling is the only G method of loading any particular description of goods he is precluded from loading them at all. I do not think that this is the true construction to be put upon the words of the charterparty. I think that, if the shipowner wished to exclude the charterer from using a particular and well-known method of loading at the port in question, that should have been H provided for in express and clear language. Where, in relation to a particular class of goods, there is more than one usual method of loading at the port and the obligation is to load “ a full and complete cargo,” it is, in my opinion, open to the charterer to load them in either of the ways in question, and if the shipowner wishes to confine the charterer

to one of those ways he must say so. I think that that is the proper way of construing these words, not *in vacuo* but in reference to the whole clause, and in particular to the subject-matter with which they deal.

In support of the argument that the words "full and complete cargo" have some intractable meaning, reliance was placed on the case of *Cuthbert v. Cumming* (1). It is said that that case establishes that, unless it is shown that the custom of the port is to treat the words "full and complete cargo" as satisfied by a cargo shipped in such a form that the entire space is not used as fully as it otherwise would have been, the only method of stowage which can be adopted is the one which will get on to the boat the greatest quantity of goods possible. However, in my opinion, that case establishes nothing of the kind. The effect of the evidence as to the custom of the port is stated by COLERIDGE, J., at p. 408, as follows :

... I will assume for the present that the custom is good in law, and was properly received in evidence ; and that being so, we have a right to construe this as a contract to load a full and complete cargo, according to the usual mode of stowage of sugar and molasses or other produce, so that the charterer would have the option of loading sugar and molasses either with or without other produce.

If one finds what is the usual method of stowage, the words "a full and complete cargo" do not prevent the charterers from adopting that usual method, and the fact that there is more than one usual method of stowage does not appear to me to alter the result.

I think that really disposes of the whole case, and I do not think I can usefully add anything to what I have already said. In my opinion this appeal fails, and must be dismissed with costs.

MACKINNON, L.J. : I agree. It is well settled that when a charterparty calls for a full and complete cargo of various or alternative commodities, the charterer is at liberty to make his own selection of the quantities or proportions of goods shipped within the description specified. It is in the interests of the shipowner that the greatest possible quantity of cargo should be put on board the ship. The question here, therefore, is solely whether, in the description of the cargo which the charterer may ship under this charterparty, these particular wood goods in bundles are amongst those specified commodities. That is a simple question of the construction of the words used in the charterparty. It is said that, as the charterparty refers to laths and slatings in bundles, there is an implied prohibition to ship any of the other categories of wood goods in bundles. I do not think any such implication can properly be drawn from the words of the charterparty. It may be that these words forbid the shipment of laths or slatings loose and not in bundles, but I cannot see why they should prevent the shipment of other descriptions of goods in bundles and not loose. I am fortified in that view by the fact that, on the evidence given both on behalf of the plaintiffs and of the defendants in the court below, it is proved to be customary to

ship at least two of these other categories, namely, planed boards and floorings, in bundles. If the shipowners want to stipulate, as they seem to suggest in this case, that nothing except laths and slatings may be shipped in bundles, they must say so expressly, and I cannot accede to the argument that they impliedly said so by the terms of this charter-party. I agree, therefore, that this appeal fails.

A

FINLAY, L.J. : I agree with the judgments of SIR WILFRID GREENE, M.R., and MACKINNON, L.J., and, I may add, with the judgment of the judge below, and do not wish to add anything.

SIR WILFRID GREENE, M.R. : I ought perhaps to add that I entirely agree with MACKINNON, L.J.'s, observation with regard to the effect of the words "slatings in bundles" and "laths in bundles."

Solicitors : *Sinclair, Roche & Temperley* (for the appellants) ; *William A. Crump & Son* (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.] C

RYNOLDS v. PHILLIPS.

[COURT OF APPEAL (Scott, Clauson and du Parcq, L.JJ.), July 18, 19, 1939.]

D

Landlord and Tenant—Rent restriction—House let in two portions—Recovery of possession by landlord in 1924—Portions united, but redivided in different manner in 1928—No registration of house as decontrolled—Whether portion of house controlled—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 2—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 2 (2).

E

The appellant had, up to 1924, been the tenant of the two upper floors of a controlled house. In 1924, he acquired the whole house and obtained possession of it. In 1928, the house was divided in a different manner from what it had been previously into separate tenements, which were let to tenants, one of whom was the respondent. The appellant had not made any application to register the house as decontrolled. In an action by the appellant to recover arrears of rent, the respondent contended that the portion of the house which was let to him was one to which the 1920 Act had applied, and that therefore, as it had not been registered as decontrolled, it was still a controlled dwelling-house within the Acts :—

F

HELD : when the landlord obtained possession of the whole house in 1924, the house became decontrolled. Nothing that had subsequently happened operated to bring any portion of the house within sect. 2 (2) of the 1933 Act, and therefore the portion let to the respondent was decontrolled.

G

Fox v. Marshall (1) followed.

[EDITORIAL NOTE.] The material facts in this case would appear to be that the decontrol and the present subdivision of the house were before 1933. The present subdivision was a new subdivision, quite different from a previous subdivision of the house when controlled. In this state of facts, the house remains decontrolled although there has been no registration under the 1933 Act.

H

AS TO EFFECT OF 1933 ACT, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 317-319, paras. 375-378 ; and FOR CASES, see DIGEST, Supp., *Landlord and Tenant*, Nos. 7359f-7361c.]

Cases referred to :

- (1) *Fox v. Marshall*, [1938] 4 All E.R. 773 ; Digest Supp.
(2) *Brooks v. Brimcome*, [1937] 2 K.B. 675 ; [1937] 2 All E.R. 637 ; Digest Supp. ; 157 L.T. 417.
(3) *Lloyd v. Cook*, [1929] 1 K.B. 103 ; Digest Supp. ; 97 L.J.K.B. 657 ; 139 L.T. 452.

A APPEAL by the plaintiff from a decision of His Honour JUDGE WOODCOCK at the Marylebone County Court, dated Feb. 9, 1939. This was an action in which the plaintiff claimed £2 arrears of rent, and the defendant counterclaimed for a sum alleged to have been paid in excess. The facts of the case are fully set out in the judgment of
B SCOTT, L.J.

T. F. Southall for the appellant.

F. Whitworth for the respondent.

C Southall : The question is whether, on the facts of this case, *Fox v. Marshall* (1) or *Brooks v. Brimcome* (2) apply. In 1924, when the plaintiff purchased this house, the premises consisted of two dwelling-houses, one in his occupation and one let to a tenant. The upper part became decontrolled when he got possession, and the bottom floor had been decontrolled by the vendor. However, the house was still one to which the Rent Acts applied, because they applied to part of it, and by
D sect. 12 (2) of the 1920 Act any part is also a dwelling-house to which the Acts apply. At the date of purchase, in 1924, the top part of the house was still a dwelling-house within the Acts. As the house was never registered as decontrolled, it remained controlled.

E Whitworth : If a house is split up and one portion happens to be one that had been split up previously, that will not bring the part back within the Acts. The part must have existed as a part continuously. Once a whole house has become decontrolled and amalgamated, it does not matter if it is subsequently broken up again. The parts still remain decontrolled. [Counsel referred to *Fox v. Marshall* (1), *Brooks v. Brimcome* (2), and *Lloyd v. Cook* (3).]
F

Southall in reply.

SCOTT, L.J. : This is an appeal from the decision of His Honour JUDGE WOODCOCK, sitting in the Marylebone County Court on
G Mar. 1 last. It raises a question under the Rent Restriction Acts and in particular under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 2 (2), or the similar provision of the Act of 1938. The case has been argued before us in regard to the 1933 Act, and there is no need to refer to the 1938 Act for the purpose of the decision.

H It is essential to understand the facts of the case, because in my view when the facts are once stated they are in effect covered by a decision of this court in the case of *Fox v. Marshall* (1). The facts were these. The house in question is within the Metropolitan Police area, and is consequently a house to which the £20 dividing line of value applies. The house contained ten rooms, and, prior to 1923, it was let in two

portions, the two top floors being one portion and the two lower floors being the other portion. The plaintiff, who is now the landlord, was then a tenant of the first and second floors at a rental of 25s. per week. There was another tenant of the lower part of the house, and each of those two tenements were dwelling-houses within the meaning of the Act of 1920, and at that time the whole house was a controlled house. A

In 1924, the then landlord came into vacant possession of the lower tenement and shortly after that the plaintiff, who was then tenant to the then landlord of the upper part of the house, bought the whole house, from that landlord and came into possession of the whole house, actual possession in the fullest sense of the word, as he and his family lived in the whole house from 1924 to 1928. Consequently under the terms of sect. 2 of the Act of 1923, he having come into possession of the whole house, the whole house was decontrolled. B

In 1928, he thought that he would prefer to live elsewhere and let the house, divided in quite a different way into a series of separate tenements, to different tenants. The appellant here is the tenant of one such tenement, and that tenement happens to be a separate tenement carved out of the house in a different way from the subdivision of the house before 1924, the rooms of this tenement being as to one of them within the upper two floors and as to two of them within the lower two floors of the house, a cross division, so that the tenement of to-day has no identity with the divisions of the house in 1924 when it was still subject to the Rent Restriction Acts. C D

The application in the case is for a decision on the question of the amount of rent payable, which depends on the decision as to whether the rent payable is a free contractual rent, to use the language used in the court below, or a controlled rent. The only way in which it could be a controlled rent would be if the tenement in question which I have described can be regarded as a dwelling-house to which sect. 2 (2) of the Act of 1933 applies. It can only apply for this reason—namely, that the landlord here (the plaintiff), who had occupied the whole house and redivided it as he thought fit in 1928, had never thought that the house was affected by the Act of 1933, and consequently had made no application to the local authority for registration under the provisions of sect. 2. Those provisions shortly are that where a dwelling-house let as a separate dwelling immediately before the passing of the Act was one which would have been within the Acts but for the Act of 1923, the landlord is called upon in effect to make an application to the local authority to register the house as a house that is a decontrolled house, with the provision that if he does not it shall be deemed to be a controlled house. E F G H

The question, therefore, in this appeal, as the landlord did not so register and never thought of registering, is whether or not this particular tenement in the circumstances can be treated as a dwelling-house which falls within the provisions of sect. 2 (2) of the Act of 1933. If it does,

then the rent in question was a controlled rent, and if it does not, it was a free contractual rent and the decision falls to be made accordingly. The county court judge decided, in a judgment of which we have a full note, that the landlord was right and the tenant wrong, in that the house which was occupied by the tenant—namely, the three rooms—was not after the passing of the 1933 Act within sect. 2 (2) of this Act so as to call for registration. The question is whether that decision was right or wrong. The county court judge based his decision upon a judgment of this court to which I have referred, namely, the case of *Fox v. Marshall* (1), and he thought that that covered the facts of the present case. In my opinion he was right. I think the decision in that case does precisely cover the facts in the present case.

The argument before this court has gone into great detail on the interpretation of sect. 2 (2) of the Act of 1933. In my opinion the decision of this court in the case of *Fox v. Marshall* (1) is directly in point. That decision is binding on us, and I prefer to leave this case with the conclusion of this court that the decision in *Fox v. Marshall* (1) is right, and I think it wise to add no new disquisition on the interpretation of sect. 2 (2), because it is so important, in my opinion, that a decision of the Court of Appeal on a question of this kind in perfectly clear language should not be embroidered by subsequent pronouncements by this court upon its limitations. The decision in that case was that the landlord having obtained possession of a whole dwelling-house which had been subject to control at a date subsequent to the passing of the 1933 Act, the house became decontrolled, but that when he subsequently subdivided it so as to make the subdivided portions fall within the limited value of £20, when the Act of 1933 came into operation and no application was made to register it, it was not permissible to apply the 1933 Act to one part of it, and to treat that part as excluded from the decontrol which resulted from possession in 1928.

Those facts are identical with the facts here. In 1924 the landlord in this case obtained possession of the whole house and lived in it for four years. Then in the exercise of his own unfettered discretion he relet the house in different parts, differing from the subdivision which had existed before 1924, and to those new tenements so subdivided, in my opinion, for the reasons stated in the case of *Fox v. Marshall* (1), the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 2 (2), has no application at all.

The appeal will therefore be dismissed with costs.

CLAUSON, L.J.: I agree.

DU PARCQ, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *J. Gaster* (for the appellant); *N. Mackover* (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

DELGOFFE v. FADER.

[CHANCERY DIVISION (Luxmoore, L.J., sitting as an additional judge),
July 13, 14, 17, 1939.]

Gifts—Donatio mortis causa—Chattels—Delivery—Choses in action—Bank deposit book.

During her last illness the deceased showed the plaintiff a bag containing certain articles—money and jewellery—which would pass by delivery, and a bank deposit book in an envelope; but, having done so, desired her to replace the bag in the deceased's wardrobe from which it had been taken. The deceased stated that, if she should die, the plaintiff was to get everything in the bag including what was in the envelope. The deceased repeated this statement several times, and later, while being nursed in the plaintiff's house, asked that the bag should be placed in the plaintiff's wardrobe, but added: "So that I can keep my eye on it." It was proved that the bank would have paid the deposited money without production of the deposit book:—

HELD: (i) although on the first occasion there was no *donatio mortis causa*, the deceased requiring the bag to remain in her dominion and custody, there was later a valid *donatio mortis causa* of the articles passing by delivery.

(ii) there was not a valid *donatio mortis causa* of the money deposited in the bank, the delivery of the deposit book being, in this respect, indistinguishable from the delivery of an ordinary bank passbook.

[EDITORIAL NOTE.] It is necessary that there should be delivery of the chattels which are stated to be the subject of a *donatio mortis causa*. In the present case this matter is carefully considered, since, in the first transaction, the deceased required the bag to be replaced in her own custody, whereas, at a later date, she asked that it should be placed in the donee's wardrobe. This is held to be sufficient delivery, although the deceased added that, if it were placed there, she could keep her eye on it. As to the deposit book, the evidence of a bank official proved that it was indistinguishable from a passbook and the position was therefore covered by authority.

AS TO DELIVERY IN *DONATIO MORTIS CAUSA*, see HALSBURY, Hailsham Edn., Vol. 15, pp. 743-747, paras. 1284-1287; and FOR CASES, see DIGEST, Vol. 25, pp. 543-546, 550-555, Nos. 300-315, 357-390.]

Cases referred to:

- (1) *Duffield v. Elwes* (1827), 1 Bl. N.S. 497; 25 Digest 549, 351.
- (2) *Re Dillon, Duffin v. Duffin* (1890), 44 Ch.D. 76; 25 Digest 543, 298; 59 L.J.Ch. 420; 62 L.T. 614.
- (3) *Moore v. Darton* (1851), 4 De G. & Sm. 517; 25 Digest 541, 288; 20 L.J.Ch. 626; 18 L.T.O.S. 24.
- (4) *Duckworth v. Lee*, [1899] 1 I.R. 405; 25 Digest 547, case e.
- (5) *Re Weston, Bartholomew v. Menzies*, [1902] 1 Ch. 680; 25 Digest 544, 302; 71 L.J.Ch. 343; 86 L.T. 551.

ACTION against the personal representative of the deceased to establish that certain money and jewellery and a bank deposit book were the subjects of a valid *donatio mortis causa*. The facts are fully stated in the judgment.

C. V. Rawlence for the plaintiff.

A. A. Watson for the defendant.

LUXMOORE, L.J.: In this case, the plaintiff seeks to establish that the late Mrs. Emilie Krieg made a delivery to her of a black handbag

and its contents in such circumstances as to constitute a valid *donatio mortis causa* of the black bag and its contents. The claim is supported by the plaintiff's evidence, and is resisted by the defendant, who is the legal personal representative of the late Mrs. Krieg.

The material facts appear to be these. Mrs. Krieg was a German lady. She lived with her brother-in-law and sister, her sister having married an Englishman, a Dr. Williamson. Her sister died, and she continued living in the same house with her brother-in-law at 68, Madrid Road, Barnes, until he died in Dec., 1937. Some years previous to that date, Mrs. Krieg had made the acquaintance of the plaintiff. The first acquaintance had been due to a business relationship, Mrs. Delgoffe having for a number of years carried on the business of a ladies' hairdresser in High Street, Kensington, of which business Mrs. Krieg had been a regular customer. I think that she had come, according to the plaintiff's evidence, every Monday for a period of 9 years. Mrs. Delgoffe gave up her business some 4 years ago—that would be in Apr., 1935—and, after she gave up her business, she used frequently to see Mrs. Krieg. She called at Mrs. Krieg's house and transacted a number of small business commissions for her, and so on. After Dr. Williamson's death, she saw Mrs. Krieg more frequently, and went to see her some three or four times a week. Mrs. Krieg had gone abroad in the summer of 1937, and, while she was abroad, she wrote to Mrs. Delgoffe and asked her to come to meet her at the station on her return. Mrs. Delgoffe met her at the station. She was not well when she came back, and, although she recovered slightly, after a fortnight she became worse, and Mrs. Delgoffe called in a Dr. Davie, who went to see her. He attended her until October, when Mrs. Krieg took to her bed. Mrs. Delgoffe was with her practically every day. She looked after her wants, waited on her for meals, and so on, and did her shopping, but Mrs. Krieg was left alone at night. A specialist was called in, as she got considerably worse, and, with the approval of Dr. Davie and the specialist, Mrs. Krieg was taken to the West London Hospital. About a week before she was taken to the West London Hospital, when she was still very ill, and, as Dr. Davie says, in an apprehensive state with regard to the future, she spoke to Mrs. Delgoffe and asked her to go to the washstand, which was in her bedroom, and take from the drawer in the washstand a key and unlock a medicine chest which was in the washstand. Inside the medicine chest was another key, which was the key of the wardrobe in her room, and Mrs. Krieg asked Mrs. Delgoffe to open the wardrobe and take from it a black bag. When Mrs. Delgoffe had done this, Mrs. Krieg said that she wanted Mrs. Delgoffe to pay attention to what she was going to say to her, and Mrs. Delgoffe says that Mrs. Krieg said in German :

If I should die, then you are to get everything in this bag—the jewellery and also what is in the envelope.

I should say that the bag contained a number of articles, coins, money,

articles of jewellery, a watch, some chains, and so on—articles which would pass by delivery, chattels in the ordinary acceptation of the word. In addition, there was an envelope containing a deposit book of the Midland Bank, which showed that Mrs. Krieg had a sum of some £933 8s. standing to her credit on that deposit account. Having said this, Mrs. Krieg told Mrs. Delgoffe to put the bag back in the wardrobe, and asked her to put the key back in the medicine chest in the washstand. Mrs. Delgoffe says :

She told me to put it back in the same place where I could find it.

She says that then Mrs. Krieg added : “ Should I die, then you will have the bag and everything that is in it.” That is the first occasion on which it is alleged that there was a valid *donatio mortis causa*. I will deal with that later.

The second occasion on which reliance is placed happened some time afterwards. After the first occasion, some few days later, Mrs. Krieg was taken to the West London Hospital. She was taken there on Nov. 11. Mrs. Delgoffe continued to visit her. She went there twice each day, and stopped until 9 p.m. every night. Mrs. Krieg was there for 3 weeks, and ultimately she left the hospital, not because she was cured, but because, I think, she felt that she would rather be in her own house. However, as she was alone in her house, she asked Mrs. Delgoffe to take her to the house in which Mrs. Delgoffe lived—that is, No. 32, Sinclair Road—and Mrs. Delgoffe agreed to do so. While Mrs. Krieg was in Mrs. Delgoffe’s house, she occupied one of the rooms which was set aside for Mrs. Delgoffe’s use. It is referred to as the dining-room. She had her bed in that room, and, after she had been there two or three days, she said to Mrs. Delgoffe that she wished that Mrs. Delgoffe had the black bag, and she asked her to go and fetch it from Madrid Road. Mrs. Delgoffe went to Madrid Road with a Mrs. Sharman, who occupied the same house, and brought back the bag. She had been given Mrs. Krieg’s keys for the purpose of getting it. When she brought back the bag, she gave it to Mrs. Krieg, who opened it and looked inside to see if everything was in order. She said that everything was in order. She said to the plaintiff : “ Put this bag into your wardrobe, so that I can keep my eye on it.” The wardrobe was opposite the bed which Mrs. Krieg was occupying. Then Mrs. Krieg added :

Should I die, I wish you to have the bag and everything that is in it.

Mrs. Delgoffe says that after that she put it in the wardrobe, which was facing the bed. A few days afterwards, Mrs. Krieg was taken to the German Hospital, and died there, I think, 9 days after her admittance. Mrs. Delgoffe says that Mrs. Krieg often told her that she would do something for her, and that she was anxious that she should have everything in the black bag.

The questions which I have to determine are whether or not there has been a *donatio mortis causa* in respect of the whole, or any, and, if so,

- which, of the articles contained in the black bag, and the black bag itself. A *donatio mortis causa* is a well-recognised form of gift. It is one made in contemplation of the death of the donor, and is to take effect only in that event, being recoverable by the donor if that event does not occur. Such a gift is, in effect, I think, in the nature of a legacy, being subject to a
- A condition, express or implied, that it is to take effect only in the event of the survivorship of the donee. There are, according to the cases—and there are to be found in the books many cases dealing with the subject-matter of *donatio mortis causa*—three essentials to constitute such a gift—namely, (i) the gift must be made in contemplation of the
- B death of the donor, although not necessarily in expectation of death; (ii) there must be delivery of the subject-matter of the gift to the donee, or, I think, a transfer of the means of, or part of the means of, getting at the property; and (iii) the circumstances must be such as to establish that the gift is to take effect only on the death of the donor. It follows
- C that the title of the donee is not complete until the donor is dead. If the subject-matter of the gift is not completely vested, the question arises whether or not the donee can call upon the legal personal representative of the donor to complete the title. Where there is a *donatio mortis causa* of a subject-matter which is not completely vested, I think
- D that the true legal aspect is that a trust has been raised under which the donee can call on the legal personal representative of the donor to complete the gift. I think that that aspect of the case was settled in *Duffield v. Elwes* (1); and has been recognised for years. Of course, in the case of a chose in action, physical delivery is impossible, but it has
- E been held that in such cases the delivery of a document essential to its recovery may be sufficient. The test of whether the delivery of the document constitutes a good *donatio mortis causa* of a chose in action depends on the answer to the question whether the document expresses the terms on which the subject-matter of the chose in action is held by
- F the donor, or the terms under which the chose in action came into existence. I think that that is really the result of the authorities, which begin with the decision of the Court of Appeal in *Re Dillon, Duffin v. Duffin* (2). In that case, the question was whether a banker's deposit note was a good subject-matter of a *donatio mortis causa*. The form of
- G the deposit note in question is set out in the report at p. 76. It was stated in the body of the note as follows:

- This deposit receipt is not transferable. The amount is repayable on demand, but will bear no interest unless it remains undisturbed for one month. The rate of interest is subject to alteration, of which notice will be given by advertisement in *The Times* newspaper. When the money is withdrawn or the interest paid the depositor must sign the cheque on the back hereof, first affixing a 1d. stamp. If
- H part only is withdrawn a new receipt will be given for the balance.

Then on the back of the note was a form of cheque, indorsed to the bank which had issued the note, directing the bank to pay "to self or bearer" the sum which would be filled in in the blank, and it was necessary, in order to withdraw the whole or any part of the money, the subject-

matter of the note, for the depositor to sign that cheque. In dealing with the matter, COTTON, L.J., says, at pp. 81, 82 :

If we go on principle, why should not this document be a good subject of *donatio mortis causa*? It is true that the fact of the cheque having been filled in and signed does not give the donee a title at law to be paid, since the cheque was not presented till after the death of the drawer. But why should there not be a good *donatio mortis causa* apart from the cheque? The case of *Duffield v. Elwes* (1) shows that there may be a good *donatio mortis causa* of an instrument which does not pass by delivery, and that the executors of the donor are trustees for the donee for the purpose of giving effect to the gift. The case of *Moore v. Darton* (3) is very instructive as to the class of instruments which are subjects of *donatio mortis causa*. There a document was executed when a deposit of money was made. The mere fact of the deposit would create a debt; but the document, beside acknowledging the receipt of the money, expressed the terms on which it was held, and showed what the contract between the parties was. It was held that the delivery of that document was a good *donatio mortis causa* of the money deposited, and so, in my opinion, was the delivery of the deposit note in the present case. The delivery gives no legal title to the donee, nor did the delivery of the security in *Duffield v. Elwes* (1); but the House of Lords there laid it down that the executors were trustees for the donee and must do what was necessary to perfect the transfer. This would not be so in the case of an incomplete voluntary gift *inter vivos*—the court would not interfere to compel either the donor or his executors to perfect it; the doctrine is an anomalous one peculiar to the case of a *donatio mortis causa*, but it is established by the decision of the House of Lords.

I think that what COTTON, L.J., is pointing out there is that, in *Moore v. Darton* (3), the actual document which was delivered was a necessary link in the obtaining by the donee of the money which was the subject-matter of the written document which had been delivered. Without it the donee would not have been able to get anything. It was the document which showed that the money was due to the donor on a specialty, and was not any ordinary debt, and it was the document which showed the terms which it would be necessary to establish in order to prove the existence of the contract.

In *Duckworth v. Lee* (4), the Irish case to which my attention was called, the English cases were considered, including *Moore v. Darton* (3), and LORD ASHBOURNE, L.C., said, at p. 407 :

In all the cases which have been cited where the gift has been upheld the document or deed delivered was essential to the recovery of the debt.

I think that that statement is justified by the authorities. In *Re Weston, Bartholomew v. Menzies* (5), a more recent case in the English courts, the question arose whether there was a valid *donatio mortis causa* of a Post Office savings bank book and also of certain share certificates in a certain building society. It was held that the share certificates in the building society were not the subject-matter of a *donatio mortis causa*, but the judge held that the savings bank book was capable of delivery so as to constitute such a gift. It seems plain from the reasoning of BYRNE, J., that the ground on which he held that the Post Office savings bank deposit book could be the subject-matter of a valid *donatio mortis causa* was that the book itself contained in substance the whole of the terms regulating the contract of deposit, and that one of the important matters which was present in that case was the fact that the book itself had to be

produced when money was deposited or withdrawn. BYRNE, J., said, at p. 685 :

With reference to the remaining question, as to the gift of the savings bank book, ever since the decision of the Court of Appeal in the case of *Re Dillon, Duffin v. Duffin* (2), it is well-established that a banker's deposit receipt in a form showing the terms of the contract and being more than an acknowledgment for the receipt of money is good subject for a *donatio mortis causa*. The question had not previously come before a Court of Appeal in England, although there had been, as stated by COTTON, L.J., in the last-mentioned case, a current of decisions in courts of first instance in England in favour of that view . . .

Then BYRNE, J., refers to *Moore v. Darton* (3) and the judgment of COTTON, L.J., in *Re Dillon, Duffin v. Duffin* (2), and says, at pp. 685, 686 :

An examination of the savings bank book in the present case appears to me to show a fulfilment of the test ; and although every rule regulating the contract is not set out in the book itself, all the essential rules are. The book is not a mere receipt. It must, as stated on the face of it, be produced whenever any money is deposited or withdrawn, and it contains the terms of the contract as to payment of interest and withdrawal, as well as the other material terms of the contract between the depositor and the savings bank department.

Then he goes on to say, at p. 686 :

Apart from authority pointing the other way, I should have considered it impossible, after comparing the terms of the deposit receipts in the cases of *Re Dillon, Duffin v. Duffin* (2) and *Moore v. Darton* (3) with the savings bank book, to hold that the latter is not a good subject for *donatio mortis causa*.

Then he refers to two Irish cases, including the Irish case of *Duckworth v. Lee* (4), to which I have just referred.

That being, as I think, the test to be applied in the case of a chose in action, what is the position in the present case with regard to the deposit book ? Mr. Drury, the manager of the particular branch of the Midland Bank where the deposit was made, was called, and he told me that the deposit book which was in the black bag was in no way essential to be produced if the depositor had required to withdraw her money, or if she had desired to deposit further money in the bank. The book itself is, in form, the passbook of the deposit account. The only statement which makes it different from an ordinary passbook is the statement that '7 days' notice of withdrawal is required. No other conditions appear in the book. Nothing is said with regard to the interest to be paid in respect of the deposit, or anything of that kind, nor is anything said about the mode of withdrawal from the account. Mr. Drury, the bank manager, said that the usual method of withdrawal was by a formal receipt given by the depositor to the bank for the amount withdrawn, or by transfer on the written instructions from the depositor's account to a current account. Mrs. Krieg had no current account, but she in fact operated her deposit account by making deposits and drawing cheques upon it, just as she would have operated a current account. This was, I think, by the courtesy of the bank, but, if the deposit book had been lost, no indemnity would have to be given, or anything of that sort. The contract with regard to interest was that the bank could vary

it at short notice—I think 24 hours—and that the interest was worked out on a day-to-day basis, and the balance was credited half-yearly in the actual account. Those, I think, are the whole of the material circumstances with regard to this deposit account. In view of the evidence of the bank manager, it seems to me impossible to say that this was such a document as would enable the holder of it to make a valid *donatio mortis causa* in respect of the money standing to the credit of the account. I see no difference between this deposit book and the ordinary passbook of a current account. That being so, I must hold that—at any rate, so far as the deposit book is concerned—it is not the subject-matter of a valid *donatio mortis causa*. A

With regard to the other matters in the bag, I have come to the conclusion that the requirements of a *donatio mortis causa* have been satisfied. In the first place, of course, the claim is a claim by a woman against the estate of a deceased person. It is uncorroborated, but I have had the advantage of seeing Mrs. Delgoffe in the witness-box. I am quite satisfied that she was a truthful witness, and that the story she told is one which I am not only entitled, but also bound, to accept. I think that there was a sufficient delivery of the black bag and the contents of it, other than the passbook—on the second occasion, at any rate—to satisfy the requirements of a valid *donatio*. So far as the first occasion is concerned, I do not think that, if that stood alone, it would have been sufficient to justify my holding that Mrs. Krieg had parted with the possession of the subject-matter of the gift, because she required the plaintiff to replace the black bag with its contents in the place whence it was taken, and where it was kept under the dominion of Mrs. Krieg the whole time, and Mrs. Delgoffe would not have been in a position to demand the possession from Mrs. Krieg. B C D E

On the second occasion, I think that the handing of the bag to Mrs. Delgoffe with the direction to place it in the wardrobe which was in the room in question—which was Mrs. Delgoffe's wardrobe, although Mrs. Krieg had the benefit for the time being of using it—was not a sufficient circumstance to prevent the delivery of the bag to Mrs. Delgoffe from being a complete delivery sufficient for an absolute gift, and therefore the delivery was a sufficient delivery. I hold that the black bag and all the articles in it, other than the passbook and the money standing to the credit of the deposit account, passed under a valid *donatio mortis causa* to the plaintiff, and to that extent the plaintiff's action succeeds. So far as the passbook and the £933 8s. standing to the credit of the deposit account are concerned, however, I must hold that there is no valid *donatio mortis causa* in that respect. F G H

Solicitors : *Ford, Michelmores, Rose & Wilkins* (for the plaintiff) ; *Watson, Sons & Room* (for the defendant).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

Re SMITHERS, WATTS v. SMITHERS AND OTHERS.

[CHANCERY DIVISION (Crossman, J.), July 6, 19, 20, 1939.]

Wills—Construction—"My securities"—"Remainder of the money."

A By her will a testatrix, after directing that all her just debts and funeral and testamentary expenses be paid as soon as conveniently might be after her decease, gave to the defendant Bernard Smithers "when my securities have been converted into cash, two-thirds of the proceeds," and to the defendant Harry Otway Smithers £500, and to the defendant Leonard Smithers "the remainder of the money." Questions arose as to what the testatrix meant by "securities" and by "the remainder of the money":—

B HELD: (i) the primary meaning of the word "security" is a debt or claim which is in some way secured, and the term does not include other investments such as stocks and shares unless there is something in the context to displace the primary meaning and to show that the wider meaning is intended.

C (ii) the gift of "the remainder of the money" meant the remainder of the residuary personal estate after paying the just debts and funeral and testamentary expenses and providing for the specific legacies.

D [EDITORIAL NOTE. For certain purposes the Administration of Estates Act, 1925, has removed the distinction between real and personal property, and the word "money," or the word "moneys," has been held to pass the whole residuary estate, including freeholds. These words, however, are still strictly construed, and, in the absence of any context, they only pass actual cash. Similarly the word "securities" is strictly construed, in the absence of context, to mean only money secured upon some fund or property, but, here, the legislation of 1925 has made no alteration in the view to be taken.

E AS TO CONSTRUCTION OF PARTICULAR WORDS, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 699-711, paras. 1317-1332; and FOR CASES, see DIGEST, Vol. 44, pp. 689-740, Nos. 5299-5964.]

Cases referred to:

- (1) *Re Rayner, Rayner v. Rayner*, [1904] 1 Ch. 176; 44 Digest 623, 4535; 73 L.J.Ch. 111; 89 L.T. 681.
- (2) *Re Neville, Neville v. First Garden City, Ltd.*, [1925] Ch. 44; 44 Digest 736, 5913; 94 L.J.Ch. 130; 132 L.T. 602.
- F (3) *Singer v. Williams*, [1921] 1 A.C. 41; 28 Digest 78, 430; 89 L.J.K.B. 1218; 123 L.T. 625.
- (4) *Re Hutchinson, Crispin v. Hadden* (1919), 88 L.J.Ch. 352; 44 Digest 707, 5509; 121 L.T. 239.
- (5) *Re Scorer, Burt v. Harrison* (1924), 94 L.J.Ch. 196; 44 Digest 706, 5486; 132 L.T. 529.
- G (6) *Re Mellor, Porter v. Hindsley*, [1929] 1 Ch. 446; Digest Supp.; 98 L.J.Ch. 209; 140 L.T. 469.
- (7) *Re Emerson, Morrill v. Nutty*, [1929] 1 Ch. 128; 44 Digest 720, 5696; 98 L.J.Ch. 145; 140 L.T. 217.
- (8) *Re Shaw, Mountain v. Mountain* (1929), 168 L.T.Jo. 371; Digest Supp.; 68 L.Jo. 334; [1929] W.N. 246.
- H (9) *Stocks v. Barre* (1859), John. 54; 44 Digest 725, 5773; 33 L.J.O.S. 8.

ORIGINATING SUMMONS to determine (*inter alia*) whether upon a true construction of the will of the testatrix the expression "my securities" as used therein comprises (a) all the stocks and shares belonging to the testatrix at the date of her death, or (b) some and if so which of such stocks

and shares, or (c) any and what other property. Also whether, upon the true construction of the will, the bequest of "the remainder of the money" to the defendant Leonard Seneton Smithers comprises (a) the whole residuary personal estate of the testatrix not specifically bequeathed, or (b) cash in the house at the date of her death, or (c) the balance of the proceeds of sale of the securities mentioned above, or (d) any and A what other property.

A. H. Ormerod for the plaintiff.

Gerald R. Upjohn for the defendant Harry Otway Hirsh Smithers.

N. C. Armitage for the defendant Bernard Francis Hirsh Smithers.

Hon. Denys Buckley for the defendant Leonard Seneton Smithers. B

R. O. Wilberforce for the defendant Charles Otway Mackinnon Morris and persons interested upon an intestacy.

CROSSMAN, J. : The question which I have to determine upon the construction of this will is what is included in the expression "my C securities" as used in the will. In considering this question I have to bear in mind first of all the words used by VAUGHAN WILLIAMS, L.J., in *Re Rayner, Rayner v. Rayner* (1), at p. 188 :

I wish to add—although it is not necessary to do so for the decision of this case, having regard to the ground upon which the court is deciding it—that, in my judgment, the meaning of a word is relative to the circumstances and occasion and D date on which the word is used ; and that if a judge is entitled to take into consideration at all the fact that at the date of the will "securities" is largely used in a sense other than a pledge for an advance of money, or in the particular sense of "investments in property transferable by the assignment of indicia such as certificates," it is the duty of the judge to inform his mind, not only by reference to dictionaries of good reputation, but also by evidence of the meaning ordinarily E given to such a word amongst those who deal in such property.

The first part of that *dictum* as to the method of construing an expression such as "my securities" was confirmed and adopted by TOMLIN, J., as he then was, in *Re Neville, Neville v. First Garden City, Ltd.* (2), when, at p. 53, he quoted and adopted those words of VAUGHAN F WILLIAMS, L.J., at p. 188 :

...the meaning of a word is relative to the circumstances and occasion and date on which the word is used.

There is no doubt that the word "securities" is very commonly used as a synonym for investments or property dealt with on the stock G exchange, but the word undoubtedly has a primary meaning, and something is needed to displace this primary meaning.

I think that a passage from the opinion of VISCOUNT CAVE in the House of Lords in *Singer v. Williams* (3) really makes it quite clear how I have to approach this question. VISCOUNT CAVE said, at p. 49 : H

My Lords, the normal meaning of the word "securities" is not open to doubt. The word denotes a debt or claim the payment of which is in some way secured. The security would generally consist of a right to resort to some fund or property for payment ; but I am not prepared to say that other forms of security (such as personal guarantee) are excluded. In each case, however, where the word is used in its normal sense, some form of secured liability is postulated. No doubt the meaning of the word may be enlarged by an interpretation clause contained

in a statute, as by the interpretation clauses in the Conveyancing and Law of Property Act, 1881, the Settled Land Act, 1882, the Trustee Act, 1893, and the Finance Act, 1916; or the context may show, as in certain cases relating to the construction of wills . . . that the word is used to denote, in addition to securities in the ordinary sense, other investments such as stocks or shares. But, in the absence of any such aid to interpretation, I think it clear that the word "securities" must be construed in the sense above defined, and accordingly does not include shares or stock in a company.

A Now that statement in the opinion of VISCOUNT CAVE was made in reference to quite a different matter, namely, in reference to a question under the Income Tax Acts as to the meaning of "securities," but it is in general terms, and I think it exactly expresses what I have to consider, and VISCOUNT CAVE dealt expressly with the case of construction of wills. It is pointed out to me in the case of construction of wills that the context might show that "securities" has some wider meaning than [p. 49]

. . . a debt or claim the payment of which is in some way secured.

C But that makes it quite plain also that in the absence of such an aid to interpretation (and in the particular case I have to deal with here) the only aid to interpretation I can find is the aid VISCOUNT CAVE, L.C., refers to in his opinion [p. 49]:

D . . . in the absence of any such aid to interpretation, I think it clear that the word "securities" must be construed in the sense above defined, and accordingly does not include shares or stock in a company.

There are, however, two other cases, to which I have been referred, which in some ways are of assistance, and in others are perhaps a little embarrassing. One is *Re Hutchinson, Crispin v. Hadden* (4), in which

E case P. O. LAWRENCE, J., as he then was, in 1919 discussed all the previous cases relating to the meaning of the word "securities" and came to the conclusion that, in that case, the phrase "securities for money" was indistinguishable from the word "securities," and that, in the absence of a context, stocks and shares did not pass under a bequest of "my moneys and securities for money." The judge found in that case that

F there was no sufficient context at all events to enable stocks and shares to pass under the bequest of "securities for money." However, in *Re Scorer, Burt v. Harrison* (5), the same judge in Dec., 1924, found a sufficient context to enable him to construe "securities" as including stocks and shares, one of the grounds of the decision, or at all events one of the points to which the judge expressly referred, being that the testatrix had drawn the will herself—it was a home-made will, which is the case here. Looking again at the actual will in this case, I have to consider (and I think it is the only question which I have to consider)

H whether I can find here a sufficient context to show that the word "securities" ought to be given the wider meaning. If I cannot find sufficient context, whatever view I may take of what the intention of the testatrix may have been—which after all is a matter of guessing—then I have to decide that "my securities" is limited to securities in the strict sense.

Now counsel for the plaintiff, the legatee to whom this bequest is made, contends that there is a context here, but I find it difficult to see exactly to what he refers me as the context beyond the fact that this will is a home-made will. The testatrix has a printed document into which in her own handwriting she writes passages and by so filling up the blanks, makes a will. In the printed document the words begin A like this :

I hereby revoke all wills by me at any time heretofore made. I appoint and then she writes in the names of her executors. Then come the words in print B

to be my Execut

and she does not fill that up. Then the printed form goes on

and direct that all my just debts and funeral and testamentary expenses shall be paid as soon as conveniently may be after my decease.

That is all in print. Then the print begins a fresh paragraph in capital letters : C

I GIVE AND BEQUEATH UNTO

and then the print ends and she fills in D

My son Bernard Smithers when my securities have been converted into cash, two-thirds of the proceeds.

Then there is a full stop, and then a capital letter :

To my son Harry Otway Smithers £500. To my son Leonard Smithers the remainder of the money. E

Now that is the whole of the will, and I have to consider—I was going to say, see whether I can find, but I think I ought not to put it in that way—whether there is any such context here as will enable me to say that “my securities” means anything more than the debts secured on something. The evidence which has been given shows me that the F testatrix had an estate of, £2,812 of which the sum of £984 7s. 8d. consisted of stocks, bonds and shares. Those are set out in an exhibited list which shows that they were as follows ; £100 Victory Bonds 4 per cent. bearer ; 16 shares Alexandria Engineering Works bearer ; £290 Lever Brothers Limited 7 per cent. cumulative preference stock ; G £100 Dominion of Canada 3½ per cent. registered stock 1950/55 ; and £277 14s. 7d. New Zealand 3 per cent. inscribed stock 1952/55.

Now as regards those five items which are the ones I have to consider, the first, the fourth and the fifth I hold to be securities in the strict sense of the term, because they are all government debts secured, I H think, by the government revenues. Consols have certainly been held to be securities in the strict sense, so there is no doubt whatever that those three items passed under the bequest of two-thirds of the proceeds. The only question is as regards the 16 shares in the Alexandria Engineering Works, and the £290 Lever Brothers Limited 7 per cent. cumulative

preference stock, and those are not securities unless I can find sufficient context to construe "securities" as including stocks and shares.

- Now I have looked at this will very anxiously, and I have tried to see my way clear to find some context here, but I am unable to find here sufficient context to construe "my securities" as meaning anything
- A** other than securities in the strict sense of the term. It is true there is a direction to pay "all my just debts and funeral and testamentary expenses," and the gift which I have to construe follows that, but I do not find that that is a context which indicates that the testatrix necessarily meant to include something more than "my securities"
- B** would naturally cover. It is true that the phrase "two-thirds of the proceeds" arises only rather indirectly, because the words "when my securities have been converted into cash" refer to something which she assumes will be done, and it might well be she assumed that all her investments, and not only those particular ones, would be converted, but that, I am afraid, is mere guesswork on probabilities, and
- C** I do not think I am entitled to make such a guess. With the best will in the world in this case I do not think I am entitled to come to the conclusion that the expression "my securities" can properly be construed as including the items to which I have referred. I must, therefore, hold that two-thirds of the second and third items in this list do
- D** not pass to Bernard Smithers under the bequest of two-thirds of the proceeds. That is the answer to question one.

- The further question which I have to determine is as to the meaning of the words "To my son Leonard Smithers the remainder of the money."
- E** The important thing to note is that the testatrix directs—it happens to be in the printed part of the will, but I do not think that on that account I can lay any stress upon it—

that all my just debts and funeral and testamentary expenses shall be paid as soon as conveniently may be after my decease

- F** and then :

I give and bequeath to my son Bernard Smithers when my securities have been converted into cash, two-thirds of the proceeds. To my son Harry Otway Smithers £500. To my son Leonard Smithers the remainder of the money.

- Now, counsel for Leonard Smithers says that "the remainder of the
- G** money" there means the residuary personal estate, and he bases his argument entirely upon the fact that you have previously had a direction that all her just debts and funeral and testamentary expenses shall be paid as soon as conveniently may be after her decease, and that "the remainder of the money" must be the remainder after taking something
- H** out, and what is to be taken out is the just debts and funeral and testamentary expenses, and, I suppose, the legacy of £500 to the son Harry Otway Smithers ; and that as those are to be taken out of the residuary personal estate as a whole, for the purpose of this will I could not consider the rest of the estate, but "the remainder of the money" should be construed to mean the remainder of the residuary personal estate.

Counsel for Bernard Smithers, on the other hand, says that, in this particular will, I have got previously a reference to the proceeds of sale of what the testatrix calls "my securities," which are disposed of, and that the natural meaning of the words "the remainder of the money" would be the remainder of those proceeds of sale.

Counsel for Leonard Smithers, in support of his argument, has relied A upon *Re Mellor*, *Porter v. Hindsley* (6), *Re Emerson*, *Morrill v. Nutty* (7), and I think he also supported his argument by *Re Shaw*, *Mountain v. Mountain* (8), a decision of FARWELL, J. I think these cases go to show that where you have a gift of the remainder of the testator's money, following upon a direction to pay debts, etc., the words "the money" B ought to be, and in fact I think must be, construed as meaning the personal estate of the testator or testatrix.

The only question in this case is whether the point taken by counsel for Bernard Smithers overrides that, his point being that the words "the money" here naturally mean the proceeds of sale referred to above. C I find difficulty in arriving at that conclusion, tempting though it is, because I think I must note the fact that the testatrix has used the expression "the proceeds" above, and she has given "two-thirds of the proceeds," and I think I should reasonably expect that two lines below she would have referred to it by the same term, and would have D said: "To my son Leonard Smithers the remainder of the proceeds"; but instead of that she has said: "To my son Leonard Smithers the remainder of the money."

I think that is an expression that she may very well have used having in her mind the remainder of her property, and I think I ought not E so lightly to get rid of the rule which has been laid down, I think originally in *Stocks v. Barre* (9), on account of the presence of the previous gift of the proceeds of the property which she describes as "my securities." I think I must treat the gift of "the remainder of the money" here as F a gift of the remainder of her property after paying her just debts and funeral and testamentary expenses and deducting the property described as the securities, and paying the £500 to the son; that is to say, it is the remainder of her residuary personal estate. I hold that this gift "to my son Leonard Smithers the remainder of the money" is a gift G to him of the residuary personal estate.

Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of the residue.

Solicitors: *Coward, Chance & Co.* (for the plaintiff and for the defendants Harry Otway Hirsh Smithers and Bernard Francis Hirsh Smithers); *Walker, Martineau & Co.* (for the defendant Leonard Seneton Smithers); H *Montagu's and Cox & Cardale*, agents for *Snell & Co.*, Tunbridge Wells (for the defendant Charles Otway Mackinnon Morris).

[Reported by CHARLES SHELLEY, ESQ., Barrister-at-Law.]

CENTRAL ADVANCE AND DISCOUNT CORPORATION, LTD.
v. MARSHALL.[COURT OF APPEAL [(Scott, Clauson and Goddard, L.J.J.), July 13, 25,
1939.]

- A *Moneylending—Memorandum—Insufficiency—Guarantee and bill of sale—*
Clause that if bill of sale became invalid, guarantors would repay loan
and interest—Clause not referred to in memorandum—Moneylenders Act,
 1927 (c. 21), s. 6.

The plaintiffs had advanced £50 to the defendant upon the terms of repayment by monthly instalments. Repayment was secured by a bill of sale executed by the defendant, and a guarantee executed by guarantors. The guarantee contained a clause providing that, in the event of the bill of sale being or becoming invalid or inoperative, the guarantors would on demand pay the lenders the amount of the loan and interest on the unpaid part thereof. The memorandum of the contract mentioned the bill of sale and the guarantee, but did not disclose the above clause :—

C HELD : (i) the guarantee was a security within the meaning of the Moneylenders Act, 1927, s. 6.

(ii) this clause was one which imposed a further liability on the borrower, and was, therefore, a term of the contract which should have been set out in the memorandum. A mere reference to the fact that it was a term of the contract that a guarantee should be given without any reference to this clause was insufficient to satisfy the provisions of sect. 6.

D [EDITORIAL NOTE. It has been decided that the memorandum of a money-lending contract must contain a statement of the terms of a security. In the present case, it is held that, where there is a guarantee of the loan containing additional terms to those usually included in a guarantee, it is necessary to set out those additional terms in the memorandum.

E AS TO SUFFICIENCY OF MEMORANDUM, see HALSBURY, Hailsham Edn., Vol. 23, pp. 190, 191, para. 280 ; and FOR CASES, see DIGEST, Supp., Money and Money-lending, Nos. 353a-353y.]

Cases referred to :

- (1) *Reading Trust, Ltd. v. Spero, Spero v. Reading Trust, Ltd.*, [1930] 1 K.B. 492 ; Digest Supp. ; 99 L.J.K.B. 186 ; 142 L.T. 361.
- F (2) *Westropp v. Equitable Investment Co., Ltd.*, unreported.
- (3) *Mitchener v. Equitable Investment Co., Ltd.*, [1938] 2 K.B. 559 ; [1938] 1 All E.R. 303 ; Digest Supp. ; 107 L.J.K.B. 316 ; 158 L.T. 176.
- (4) *Eldridge & Morris v. Taylor*, [1931] 2 K.B. 416 ; Digest Supp. ; 100 L.J.K.B. 689 ; 145 L.T. 499.
- G (5) *Simmons v. Russell Financiers, Ltd.*, [1934] 2 K.B. 487 ; Digest Supp. ; 103 L.J.K.B. 724 ; 151 L.T. 472.

APPEAL by the defendant from a decision of His Honour JUDGE DUMAS at the Westminster County Court dated Feb. 1, 1939. The facts of the case are fully set out in the judgment of the court, delivered H by CLAUSEN, L.J.

H. Samuels for the appellant.

D. C. L. Potter for the respondent.

Samuels : The memorandum is silent as to the terms of the securities, and contains no copy of the securities. Further, it should have been signed by the guarantors, and a copy of it sent to them. A guarantor

is in fact a borrower. He should be treated as such. [Counsel referred to *Reading Trust, Ltd. v. Spero, Spero v. Reading Trust, Ltd.* (1), *Westropp v. Equitable Investment Co., Ltd.* (2), *Mitchener v. Equitable Investment Co., Ltd.* (3), and *Eldridge & Morris v. Taylor* (4).]

Potter : It is not necessary to set out the effect of the terms, but only the terms themselves : *Simmons v. Russell Financiers, Ltd.* (5). A

Samuels was not called on to reply.

CLAUSON, L.J. [delivering the judgment of the court] : On Sept. 24, 1937, the plaintiffs, who are registered moneylenders, advanced £50 to the defendant on the terms of repayment by certain monthly instalments, the repayment being secured by a bill of sale executed by the defendant and a guarantee executed by the guarantors, the bill of sale and the guarantee being delivered to the lenders against the advance. Nothing turns in the present case on the contents of the bill of sale. The guarantee contains a clause providing that, in the event of the bill of sale being or becoming invalid or inoperative in whole or in part, the guarantors will on demand pay to the lenders the amount of the loan and interest on the unpaid part thereof. B
C

The defendant paid thirteen instalments, and, two further instalments having fallen due, the lenders sued the defendant for them in the county court. The defendant put in a defence raising various points under the Moneylenders Act, 1927. The only matter to which it is necessary for us to refer is the contention that the contract for repayment and the bill of sale and the guarantee are unenforceable on the ground that the note or memorandum in writing of the contract did not contain all the terms of the contract, in that while the note or memorandum mentioned the bill of sale and the guarantee, it did not disclose the clause mentioned above, imposing on the guarantors immediate liability for repayment of the whole debt in the event of the bill of sale being or becoming inoperative in whole or in part. The existence of this clause obviously resulted in the possibility of the guarantors becoming liable to pay the whole debt immediately in the event mentioned of the bill of sale being or becoming inoperative in whole or in part, and in the event of the lenders enforcing the relevant clause against the guarantors. D
E
F

On the facts stated, it appears to us to be plain that one of the terms of the contract was that the clause in question should be contained in the guarantee, and that no sufficient statement of this term of the contract appears in the note or memorandum. A mere reference to the fact that it was a term of the contract that a guarantee should be given without any reference to the presence of this clause in the guarantee seems to us to be insufficient to satisfy the provisions of the Moneylenders Act, 1927, s. 6. The Act does not require the terms of a security to be set out in the memorandum, but, if the effect of the security is that a liability different in any respect to that described in the memorandum is, or may be, directly or indirectly imposed on the borrower, this G
H

further liability must appear in the memorandum. The presence of the clause in question in the guarantee (a guarantee given as a term of the contract) imposes the possibility of a serious liability directly on the guarantors, and, owing to the relation between the guarantors and the borrower, indirectly upon the borrower. It appears to us to follow that
 A the failure to state this term of the contract has the result that the note or memorandum fails to disclose a material term of the contract, and thus fails to comply with sect. 6 of the Act.

It was not made clear to us how far the point, which appears to us to be decisive of the case, was put before the county court judge; but
 B it was clearly open to the defendant on his pleadings, and was clearly raised by the notice of appeal, and we feel bound to have regard to it.

It appears to have been suggested that the guarantee is not a security within the meaning of that word in sect. 6. We can see no ground for this suggestion. The point is material only on the question of the form
 C which our order should take.

The appeal will be allowed with costs. There will be judgment for the defendant in the action, with costs on the scale adopted in the court below. On his counterclaim the defendant is entitled to a declaration that the contract of repayment and the bill of sale and the guarantee are
 D unenforceable, and to an order for delivery up of the bill of sale and the guarantee, and to an order for costs, on the scale adopted in the court below.

*Appeal allowed with costs. Declaration that the contract of repayment, the bill of sale, and the guarantee are unenforceable. Order for delivery
 E up of the bill of sale and the guarantee.*

Solicitors: Stone & Stone (for the appellant); Barnes & Butler (for the respondents).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

F

PERKINS v. HUGH STEVENSON & SONS, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Finlay, L.J.J.), July 17, 18, 19, 1939.]

G *Workmen's Compensation—Alternative remedies—Election between two remedies—Receipt of compensation—Notice to employer that payments being received without prejudice—Workmen's Compensation Act, 1925 (c. 84), s. 29 (1), (2).*

H The plaintiff, a workman in the employ of the defendants, met with an accident on Sept. 17, 1937, in the course of his employment, and applied for, and was paid, compensation under the Workmen's Compensation Act, 1925, until Oct., 1938, by which date he had recovered from his injuries. On Mar. 21, 1938, he issued a writ claiming damages for negligence, and for breach of statutory duty, alternatively, compensation under the Employer's Liability Act, and, in the further alternative, compensation under the Workmen's Compensation Act. On Nov. 10, 1937, the plaintiff's solicitors wrote informing the defendants that the payments which were being made were received without

prejudice to the plaintiff's common law rights. The defendants replied that the plaintiff's common law rights were barred as he had already made his election. It was contended that there could be inferred from the correspondence and the conduct of the parties an agreement that the payments received by the workman should be without prejudice to his common law rights :—

HELD : (i) it was not possible to infer such an agreement between the parties. A

(ii) the employer had paid full compensation under the Workmen's Compensation Act, 1925, and was therefore not liable to a claim for damages at common law by reason of the provisions of sect. 29 (1), that the employer shall not be liable both independently of and also under the Act.

[EDITORIAL NOTE. This is a decision of the Court of Appeal upon a subsection that has been the subject of much litigation in the past few months. The facts of the present case make it perhaps of limited application in the solution of the problems presented in certain recent cases. Here the solicitors sought, after the workman had received a number of payments based upon the Act, to make the receipt of those payments without prejudice to a claim independent of the Act, but the workman, in fact, received further payments under the Act and gave a clean receipt for them. He continued to receive such payments and give such receipts until he had recovered from the injury. The Court of Appeal state that, in such circumstances, there is no method known to the law whereby such payments could be set off against an award of damages at common law. Such being the case, the matter seems clearly to be within the closing words of sect. 29 (1) of the 1925 Act, and the workman cannot recover apart from the Act. B

AS TO ALTERNATIVE REMEDIES, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 195, 196, paras. 430, 431; and FOR CASES, see DIGEST, Vol. 34, pp. 490-492, Nos. 4063-4071. See also WILLIS'S WORKMEN'S COMPENSATION, 31st Edn., pp. 478-483.] C

Cases referred to : D

- (1) *Codling v. Mowlem (J.) & Co., Ltd.*, [1914] 3 K.B. 1055; 34 Digest 491, 4067; 83 L.J.K.B. 1727; 111 L.T. 1086; 7 B.W.C.C. 786; *affg.*, [1914] 2 K.B. 61 E
- (2) *Bennett v. Whitehead (L. & W.), Ltd.*, [1926] 2 K.B. 380; 34 Digest 492, 4068; 135 L.T. 329; 19 B.W.C.C. 133, C.A.
- (3) *Kinneil Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell)*, [1931] A.C. 575; Digest Supp.; 100 L.J.P.C. 113; 145 L.T. 289; 24 B.W.C.C. 181; *affg.* S.C. *sub nom.* *Waddell v. Kinneil Cannel & Coking Coal Co., Ltd.* (1930), 23 B.W.C.C. 567. F
- (4) *Kelly v. North British Ry. Co.*, [1916] S.C. 19; 34 Digest 496, case *m*.
- (5) *Oliver v. Nautilus Steam Shipping Co.*, [1903] 2 K.B. 639; 34 Digest 495, 4087; 72 L.J.K.B. 857; 89 L.T. 318; 5 W.C.C. 65.
- (6) *Selwood v. Towneley Coal & Fireclay Co., Ltd.*, [1939] 2 All E.R. 132; Digest Supp.; 32 B.W.C.C. 37. G
- (7) *Burke & Unsworth v. Elder Dempster Lines, Ltd.*, [1939] 3 All E.R. 339; Digest Supp.
- (8) *Kendall v. Hamilton* (1879), 4 App. Cas. 504; 21 Digest 218, 540; 48 L.J.Q.B. 705; 41 L.T. 418.
- (9) *Scarfe v. Jardine* (1882), 7 App. Cas. 345; 21 Digest 224, 577; 51 L.J.Q.B. 612; 47 L.T. 258. H
- (10) *Pusey v. Desbouvrie* (1734), 3 P. Wms. 315; 35 Digest 125, 265.
- (11) *M'Ginty v. Kyle*, [1911] S.C. 589; 34 Digest 493, case *d*.
- (12) *Davenport v. R.* (1877), 3 App. Cas. 115; 31 Digest 472, 6195; 47 L.J.P.C. 8; 37 L.T. 727.
- (13) *Little v. MacLellan* (1900), 2 F. (Ct. of Sess.) 387; 34 Digest 491, case *h*.

(14) *Evans v. Barilam*, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; 157 L.T. 311.

APPEAL by the plaintiff from a judgment of HILBERY, J., dated Feb. 20, 1939. The facts are fully stated in the judgment of SIR WILFRID GREENE, M.R.

- A *Neville J. Laski, K.C.*, and *D. M. Wilson* for the appellant.
C. L. Henderson for the respondent company.

Laski, K.C.: If a workman receives compensation and then recovers damages, the employer can set off the compensation against the damages. Until the workman has exercised his option, he is entitled to claim damages at common law, notwithstanding that he has received compensation in ignorance of an alternative remedy: *Codling v. Mowlem (J.) & Co., Ltd.* (1). A meaning must be given to the word "option" in the phrase "at his option." It is an option given to the workman and not to the employer. It is intended to operate for the benefit of the workman, but it cannot do so unless the workman knows what the alternatives are. A man does not claim compensation under the act because he is sent to his employers by the Public Assistance Committee to get compensation. The words "at his option" are bereft of meaning unless they can be construed in the way above suggested. [Counsel referred to *Kinneil Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell)* (3), *Selwood v. Towneley Coal & Fireclay Co., Ltd.* (6), *Burke & Unsworth v. Elder Dempster Lines, Ltd.* (7), *Kendall v. Hamilton* (8), *Scarf v. Jardine* (9).]

Wilson, following on the same side, referred to *Pusey v. Desbouvrie* (10).

- Henderson*: The plaintiff has given no evidence of incapacity, and he has received the full amount of compensation to which he is entitled under the Workmen's Compensation Act. In *M'Ginty v. Kyle* (11) it was held that if a claimant elected to proceed in one way, he thereby repudiated the other. In *Codling v. Mowlem (J.) & Co., Ltd.* (1), it was said that an employer had a right not to be sued twice. The workman claimed compensation and received it, and has therefore been paid workmen's compensation and he cannot claim twice. It is misleading to take the case of a claim which was made in the first instance at common law. The court can fix compensation under the Act if the workman is found entitled to it. There is, however, no similar provision where the claim which is made in the first instance is for compensation under the Act. If the workman asks for and receives compensation, the question of option does not arise by reason of the words of sect. 29 (1). It is clear that compensation under the Act and compensation otherwise are mutually exclusive remedies. If the plaintiff in the present case were to succeed, the remedies would not be mutually exclusive but cumulative. The employer has not to pay twice. If, however, the plaintiff were to recover damages, the employers could not deduct what has been paid as workmen's compensation as having been paid by mistake. It was not paid by mistake but in response to a legal claim. The word "pay" has been inserted in the section because the legislature recognised that if payment

was made by reason of a claim, the option could no longer be exercised. *Kelly v. North British Ry. Co.* (4) was relied upon by CROOM-JOHNSON, J., in *Burke & Unsworth v. Elder Dempster Lines, Ltd.* (7), but in the present case there is no evidence of any agreement between the workman and the employer that the payments were made or received without prejudice. In *Selwood v. Towneley Coal & Fireclay Co., Ltd.* (6), A the judge did not find that the workman had received compensation, but that he had received money offered to him. Also, that there was an absence of the knowledge which was necessary to enable the workman to make an agreement binding upon him in law. The words "without prejudice," in the absence of agreement between the parties, do not alter B the position: *Davenport v. R.* (12). [Counsel also referred to *Little v. MacLellan* (13), *Kinneil Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell)* (3), *Evans v. Bartlam* (14), *Bennett v. Whitehead* (2), and *Oliver v. Nautilus Steam Shipping Co.* (5).]

Laski, K.C., in reply. C

SIR WILFRID GREENE, M.R.: In my opinion, the judge came to a correct decision in the action out of which this appeal arises.

The appellant was a workman who, on Sept. 17, 1937, suffered an accident while in the employment of the respondents. He applied for, and was paid as such, weekly sums by way of compensation under the D Workmen's Compensation Act. Those payments continued until Oct., 1938, at which date it appears, at any rate, highly probable, on the evidence, that his right to compensation had come to an end owing to his recovery from the accident. On Mar. 21, 1938, while those payments were being made and received, he issued the writ in the present action, E claiming damages for negligence and for breach of statutory duty; alternatively, compensation under the Employers' Liability Act; and alternatively, compensation under the Workmen's Compensation Act. That last claim was no doubt put in with the object of obtaining, if he failed in his proceedings outside the Workmen's Compensation Act, the F assessment of compensation under that Act, the right to which is given by the Workmen's Compensation Act, 1925, s. 29 (2), to the workman who is unsuccessful in proceedings at common law or otherwise than under the Act. The first payments which were made by the employers in pursuance of the appellant's claim were not in any way qualified, nor G was the receipt of them in any way qualified. I should mention here, in parenthesis, that a claim under the Act for compensation can be quite informal, and, in the present case, there is, in my judgment, no doubt that the claim was made under the Act and that the payments were made in H pursuance of that claim.

After, I think, eight payments had been made, the appellant obtained the assistance of solicitors who, on Nov. 10, 1937, wrote to the respondents, referring to the accident, and adding the following paragraph:

We understand that certain payments have been made to Mr. Perkins and we write to inform you that his acceptance of such payments was without prejudice

to his rights at common law and under the Employers' Liability Act and that if any further payments are made, they will be accepted subject to the same qualification.

The reference in the letter to the earlier payments was, of course, a valiant attempt on the part of the solicitors to preserve their client from any prejudice that the receipt of the earlier payments might have caused him. That letter was answered on Nov. 19, 1937, by an insurance company acting on behalf of the respondents. The letter contained this paragraph :

We must point out that your client has already made his election, and has in fact claimed and received compensation under the Workmen's Compensation Act. This being so, his claim for damages at common law is barred.

On Nov. 22 the appellant's solicitors answered that letter as follows :

We deny that our client has made any election in this matter or that he has claimed and received compensation under the Workmen's Compensation Act. In any case, however, it is a matter for the court and you will be hearing further from us in due course.

The payments, as I have said, continued long after that letter of Nov. 10 was written, and on each occasion when a payment was made the receipt was a clean receipt and no terms were imposed, much less agreed to, in respect of any of those payments. The judge, upon the facts, held that at the time when the workman made his claim for compensation and received the first payment he did not know that he had a right under sect. 29 (1) of the Act to elect as between two alternative remedies, and on that basis he held, in conformity with a decision of ATKIN, J., as he then was, in *Codling v. Mowlem (J.) & Co., Ltd.* (1), a decision on this point which was approved in this court in the case of *Bennett v. Whitehead (L. & W.), Ltd.* (2), that the workman, not knowing of the existence of his right to elect, could not be said to have exercised the option given to him by the subsection. I do not propose to examine that part of the judgment, in so far as it rests upon a finding of fact as to the workman's knowledge at the time. The evidence about that is not complete, but I will assume, for the purposes of this judgment, that the workman did not know at that time that he had that statutory right. The effect of his subsequently becoming aware of that statutory right, as he clearly did by Nov. 10, coupled with the subsequent payments, I shall deal with later in this judgment. For the moment, the matter with which I propose to deal is not concerned with the effect of that letter, but is upon the basis that the payments were made under the Workmen's Compensation Act and obtained under that Act, without complicating the matter by any question of receipt without prejudice.

Sect. 29 (1) of the 1925 Act, and the similar section in the earlier legislation, have given rise to a number of problems and a not inconsiderable difference of judicial opinion on certain points. Many cases have been decided upon the language of the subsection ; but, fortunately, upon the facts of the present case, I do not find it necessary to refer in any detail to any of them. The subsection reads as follows :

When the injury was caused by the personal negligence or wilful act of the

employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid.

The case that we have here is not a case where the workman has claimed compensation and, without receiving payment under that claim, has subsequently abandoned his claim and brought proceedings at common law, nor are we concerned with a case where a contested claim has gone part of the way to arbitration and has then been dropped. Questions which arise upon cases of that kind are not questions with which we are concerned, because we have here the fact that the workman has received compensation pursuant to a claim made under the Act.

It must, I think, be accepted that the mere making of a claim without knowledge of the existence of the right of choice which the Act gives will not amount to an exercise of the option in circumstances where the workman did not know of the existence of his right of choice. It would also appear that the mere making of such a claim, even if he had the knowledge, would not bar him from abandoning it and afterwards proceeding at common law. That appears to be the effect of the decision of this court in the case of *Bennett v. Whitehead* (2). What is to happen where the workman, having at the time of making his claim and receiving the money *ex hypothesi* no knowledge of his right of option, nevertheless receives and puts into his pocket money paid in pursuance of that claim and in liquidation of the employer's statutory liability under the Act? In answering that question, it is important to consider the language of what I may call the second limb of the subsection. As I view that second limb, at any rate for the purposes of the present case, there is no necessity to decide whether or not it operates as a qualification on the option given by the first part of the subsection, or whether it is rather an independent provision. The result, for the present purposes, would be the same, and the decision of any such fine point would, for present purposes, be academic.

The effect of the second limb of the subsection is to exempt the employer from liability to pay compensation both under the Act and outside the Act. Whether or not that is limited to cases of payment to the same person is a matter which has been much debated, and eventually, I think, set at rest by the decision of the House of Lords in *Kinneil Cannel & Coking Coal Co., Ltd. v. Sneddon (or Waddell)* (3). The words, in my opinion, do exempt an employer from liability to pay to the same person and in respect of the same accident compensation both under the Act and outside the Act. The words "shall not be liable to pay compensation for injury," require a word or two of comment. They cannot, I think, be interpreted as meaning that no liability shall exist. What happens when an accident takes place, if it be one giving a right to

- compensation under the Act and also a right of action at common law is, I apprehend, that from that moment the employer is under two liabilities. Which one will ultimately be made effective against him is, at that moment, uncertain. He is not to have both liabilities made effective against him. But, at the outset, both liabilities are there, and it is for
- A the workman, by the appropriate action, to enforce the one or the other. I therefore regard these words as referring to the enforcement of the liability, and, to put it in quite popular language, the employer is not to be made to pay twice over to the same person. I add those words, "to the same person," because I do not wish it to be thought that I am saying
- B anything which is inconsistent with what was said in the House of Lords in *Kinneil's* case (3). The liability of the employer to pay compensation under the Act, which arises when the accident takes place, is one which, of course, like all liabilities, can be enforced in one of two ways—I should not, perhaps, say "enforced," but can be made effective. It can be made
- C effective either by satisfaction of the liability out of court, or by the obtaining by the workman of an award which entitles him to payment from his employers. But whichever method is in fact adopted in any particular case, the result is necessarily the same, in the sense that, by the payment in the one case and by the making of the award in the
- D other case, the liability of the employer under the Act is discharged; and where the employer, in response to a claim under the Act, has made a payment of compensation under the Act, that payment discharges once and for ever, in whole or *pro tanto*, the statutory liability under the Act. It seems to me impossible to say in a case where, in response to a
- E claim for compensation under the Act, the employer, in satisfaction of that claim, has made the statutory payment, that he has not been made liable to pay compensation under the Act. He has been made liable to pay just as much by acceding to the claim, without litigation, as he would have been made liable to pay if he had resisted the claim and had had it
- F enforced against him as the result of that litigation.

- The matter can be looked at in another way. Suppose the employer, having had workmen's compensation claimed against him, satisfies that claim up to the hilt, and when he has done so the workman begins an action at common law and says, "At the time when I made that claim
- G and received those payments I knew nothing about my option under the subsection, and, therefore, it cannot be said that I exercised that option at all. The first part of the subsection, therefore, does not affect me." What would be the position with regard to the second part of the subsection? Suppose that in the action the workman were to be held
- H entitled to recover damages at common law, what would be the result of the whole matter? The result of the whole matter, truly stated, would be that the employer had, in respect of his liability under the Workmen's Compensation Act, paid compensation under that Act, and, in respect of his liability at common law, had paid damages for negligence at common law, and a breach of that limb of the subsection must have

taken place. It seems to me that the second limb of the subsection in terms makes it impossible for such a situation ever to arise.

The argument is reinforced, if it be necessary, by the circumstance that where the workman has received compensation under the Act and subsequently brings proceedings at common law, there is no machinery by which the money he has received as compensation can be set off against or deducted from the damages to be awarded to him at common law. The Act is silent upon that matter ; there is no provision dealing with that matter as there is for dealing with costs in the other case where he brings his claim at common law and fails, and then claims under the Workmen's Compensation Act, 1925, s. 29 (2). There is no provision of that character dealing with the case of a workman receiving payments under the Act, in circumstances where he could not elect because he did not know, and then afterwards recovering damages at common law. There is no principle of law known to me under which, in those circumstances, it would be possible to deduct or set off what he had been paid as compensation under the Workmen's Compensation Act. The result would accordingly be that, as the result of the whole transaction, the employer would have discharged two liabilities : (1) a liability under the Act, and (2) a liability at common law, and that is the very thing against which the subsection protects him. Now the decision of the point with which I have just dealt is not, in my view, assisted in any way by the authorities to which we have been referred. It is one that I myself find easy of solution once the language of the subsection is sufficiently appreciated in its relation to these particular facts.

I have, so far, dealt with the case without reference to the circumstance that, by Nov. 10, 1937, the workman was aware of his right of option. From that moment onwards, but for the point which I will mention presently, it could not have been suggested that he was doing otherwise than exercising his option and electing between two mutually exclusive remedies, and he would, on that basis, have exercised it effectively with no *locus pœnitentiæ*, because his claim had been complied with and satisfied. When that happened it seems to me that any *locus pœnitentiæ* which he might have had after making the claim and before it was satisfied would not exist, after payment had been made, any more than it would have existed after an award had been obtained. But it is said that that result does not follow by reason of the circumstance that, in the solicitors' letter of Nov. 10, it was said that all future payments would be accepted without prejudice. Counsel for the appellant thereupon conceded, and I think he was bound to concede, that unless there could be inferred from the correspondence and the conduct of the parties an agreement with the employer, the mere insertion of the words " without prejudice " in the letter cannot alter the character of the payments which were made and received. That is a proposition which, I think, cannot be disputed. The question, therefore, is whether or not it is possible to infer, from that correspondence and the conduct of the

parties, an agreement between the workman and his employer, to the effect that any moneys paid by weekly payments thereafter should not be finally treated as payments under the Workmen's Compensation Act, but should be held, so to speak, to abide the event, with the result that they would be set off against or deducted from any damages which the workman might ultimately recover. If there had been an agreement of that sort, the situation would, I think, have been different, and the case would have fallen within the principle which was dealt with in a Scottish case, *Kelly v. North British Ry. Co.* (4).

I find myself quite unable, in the present case, to infer any agreement at all between these parties. In fact, the correspondence and the acts of the parties appear to me to show that, so far from being in agreement, they were completely at arm's length. The employer continued to pay pursuant to the claim which had been made upon him and pursuant to his statutory liability. He declined to agree to those payments being made without prejudice or to abide the event. That he refused to do. He tendered the money and a clean receipt was given. In those circumstances, the position merely was that the workman, under the cover of the letter was, in effect, saying, "I am still claiming workmen's compensation, but I propose to treat the money received under the Act as received without prejudice," and the employer was agreeing to no such thing, but merely making payments pursuant to the claim under his statutory liability. The insistence by the recipient that the receipts were without prejudice appears to me to be of no avail at all.

I think I have dealt with all the points with which it is necessary to deal for the decision of this case, and, in my opinion, as I said at the outset, the decision of the judge was perfectly correct and must be affirmed, with the result that the appeal must be dismissed.

MACKINNON, L.J. : I agree. I observe that SCRUTTON, L.J. said, in *Bennett v. Whitehead (L. & W.), Ltd.* (2), at p. 396, with regard to the equivalent of this sect. 29 :

... there has been an embarrassing difference of opinion between the judges of the English, Scotch and Irish courts, both between nations, and individual judges of the same nation. It is to be hoped that the House of Lords may in some case have the opportunity of giving a final construction of the sections.

Fortunately, I think in this present case none of the nice questions which were debated in that case arise.

When the action came on for trial in Feb., 1939, the plaintiff had received weekly payments of 30s. per week for the whole period during which he had been disabled by the accident, those weekly payments amounting in all to £81. He had given a receipt for each payment expressed to be

Compensation . . . in respect of injuries by accident . . . for which injuries I hereby claim and elect to be compensated, in accordance with the Workmen's Compensation Act, 1925.

It is true that, in the course of those payments being made, his solicitors

had written a letter stating that he had previously accepted, and would in future accept, such weekly payments without prejudice to his right at common law, but the insurance company refused to agree to any such suggestion, and, in face of their refusal, the plaintiff continued to accept the weekly payments and to sign the receipts for them in the form I have quoted. A

If the present action had been allowed to proceed and succeed and the plaintiff had been awarded damages at common law, I can think of no legal ground on which the defendants could claim to deduct from the amount of those damages the £81 they had paid to him by those weekly payments. If, as in *Oliver v. Nautilus Steam Shipping Co.* (5), B or in *Kelly v. North British Ry. Co.* (4), the weekly payments had by agreement between the plaintiff and the defendants been made subject to a condition, the defendants might have claimed credit for the £81 by virtue of such agreement, but apart from any such agreement there would be, as I say, no ground on which the defendants could claim C credit for the £81 against the damages awarded at common law. If that be so, quite clearly the result of allowing this action to proceed and succeed would be to bring about a breach of the words towards the end of sect. 29 (1):

but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act . . . D

That being so, I think it is clear that these considerations are sufficient to dispose of this case and to show that it was rightly decided by HILBERY, J. E

FINLAY, L.J.: I agree, and I will add very few words. I assent to everything which SIR WILFRID GREENE, M.R., has said. For myself, I think that this particular case can be decided upon the ground upon which indeed the judge below decided it—that is, on what has been F called the second limb of sect. 29 (1), which is as follows:

the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act . . .

Now I find difficulty in seeing how it can possibly be said that the G employer can be said to be not liable to pay compensation under the Act. He was liable to pay and did pay, and, indeed, paid the whole amount which the workman could have obtained under the Act. It seems to me that it cannot matter in the least whether he paid pursuant to an order of the court made in an arbitration, or whether he paid H because, being clearly liable, he agreed to pay without troubling to go to the court. It is a case to which the words in this limb of the subsection appear to me precisely to apply, and I agree with what MACKINNON, L.J., has just said. If an action brought independently of the Act were to succeed, that would happen which the legislature

expressly says is not to happen, namely, that the employer would then be held liable independently of the Act, having already become liable under the Act.

I think the absence of any provision for any deduction by way of set-off, or anything of that sort, from the amount recoverable at common law or under the Employers' Liability Act in respect of the amount paid under the Workmen's Compensation Act, clearly shows that the view, which seems to me to be quite obvious, is correct. When the legislature made no provision for any deduction or any taking into account of the payment under the Workmen's Compensation Act, I think it meant to say, and perfectly expressly said that, if there is a liability to make payment under the Workmen's Compensation Act, then there shall be no liability independently of the Act. For these reasons I entirely agree that the judgment of the judge in this case was quite right.

C *Appeal dismissed.*

Solicitors: *Murray Napier & Co.* (for the appellant); *W. Stanley Eastburn* (for the respondents).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

D

HARI CHAND AND ORS. v. SECRETARY OF STATE.

[PRIVY COUNCIL (Lord Macmillan, Sir George Rankin, Mr. M. R. Jayakar), **June 29, 30, 1939.**]

E *Privy Council—India—North-West Frontier Province—Compulsory purchase—Resumption of possession of cantonment—Appurtenances—Compensation—Land Acquisition Act (I of 1894), ss. 4, 6, 9, 11, 18.*

Where the government grant any rights to individuals within the area of cantonments, one of the cardinal conditions of the grant is that the government retain the power of resumption at any time on giving one month's notice. If they give that notice, they are required to pay the value of such buildings as may have been authorised to be erected. The government proposed to resume certain properties originally granted out, comprising the sites of twelve bungalows, and issued notifications of resumption. The appellants, the owners of the lands comprising the sites of the bungalows, contended: (i) that the notification was bad because it was not a notification for the acquisition of the land, but a notification of an intention to acquire only buildings on the land; (ii) that they were entitled to the sites upon which the various bungalows were erected; (iii) that the compensation awarded to them had not been made on a proper basis, and that nothing had been given in the awards in respect of the appurtenances of the buildings, namely, roads, culverts, gardens, trees, etc. :—

H **HELD:** (i) the government here were the owners of the land and when they sought to put in force the provisions of the Land Acquisition Act they did not requisition what was their own, but what they desired to acquire, namely, the buildings on the land.

(ii) it was for the claimants (the appellants) to establish affirmatively their title to the sites, and this they had not done.

(iii) the subject to be valued being a building apart from the site, the principle here adopted of fixing value by ascertaining the cost of

reproducing the building at the present time and then allowing for depreciation, was the proper principle to follow in making the awards which were made. As the premises were enjoyed throughout on precarious terms, all the grantee was entitled to recover was the value of the buildings erected on the ground, and anything which the grantee might have done in the way of utilising the ground surrounding the building for the purposes of amenity or enjoyment was associated rather with the site than with the building. Compensation had, therefore, to be restricted to the value of the buildings. A

[EDITORIAL NOTE.] This case is of purely local interest. Their Lordships have here considered the general principles relating to the resumption of possession of cantonments by the government. The principal point in the case is whether the compensation extends to gardens, roads and things other than buildings placed upon the land. B

AS TO LAND ACQUIRED FOR GOVERNMENT PURPOSES, see HALSBURY, Hailsham Edn., Vol. 6, pp. 185, 186, paras. 228, 229.]

Case referred to :

(1) *Secretary of State for India in Council v. Satish Chandra Sen*, (1930) 57 I.A. 339. C

CONSOLIDATED APPEALS from a judgment and twelve decrees of the Court of the Judicial Commissioner, North-West Frontier Province, Peshawar [MIDDLETON, J.C., and KAZI MIR AHMAD, A.J.C.] dated July 28, 1936, which substantially affirmed the judgment of the district judge of Peshawar, dated Feb. 15, 1935. The judgment of their Lordships was delivered by LORD MACMILLAN. D

A. M. Dunne, K.C., and S. P. Khambatta for the appellants.

J. Millard Tucker, K.C., W. Wallach, and Hon. Quintin M. Hogg for the respondent. E

LORD MACMILLAN : Their Lordships are invited in these 12 consolidated appeals to reconsider a number of awards made by way of compensation for the acquisition by the government of certain bungalows in the Cantonment of Peshawar. In the courts below a large number of questions were raised and debated in relation to the awards, but before their Lordships, counsel on behalf of the appellants confined himself to two or three main issues. F

As a matter of history, the cantonments are regulated, so far as regards grants to individuals, by an order of the Governor-General in Council dated so far back as 1836. That order appears to have been carried forward to date by a series of subsequent orders more or less identical in their terms. Where the government grant any rights to individuals within the area of the cantonments, one of the cardinal conditions of the grant is that the government retain the power of resumption at any time on giving one month's notice. If they give that notice, they are required to pay the value of such buildings as may have been authorised to be erected. G H

In this case the government proposed to resume 12 or 13 of properties originally granted out, and they issued notifications of resumption,

of which there is an example in the case of the first appellant Hari Chand's property. It runs as follows :

Whereas the land comprising the site of the property known as Bungalow No. 5, Fort Road, Peshawar Cantonment, belongs to Government and is held by you on cantonment tenure under which Government are entitled to resume the said land subject to paying the value of such buildings as may have been authorised to be erected thereon ; And whereas Government have decided to resume possession of the said land and to obtain possession of the buildings standing thereon : Take notice therefore that Government will under all powers enabling them in that behalf through their agent on Oct. 15, 1932, resume possession of the said land and your occupation and any rights, easements and interests you may have in the said land and the buildings thereon shall cease as from that date.

The notification also contained an offer of compensation.

- A Apparently none of those to whom the notices were addressed was satisfied with the offer, and while the natural and ordinary course would have been to proceed to arbitration for the purpose of assessing the compensation, for some reason or other that course does not seem to have been pursued or to have been acceptable to the parties, and the government accordingly resorted to the Land Acquisition Act of 1894 for the purpose of expropriating the owners of the bungalows on the terms of that statute. Accordingly, a notification was served on each of the proprietors of the bungalows, and in the recital of each notification it is set out that the government claimed to be the owners of the land upon which the various bungalows and outhouses had been erected. That is set out as a matter of narrative in the notification. Then it proceeds to state that the government have given notice that the land has been resumed by them and that they are desirous now of acquiring the buildings thereon and any other outstanding interest therein, and for that purpose they invoke the provisions of the Land Acquisition Act of 1894.

The first point taken here has been that the notification was bad because it was not a notification for the acquisition of the land, but a notification of an intention to acquire only buildings on the land. It was said that the Land Acquisition Act only authorised notification of an intention to acquire land and therefore that the whole proceedings under the Land Acquisition Act were fundamentally bad because the notification upon which the proceedings started was invalid. It has to be noticed, however, that in the Land Acquisition Act

- G the expression "land" includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth.

In the present case, the government's position being that they were the owners of the site, it would have been manifestly idle for them to have proposed to acquire what was already their own, and therefore

- H when they sought to put in force the provisions of the Land Acquisition Act, they naturally requisitioned what was not their own but what they desired to acquire, namely, the buildings on the land. It appears to their Lordships that in any event this objection to the notification comes too late, because the parties proceeded under the Land Acquisition Act to follow all the procedure which that statute lays down right up

to and including the final determination of compensation. The court that dealt with the matter was really a compensation court, and if it had been intended to attack the whole proceedings as initially invalid, this would more properly have been done before some other tribunal. The court did, however, incidentally consider the question of the validity of the notice, and their Lordships agree with the view taken that the notification is not open to objection. A

Junior counsel for the appellants sought to satisfy their Lordships that the statement in the recital, namely, that the site belonged to the government, was in fact inaccurate, and that the claimants were entitled to the sites upon which the various bungalows were erected. One thing is quite clear from the legal point of view, and that is that a claimant who desires to obtain compensation must establish his title, and in the recent case to which we were referred, *Secretary of State for India in Council v. Satish Chandra Sen* (1), where the question of cantonment tenure in Bengal was under consideration, it was made clear that a claimant must establish his title affirmatively. In the present case it may be that there might be some question as to the government's title, but it was for the claimants themselves to establish affirmatively their title to the sites. The court below which had the advantage of having documents before them which have not been before their Lordships, went very fully into the matter and satisfied themselves that the claimants here had not established their title to the sites. Their Lordships see no reason to differ from this conclusion. B C D

That being so, the only remaining question is whether the compensation to which the claimants are entitled for the deprivation of their buildings has been ascertained according to law. It is not the practice of their Lordships to consider detailed criticisms of valuation. It is always open to an appellant before their Lordships to raise a question of principle relating to the method of assessment, and if their Lordships are satisfied that the compensation officer or the court which reviewed his award has erred on a matter of principle, then relief will be given. In the present instance the subject-matter of valuation or compensation being the buildings and not the site, inasmuch as the site was already the property of the government, the question is what was the appropriate method of valuing the buildings. It was made a matter of complaint that in consequence of the resumption notice having been served, the value of all these buildings, some of them no doubt attractive residences, had been seriously depreciated. Their Lordships could have appreciated that criticism if the principle of valuation adopted had been that of proceeding upon the rental value of the buildings, but in the present case the method adopted has been what is commonly known as the contractor's method. The subject to be valued being a building apart from the site, the principle of fixing value by ascertaining the cost of reproducing the building at the present time and then allowing for depreciation in consideration of the age of the building and for the cost E F G H

of such repairs as might be required apart from depreciation, is quite a well-known and recognised method of valuing buildings for the purpose of compensation. That method was pursued here, and that method is not, as their Lordships conceive it, affected by the resumption notice, because the prices which would be taken and were taken in this case

A for the purpose of ascertaining the cost of reproducing the building would not be affected by the resumption notice at all. The buildings accordingly, in their Lordships' view, have been valued for the purpose of compensation on a perfectly admissible and perfectly legitimate principle, and that being so, there would appear to be no valid objection

B on this score to the awards that were made.

One further point was taken, however—a point of detail, to which it is proper that allusion should be made. It is said that nothing has been given in the awards in respect of what might be called the appurtenances of the buildings, such things as roads, pathways, culverts,

C gardens, trees and various things which were enjoyed by the occupants of the bungalows as useful amenities in connection with them. The court below considered this matter, and were of opinion that it was not proper to include any figure for these items in the awards, with one small exception; they did allow something, a small acknowledgment, in

D respect of what are described as necessary roads, presumably accesses which were necessary for the enjoyment of the bungalows, and a small addition was made to the awards under this head. Their Lordships do not feel called upon to comment upon that circumstance, but they are of opinion that in the case of premises such as had to be valued here

E and which were enjoyed throughout on terms which were certainly precarious, namely, that at any time the government might resume the premises on giving one month's notice, and that all that the grantee was to be entitled to receive in the event of that power being exercised, was the value of the buildings erected on the ground, anything which

F might be done by the grantee in the way of utilising the ground surrounding the building for the purposes of amenity or enjoyment was, as the court below has held, associated rather with the site than with the building. If the compensation has to be restricted, as it has to be in this case, to the value of the buildings, their Lordships agree with the court

G below that no additional allowance should be made in respect of amenities such as trees and gardens and so on associated with the enjoyment of the bungalows.

Counsel for the appellants, on behalf of his clients, has brought before their Lordships all that could be advanced by way of criticism of the

H awards, but these criticisms, in their Lordships' opinion, fail. The result is that their Lordships will humbly advise His Majesty that the appeals should be dismissed with costs.

Solicitors: *T. L. Wilson & Co.* (for the appellants); *The Solicitor, India Office* (for the respondent).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

WIRTH v. WEIGEL LEYGONIE & CO., LTD.

[KING'S BENCH DIVISION (du Parcq, L.J., sitting as an additional judge),
July 11, 12, 1939.]

Bills of Exchange—Promissory note—Irrevocable undertaking to pay contained in letter—Bills of Exchange Act, 1882 (c. 61), s. 83 (1).

Revenue—Stamps—Irrevocable undertaking to pay—Whether agreement or promissory note for purposes of stamping—Stamp Act, 1891 (c. 39), ss. 33 (2), 38 (1). A

By an agreement between K., an export and import merchant, and the plaintiff, the latter was from time to time to finance certain of K.'s transactions. For this purpose the plaintiff opened a special banking account in his own name into which he paid £3,000, over which he was to have sole control. He was to pay to the defendants the amounts required by K. to cover particular transactions of K. and in consideration of such advances he was to receive one-third of the net profits subject to a minimum percentage on the monthly turnover. A letter in the following form, which was described as a guarantee, was addressed by the defendants to the plaintiff in respect of each transaction. "We confirm herewith that we undertake to pay irrevocably the sum of £—— to you or into your banking account on —— in respect of the above reference." K. was to put the defendants in funds to meet the proposed payments by the defendants to the plaintiff, but eventually K. was unable to provide such funds, and the defendants refused to pay the sums due to the plaintiff:— B C

HELD: (i) there was no partnership between the plaintiff and K. D

(ii) the letters were not promissory notes within the meaning of the Bills of Exchange Act, 1882, s. 83 (1), nor within the meaning of the Stamp Act, 1891, s. 33 (2), and did not require stamping as promissory notes.

(iii) the transaction between the parties was not a guarantee.

(iv) the letters required to be stamped with a 6d. stamp as agreements. E

[EDITORIAL NOTE.] The main question in this case was whether the "confirming letters," as they were called, were promissory notes within the Bills of Exchange Act, 1882, and, if that were not so, whether they were documents deemed to be promissory notes within the Stamp Act, 1891. Both these questions are answered in the negative. Apart from this question, there arose a further matter whether these letters ought to be stamped as agreements. This, being a stamp objection, was not a matter in which the defendants were concerned, but one between the court and the plaintiff. F

AS TO DOCUMENTS REQUIRING TO BE STAMPED AS PROMISSORY NOTES, see HALSBURY, Hailsham Edn., Vol. 2, pp. 731-733, paras. 1030-1032; and FOR CASES, see DIGEST, Vol. 6, pp. 497-501, Nos. 3149-3173.] G

Cases referred to:

(1) *Yeo v. Dawe* (1885), 53 L.T. 125; 6 Digest 498, 3153.

(2) *Mortgage Insurance Corp'n. v. Inland Revenue Comrs.* (1888), 21 Q.B.D. 352; 6 Digest 497, 3150; 57 L.J.Q.B. 630.

(3) *Guaranty Trust Co. of New York v. Hannay & Co.*, [1918] 1 K.B. 43; 6 Digest 428, 2775; 117 L.T. 754; *reversd.* on another ground, [1918] 2 K.B. 623. H

ACTION to recover £2,450 due under agreements in the form set out in the judgment whereby the defendants irrevocably undertook to pay certain sums of money to the plaintiff. The facts are fully stated in the judgment and the following are the translations of the letters shortly

referred to in the judgment. That of Mar. 7, 1935, from Kischner to the plaintiff was as follows :

A Dear Mr. Wirth. I have pleasure in confirming our conversation at which we have come to the following agreement. You undertake to open at Barclays Bank an account to the amount of £3,000, viz., £1,000 at once, and the remaining sum according to requirements, but at latest within 3 months. The money is to be used for financing my overseas transactions as set forth in the following. The amount remains on your account over which you have the sole right of disposal. The financing will be carried out in such a manner that you will remit the amounts in question on my instructions, provided that I give you at the same time a guarantee by a trustworthy forwarding agent for the repayment of the amount involved. The guarantee must secure irrevocably repayment to your account with Barclays Bank, or direct to you, within a fixed period of time. You will give instructions for the remittance of the amounts after you have satisfied yourself as to the guarantee provided. You shall be free to withdraw from this agreement provided you give me 2 months' notice.

B I undertake to pay you as consideration for the financing above referred to a remuneration of one-third of the total net profit. We have, however, agreed that the minimum rate shall be $1\frac{1}{2}$ per cent. of the monthly turnover for transactions carried out within one month, that is to say, when the money is repaid within the month. A rate of 4 per cent. as the minimum has been agreed upon for transactions which take up to 2 months. In the event of a transaction taking a longer time than 2 months you will receive a remuneration on the lines of 4 per cent. per 2 months of the turnover.

C The letter of Mar. 8, 1935 from Kischner to the defendants was as follows :

Re Account No. 3

D Dear Sirs. I beg to refer to our conversation of this morning regarding the opening of account No. 3 and have pleasure in confirming the arrangements made as follows :

E You will make payments in respect of consignments to be handed over to you for shipment, such payments to be considered as advances, and to be subject to terms, etc., governing the existing account No. 2. No interest, however, is to be charged as the funds necessary for these advances will be placed by me at your disposal. In order to obtain these funds you will please submit your letter for every amount required, confirming the repayment of this sum on a certain date according to requirements. Your letter is to be addressed to Mr. A. H. Wirth and a draft of such letter is enclosed. Every transaction will have a specific reference number, viz., A.C.3 T.R./W.L. (numbered 1, 2, 3 and so on) meaning account No. 3, Transaction Weigel Leygonie, No. 1, 2, 3, etc. On receipt of your confirming letter for any particular transaction, the details of which will be given by me as to the sum required and the date of repayment to be indicated, I shall be pleased to submit to you (i) my cheque for the amount in question, which is to be credited to my account No. 3, and instructions as to the disposal of each sum will be given in due course by me. (ii) My letter confirming to you that I will repay the amount of the particular advance not later than the date indicated in your letter to Mr. Wirth.

F As soon as any particular advance under account No. 3 is repaid by myself, the procedure will be reversed. On repayment to you, you will return my letter of confirmation to me. I shall request you to forward the amount to Mr. Wirth in fulfilment of your undertaking covering the particular transaction. Mr. Wirth will surrender to you your letter of confirmation relating to the repayment in question.

Hon. Quintin M. Hogg and G. R. Rougier for the plaintiff.

A. T. Denning, K.C., and R. M. Wilson for the defendants.

H *Denning, K.C.* : The plaintiff must rely on the letters of the defendants alleged to be guarantees. In law these amount to promissory notes, and, as they are not stamped as required by the Stamp Act, 1891, cannot be used for any purpose whatever. In these transactions Kischner and the plaintiff were in fact partners. Therefore the plaintiff is equally liable to the defendants for the sum due by Kischner to them. If the

plaintiff is a partner of Kischner he is liable to put us in funds to meet any liability there may be on the documents. If it is held that these letters constitute a guarantee of a debt by Kischner to the plaintiff they do not amount to a sufficient memorandum within the Statute of Frauds. Necessary terms cannot be incorporated in a document merely by cross reference numbers.

Hogg : These documents are not promissory notes. Even without them I am entitled to succeed. Starting with an oral agreement in 1935 there has been a long series of completed transactions from which it is possible to imply a tripartite arrangement which binds the defendants. The plaintiff was in effect advancing the money to Kischner. The letters relied on were not intended by the parties to be promissory notes and intention is an important element in deciding their nature : *Yeo v. Dawe* (1). Each document was only part of a contract containing other stipulations. An unconditional promise to pay which is incorporated with other matters is not a note. By the test of the Bills of Exchange Act alone, or in conjunction with that of the Stamp Acts, these are not promissory notes. The cross reference on the documents introduces various conditions beyond the bare promise to pay a definite sum. Further, the sums mentioned were not payable to a specific person because of the provision for the alternative payment into the plaintiff's special banking account. There is no guarantee here, and the defendants being primarily liable no memorandum under the Statute of Frauds is necessary. That is also the case if, on the true construction of the arrangement between the parties, there is a joint and several liability to the plaintiff. [Counsel referred to *Mortgage Insurance Corpn. v. Inland Revenue Comrs.* (2) and to *ALPE ON STAMP DUTIES*, 22nd Edn., p. 88.]

DU PARCQ, L.J. : The plaintiff in this case came to England a few years ago with a small capital—namely, what was left to him, I gather, of a much larger fortune. He had about £5,000, and he met a man named Kischner, who, like himself, was a foreigner, being a German. The plaintiff, being a business man, knew that it would be dangerous to trust too much to anybody without very satisfactory references, and, as a result of what he knew, he would not be disposed to trust too much to Kischner. However, he was quite ready to advance some of his money to Kischner if it was properly secured, and on Mar. 7, 1935, an agreement was written out and signed by both Wirth and Kischner, Kischner signing first. That agreement was in the German language, and I have a translation of it before me. I think that, in looking at a translation, one must be a little careful not to give necessarily to the translation the full meaning to a precise word in a document which is to be construed by English law, when one finds that that word is a translation of a German word, but, subject to that, I have no doubt that it is a strictly accurate translation. I do not propose to read that letter, but what it comes to is,

putting it very shortly, that Wirth promised that he would open an account at Barclays Bank. That account was to be entirely under the control of Wirth, and Wirth was to advance money from it to Kischner at Kischner's request, Kischner undertaking to use the money for financing his overseas transactions in the export and import business he carried on.

A As to the repayments of the amounts, Kischner said that he would provide what was called a guarantee by a credit-worthy forwarding agent for the payment of the sums involved, and they were subject to repayment irrevocably, and were to be paid into Barclays Bank or to Wirth. There were terms under which Wirth was to be entitled to withdraw from the

B agreement, and there were terms set out as to what Wirth was to get for what he did. He was to be remunerated by a payment of one-third of the total net profit, but there was to be a minimum rate of $1\frac{1}{2}$ per cent. of the monthly turnover, and 4 per cent. as the minimum for transactions which took up to 2 months.

C That was quite a satisfactory agreement, no doubt, provided that a really credit-worthy forwarding agent could be found to give what he called a guarantee, and I cannot read that as meaning that Kischner would be bound to repay the sum advanced to him. I read it as meaning that he would find a forwarding agent worthy of credit who would promise

D to repay those sums, and one can assume that it was intended that Kischner would put that agent in funds which would ensure the payment of the amount as it fell due. He might put him in funds, of course, beforehand, or he might persuade the shipping agent to give him credit. However, that matter was arranged between Kischner and the forwarding

E agent. Wirth would look primarily to the forwarding agent, and I do not think that this is strictly a guarantee in the sense that the forwarding agent would say, "I will be surety for Kischner." On the contrary, I think that the forwarding agent was to be persuaded to undertake the liability to pay, and, if he did not pay, Kischner would have to pay,

F although it was expected that Kischner would so arrange matters that, when the money was due, on the appropriate date the forwarding agent would pay.

About the same time, there was an interview between Wirth and somebody representing the defendant company. Bardot, managing director

G of the defendant company, said in evidence that he saw the plaintiff on Mar. 8. Kischner brought him, and there was present one, Cooper, who was then shipping clerk to the defendants, but who is now no longer alive. Bardot said that really very little passed at that interview. It was a mere introduction. He says that he was shown no draft letter

H at that time, and I gather from his evidence that the arrangement of the transaction was left rather in the hands of Cooper. I find as a fact, that on or about Mar. 7, 1935, Wirth had a conversation with someone—either Bardot or Cooper—who was certainly acting with the full authority of the defendant company, and that, in the course of that conversation, the representative of the defendant company was shown

the draft agreement, and said to Wirth, in reply to a question as to whether the company was prepared to repay such moneys as were advanced in any event :

Yes. You have it in black and white. It is mentioned in your letter and it is irrevocable.

I am not reading the exact words which Wirth used. He spoke English A well, but not quite grammatically, and his exact words were as follows :

Yes, because you have it in black and white. It is mentioned in your letter irrevocably, and it means you get your money in any case back.

It is no good saying that those words were used, because they were not, B as the conversation was in German, but I am satisfied that words which are correctly represented by those which I have read out were used, and, as I say, if they were used by Bardot, he, as the managing director of the company, had authority. However, if they were said by Cooper, C it amounts to the same thing, because the negotiations in this matter were left by the defendant company in Cooper's hands.

The document in question was one which had been prepared by Kischner and had been seen by the solicitor employed by Wirth (not those who are now advising him). It is in the following terms : D

We confirm herewith that we undertake to 'pay to you irrevocably the sum of [£100 is put in, but it might have been any other figure] in respect of the above reference, on Apr. 30, 1935. . . .

That is a subsequent date, and then some words were written in by the solicitor to whom I have referred, but I think that they add nothing to it, E although they were embodied in the document.

The arrangements between Kischner and the defendant company are set out in another letter of Mar. 8, and one may be inclined to think that probably Mar. 8 was a day later than the day of the interview between the plaintiff and the defendants, but nothing really turns on F the precise date, and what was to happen is plain enough. I am not going to read that letter. Wirth was quite satisfied, providing he knew that what he paid over would be repaid by the defendants, and he had their assurance that they would repay him. The defendants quite understood, as Bardot put it, that Wirth would give the money to Kischner G on the strength of the letter or document signed by the defendants. Bardot says that he got all his information about the way the account was going to be run from Cooper, and he said that it was set out in the letter of Mar. 8, to which I am referring. The money was to be advanced H after one of these letters, as I will call it, to use a neutral word, had been signed by the defendants and handed to the plaintiff, and the plaintiff would then advance his money and Kischner would presumably make the necessary arrangements with the defendants, and the defendants would pay. So it went on in what seemed to be quite a satisfactory manner until on no less than 128 occasions money was paid by Wirth and repaid

by the defendants. Then came a time when it seems that Kischner no longer made satisfactory arrangements. The defendants took up this attitude: "Well, we did promise to pay you. We did give an irrevocable promise to pay, but that was because we thought that Kischner would pay us, and, now we find that he has dishonoured his cheque, we are not going to pay you." That, I have no doubt, came, as it obviously did, as a very great shock to Wirth, because he thought that he had protected himself by getting terms which seemed to him, and might seem to people with a greater knowledge of the English language than he had, to be a most unequivocal and categorical promise that, whatever Kischner might do, the defendants would pay him.

I need hardly say that it is not the slightest use for the defendants to put forward as a defence the allegation that they were only to pay if Kischner paid them. Any such suggestion would be, as it seems to me, quite nonsensical, in view of the arrangement between the parties, and, if that were all, it would be very simple to say that my judgment must be for the plaintiff. However, it is not all, because, although any layman, whether a foreigner or an Englishman, would probably think that the defendants ought to pay in this case, the money being owing, the defendants quite rightly took legal advice, and those who advised them looked to see, as they were bound to do, whether there was any defence available to the defendants. As a result, various defences have been pleaded, with which I must deal and with which I will deal shortly. I am able to deal with them shortly because of the clear and concise way in which they have been argued before me.

It is said that the plaintiff entered into a transaction with Kischner which was in fact a partnership, and that he was a partner, and that, if he was a partner, that means that he must suffer the default of Kischner, and cannot make any claim against the defendants here. I am quite satisfied that he was not a partner. It is quite true that he was to be remunerated for the loans he made to Kischner by getting a share of the profits, but it has long been well settled law, and was so before the Partnership Act, 1890, that the mere fact that a lender is remunerated by interest on his money, which varies with the profit, so that he gets a share of the profits, does not of itself make him a partner. Here it would be quite untrue to say that one penny of the plaintiff's money was invested in Kischner's business. Some attempt was made to suggest that they were very closely in league with one another (i) because, when Kischner left some premises of which he was tenant, Wirth took them over and went and carried on business there, (ii) because, whereas Kischner carried on an export and import business, so did Wirth, although indeed they were quite separate businesses, and I have no evidence that they even overlapped, and (iii) because their letter-heading was rather similar, only because, as far as I can see, they used the same type. None of these reasons is at all adequate to justify my holding that there was the slightest resemblance to a partnership in the transactions in which they were

engaged. I think, looking at the agreement between them, that it was plainly a mere loan, and I say that Wirth was not risking his capital in Kischner's business at all, and there was not a contract in writing signed by the parties thereto to satisfy the Partnership Act, 1890, s. 2 (3) (*d*). I may add that no question at all arises as to any holding out as a partner. It is not suggested that Wirth has ever held himself out as being a partner, **A** and it is quite plain, I think, that nobody concerned in the case thought he was a partner until that idea occurred to someone with legal knowledge who was advising the defendants.

The next point is this. The defendants say that these documents were promissory notes, and that a promissory note must be stamped when **B** it is made, and it is too late to stamp them now. Wirth says that he raised the question of the stamping of these documents, and was told by Bardot that they need not be stamped. I am not at all satisfied that he was so told. I think that he was told by somebody at the defendants' office, but I am not at all prepared to find that it was Bardot. It may have **C** been Cooper. I think that it was said in all honesty, that it might not have occurred to the man speaking to Wirth that it might be said to be an agreement requiring a stamp. I am quite sure that it never entered the head of anybody in the defendants' office that these documents were promissory notes. It may be possible to say that, strictly and technically, **D** they did not issue these, if they were notes, though I should think that they might be in a very dangerous position, because, if they did not issue them, they gave them to Kischner in order that, acting on their behalf, he should hand them to Wirth. I am quite sure, however, that they would not knowingly have given documents which they believed **E** to be promissory notes on ordinary paper without stamps, and I am quite certain that, if they said that they did not need to be stamped, it would be wrong to say that they were acting fraudulently because they knew very well that they were promissory notes. There is no fraud in this case at all. A man may think that another man ought to honour his **F** obligation, and may apply one or more epithets to his character for not doing so, but, as far as the law goes, one cannot say that a man has carried on a fraud if he does not pay his debts.

Having set that aside, I have to consider, as a matter of law, whether or not those documents are promissory notes which require to be stamped **G** as such. Before proceeding with that, however, a preliminary question arises with which I must deal. Counsel for the plaintiff says that I really need not trouble about that, because he is entitled to succeed even if I do not look at the documents at all, on the general principle that, if a man promises to carry out a contract or pay money, and fails to fulfil his **H** promise, one may have in one's pocket a document which ought to be stamped as a promissory note, which would be direct evidence of the promise, but one need not produce it. That is true, of course, but I think that counsel for the plaintiff is in some difficulty about that in this case, although the general principle is clear enough. The trouble I feel

about it is that what the defendants really agreed to do in this case was to give a document, and to pay according to the terms of that document, and, until they gave the document, they were under no liability, in my opinion.

A The Stamp Act, 1891, provides that a promissory note must be stamped according to the rate prescribed in the schedule, and then by sect. 38 (1) it imposes a penalty on anyone :

. . . who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped. . . .

B Then it says that the unstamped promissory note is not to be available for any purpose whatever. There is a definition clause in the Stamp Act, 1891, although we all know, or think we know, what a promissory note is, and there is a definition clause in the Bills of Exchange Act, 1882, which, I suppose, is explanatory of the common law, and applicable to merchants. However, the Stamp Act, 1891, is by no means allied to
C that, and the legislature is seeking to separate the thing as widely as possible. The Bills of Exchange Act, 1882, s. 83 (1) provides as follows :

A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or
D determinable future time, a sum certain in money. . . .

If one thinks what that means literally, one begins to see what difficulties are created by this legislation. The Stamp Act, 1891, s. 33 (2) provides as follows :

E A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money.

That is to say, a good many documents which are not promissory notes are to be deemed to be promissory notes. A great many documents which
F do not come within the terms of the Bills of Exchange Act, 1882, must be deemed to be promissory notes, and the definition in the Bills of Exchange Act, 1882, are to be included in the term " promissory note " in the Stamp Act, 1891. It is necessary to cut down the meaning of that definition to some extent, as the court has recognised. I have had cited
G to me the decision of the Court of Appeal in *Yeo v. Dawe* (1), and another decision of the Court of Appeal, in which LORD ESHER, M.R., gave another judgment in *Mortgage Insurance Corp'n. v. Inland Revenue Comrs.* (2). I think that it is fair to say that if a document comes within the Bills of Exchange Act, 1882—or, putting it more correctly, if a
H document really is a promissory note—there can be no question that it must be stamped as one, and it then comes within the Stamp Act, 1891. The definition of what is a promissory note is certainly struck at by the Stamp Act, 1891, but, when one gets beyond the region of the definition of what are promissory notes into the region of the definition of what are to be deemed to be promissory notes, one perhaps gets the best guidance

as to what is to be included by what was said by BOWEN, L.J., in the *Mortgage Insurance Corp'n's* case (2), at p. 358 :

... they are meant to include documents the contents of which consist substantially of a promise to pay a definite sum of money, and of nothing else.

I think that one might say that, if one has what is really an agreement, A
or part of an agreement, set out in writing, then it is not necessary, at any rate, to include it for the purpose of the Stamp Act, 1891, in the term "promissory note." I think that I ought first to ask myself whether or not these documents are promissory notes so far as the common law meaning or definition in the Bills of Exchange Act, 1882, is concerned, B
and then whether or not, if they are not, the Stamp Act, 1891, includes them, and I have come to the conclusion that I ought not to hold that these are promissory notes. I think that it is right to say, in judging that question, that one must look at the document as it stands. Supposing that somebody had attempted to deal with these promissory notes, or, C
to put it another way, supposing that they were produced to a judge who had not yet been told of the surrounding circumstances, and it was for him to adjudicate whether or not they were promissory notes, the first thing to be noticed by the business man, or by the less commercially-minded judge, would be these words on the heading of the document of D
Mar. 9, 1935 :

Reference A.C.3 T.R./W.L.1 S. Kischner, London, W.C.1. We confirm herewith that we undertake to pay irrevocably the sum of £200 to you or into your banking account on May 25, 1935, in respect of the above reference.

He would at once ask : "What do those words mean ? Is this a con- E
firmation of something which the parties have apparently agreed ?" It relates to a man named Kischner, and, if I read to the end of the document, I find that it is in respect of the reference to Kischner that there is an undertaking to pay this sum. That may mean that it is to be paid if Kischner does not pay it, or it may mean that it is to be paid, to put F
the matter in a slightly different way, unless Kischner pays it first. That is to say, Messrs. Weigel Leygonie & Co. and Kischner were all liable to pay, or are both liable to pay. It would depend on there being an account between Kischner and Messrs. Weigel Leygonie & Co., which may be subject to all sorts of stipulations and difficulties, and I cannot G
believe that anyone can take this as an entirely unconditional promise to pay that sum. On the other hand, if I consider the surrounding facts and circumstances, then I know that it was a writing which confirms, as it purports to do, something which had been orally agreed, and that it was part of the working of these transactions that the defendants H
were promising to pay this sum upon payment by Mr. Wirth. In other words, they were saying : "We will repay you."

The document of Mar. 9, 1935, and the other similar documents contain these words : "to you or into your banking account." I do think that, because it contains those words, that is an additional reason for

saying that it is not a promissory note. The Bills of Exchange Act, 1882, s. 83 (1), defines a promissory note as follows :

A promissory note is an unconditional promise in writing made by one person to another . . . engaging to pay . . . a sum . . . in money, to, or to the order of, a specified person or to bearer.

- A I doubt whether a promise to pay to a man or to somebody else, who may be his creditor or debtor, is a promissory note. I think that the terms show that the defendants had the option whether they paid the money due to Mr. Wirth or into his banking account. It is to be observed that it is not a payment at a particular place or at a bank, and it may be
- B an account on which the customer of the bank is owing money to the bank, and not on which the bank is owing money to the customer, and it may mean that the defendants would carry out their undertaking by paying the money, not to the plaintiff, but to creditors of his. I do not desire to make that my main ground for my decision on that point,
- C although it gives a certain amount of assistance, but I think that counsel for the plaintiff was disposed to adopt it as an argument, and I mention it because I think that it may have some importance.

- I do not think that there is any case entirely on all fours with this. It is plain, of course, that, where one has a case like *Guaranty Trust Co. of New York v. Hannay & Co.* (3), and one has words such as occur there—namely, “charge the sum to account of [a named person],” that is to say, the particular account—it does not prevent what on the face of it looks like a bill of exchange from being a bill of exchange. That does not seem to me to touch this case at all. Here is a document in the form of a letter
- E on the face of it referring to several provisions not dealt with in the document, and I say that, when one knows something of the surrounding circumstances, that knowledge seems to me to make it difficult, if not impossible, to regard this as a promissory note within the meaning of the Bills of Exchange Act, 1882. I think that I am also justified in
- F saying, and bound to say, that it does not come within the Stamp Act, 1891, because there is clearly more in it than a promise to pay a definite sum of money. There are those words, which would be mysterious to anyone who did not know the full circumstances, which form an important addition to the mere promise to pay a sum of money, and it may be that
- G such a qualification of a promise, for all that a man ignorant of those circumstances would know, would make it of no effect. On the other hand, however, if one does know all the circumstances, I think that one ought to assume that there are other conditions and stipulations imported into this document. I feel sure that these documents do not require
- H to be stamped as promissory notes and that I am entitled to look at them.

That leaves only one more point, which I must deal with shortly. It is said that, if they are not promissory notes, at any rate they are guarantees. Counsel for the plaintiff is quite right in saying, of course, that the Statute of Frauds uses, not the word “guarantee,” but the words “debt, default or miscarriage of another.” As I have indicated already,

it is not at all easy to say that these letters did amount to a promise to answer for the debt, default or miscarriage of another. I think that they were a promise to pay the sum, and, as between the plaintiff and the defendants, the plaintiff was looking to the defendants for the money, and was entitled to do so. I do not think that Kischner was not bound to pay. He could not be called upon to pay, in my view, unless the defendants on May 25, according to this document of Mar. 9, fail to pay. If they did so fail, however, then no doubt he would have been so bound to pay. If he liked, I have no doubt, he could have gone to Wirth before May 25 and paid him, and then the defendants would not have been obliged to pay. That does not mean, however, that they were guaranteeing payment by him, which, indeed, was not contemplated. It was not contemplated that, either before or on May 25, Kischner would pay the plaintiff. What was contemplated was that before May 25 came, or on May 25, every step would be taken by Kischner which would make it right to expect the defendants to pay. That is to say, he was going to enable them to pay. Therefore, I do not think that this can be called a guarantee at all, and I am not satisfied, even if it was a guarantee, that anything is omitted which ought to be in it.

The question was then argued by counsel for the plaintiff that the document of Mar. 9, 1935, and similar documents were not liable to stamp duty and referred to ALPE ON THE LAW OF STAMP DUTIES, 22nd Edn., pp. 58, 59.

DU PARCQ, L.J., held that that document and those similar to it required to be stamped as agreements with a 6d. stamp and the plaintiffs thereupon undertook to procure them to be so stamped and to pay the appropriate penalty.

Judgment for the plaintiff for £2,450 and interest at 4 per cent. on each separate sum from the date on which it became due with costs.

Solicitors: *Herbert Baron & Co.* (for the plaintiff); *Tanner & Worley* (for the defendants).

[*Presented by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

Dictum of LORD ATKIN, at p. 730, applied. DAVIES v. SWAN MOTOR CO., LTD. [1949] 1 All E.R. 620.

CASWELL v. POWELL DUFFRYN ASSOCIATED COLLIERIES LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright, Lord Porter), **May 4, 5, 8, 9, 15, 16, July 25, 1939.**]

Mines—Coal mine—Dangerous machinery—Absolute duty to fence—Machinery only dangerous while moving—Duty on workman to see that fence was in position—Standard of care to be applied to workmen—Impracticability of preventing statutory breach—Coal Mines Act, 1911 (c. 50), ss. 55, 102 (8).

The defendants were the proprietors of a coal mine in which there was a conveyor belt. This was originally totally enclosed, but, in order that some rollers might be cleaned, it was found necessary to make a portion of the fencing removable. The correct method of cleaning was

to have the engine stopped and to scrape one half of each roller with a scraper, and then, having moved the belt slightly by restarting the machinery, to scrape the remainder. A workman was found dead with his head inside the machinery. On the day in question, the machinery had been stopped only in order to allow full trucks to be removed from under the end of the conveyor and empty ones to be substituted :—

HELD : (i) contributory negligence is a defence to an action for breach of statutory duty.

(ii) the defendants had not established any contributory negligence on the part of the deceased workman.

(iii) the absence of a portion of the fencing amounted to a breach of statutory duty on the part of the respondents, which was a substantial cause of the accident.

(iv) the defendants had failed to show that "it was not reasonably practicable to avoid or prevent the breach" within the meaning of s. 102 (8) of the Act.

Per LORD ATKIN : A system which involved work being done at a machine which might be set in motion without any signal to the workman engaged in cleaning it seems to me most defective. Any kind of signal could have been employed which would give the cleaner time to stop cleaning and close the fence.

Per LORD WRIGHT : What is all important is to adapt the standard of what is [contributory] negligence to the facts, and to give due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-occupation in what he is actually doing at the cost perhaps of some inattention to his own safety.

Order of Court of Appeal ([1938] 3 All E.R. 21) *reversed*.

[EDITORIAL NOTE.] In this case the House of Lords has considered fully the action founded on a breach of statutory duty—such a breach usually arising under the Factories Act or the Coal Mines Act. The chief point of interest, however, will be that the House of Lords have now had an opportunity of expressing their views upon the much-discussed dictum of LORD WRIGHT in *Flower v. Ebbw Vale Steel, Iron & Coal Co.* (5), and it is satisfactory to know that LORD WRIGHT was a member of the House that heard this appeal. There was a direct conflict of view between that dictum and the judgment of the High Court of Australia in *Bourke v. Butterfield & Lewis, Ltd.* (2), and the Court of Appeal in England have at times stated the law, if not in such directly conflicting terms, at least in terms which suggested that the dictum required some qualification. The effect of the present decision is to reconcile the English decisions and to reject the view taken by the High Court of Australia. The standard of negligence is, in all cases, not an absolute standard, but is dependent upon the attendant circumstances, and in the case of contributory negligence consisting of neglect of one's own personal safety, the court must have regard to the distractions of the plaintiff or deceased at the time of the accident, and to the strain and fatigue of the work which may make a workman give less thought to his personal safety than persons with less trying surroundings and preoccupations. Thus, though there is only one standard of negligence, that standard is subject to qualification in all cases, but more particularly so in the case of a person employed in a factory or a mine.

AS TO DANGEROUS MACHINERY IN MINES, see HALSBURY, Hailsham Edn., Vol. 22, pp. 821-824, para. 1689 ; and FOR CASES, see DIGEST, Vol. 34, pp. 746, 747, Nos. 1211-1213.

AS TO CONTRIBUTORY NEGLIGENCE IN ACTIONS FOR BREACH OF STATUTORY DUTY, see HALSBURY, Hailsham Edn., Vol. 23, p. 686, para. 969 ; and FOR CASES, see DIGEST, Vol. 24, pp. 908-911, Nos. 62-81.]

Cases referred to :

- (1) *Wakelin v. London & South Western Ry. Co.* (1884), [1896] 1 Q.B. 189 *n*; 36 Digest 7, 4; 65 L.J.Q.B. 224 *n*.; 73 L.T. 615 *n*.; *on appeal* (1886), 12 App. Cas. 41.
- (2) *Bourke v. Butterfield & Lewis, Ltd.* (1927), 38 C.L.R. 354; Digest Supp.
- (3) *Radley v. London & North Western Ry. Co.* (1876), 1 App. Cas. 754; 36 Digest 109, 729; 46 L.J.Q.B. 573; 35 L.T. 637. A
- (4) *Butterfield v. Forrester* (1809), 11 East, 60; 36 Digest 112, 745.
- (5) *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132; Digest Supp.; 103 L.J.K.B. 465; 151 L.T. 87; *on appeal*, [1936] A.C. 206.
- (6) *Swadling v. Cooper*, [1931] A.C. 1; Digest Supp.; 100 L.J.K.B. 97; 143 L.T. 732.
- (7) *Caswell v. Worth* (1856), 5 E. & B. 849; 36 Digest 111, 735; 25 L.J.Q.B. 121; 26 L.T.O.S. 216. B
- (8) *Dew v. United British S.S. Co., Ltd.* (1928), 98 L.J.K.B. 88; Digest Supp.; 139 L.T. 628.
- (9) *Senior v. Ward* (1859), 1 E. & E. 385; 36 Digest 137, 910; 28 L.J.Q.B. 139; 32 L.T.O.S. 252.
- (10) *Pringle v. Grosvenor* (1894), 21 R. (Ct. of Sess.) 532; 24 Digest 911, case *g*. C
- (11) *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan*, [1934] A.C. 1; Digest Supp.; 102 L.J.P.C. 123; 149 L.T. 526; 26 B.W.C.C. 463.
- (12) *Davies v. Mann* (1842), 10 M. & W. 546; 36 Digest 113, 751; 12 L.J.Ex. 10.
- (13) *Britton v. Great Western Cotton Co.* (1872), L.R. 7 Exch. 130; 36 Digest 98, 651; 41 L.J. Ex. 99; 27 L.T. 125.
- (14) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 24 Digest 911, 80; 67 L.J.Q.B. 862; 79 L.T. 284. D
- (15) *Craze v. Meyer-Dumore Bottlers' Equipment Co., Ltd.*, [1936] 2 All E.R. 1150; Digest Supp.
- (16) *Lewis v. Denyé*, [1939] 1 All E.R. 310; Digest Supp.
- (17) *Coltress Iron Co., Ltd. v. Sharp*, [1938] A.C. 90; [1937] 3 All E.R. 593; 106 L.J.P.C. 142; 157 L.T. 394. E

APPEAL from an order of the Court of Appeal (GREER and MACKINNON, L.J.J., SLESSER, L.J., dissenting) dated May 12, 1938 and reported [1938] 3 All E.R. 21, affirming, by a majority, an order of HUMPHREYS, J., dated Dec. 14, 1937, whereby judgment was directed to be entered for the defendants, the present respondents. The facts and the arguments are set out in the opinion of LORD ATKIN. F

D. P. Maxwell Fyfe, K.C., and *Joshua D. Davies, K.C.*, for the appellant.

Rt. Hon. Sir William Jowitt, K.C., *Trevor Hunter, K.C.*, and *Godfrey Parsons* for the respondents. G

LORD ATKIN : My Lords, this is an appeal from a decision of the Court of Appeal who dismissed an appeal from a judgment of HUMPHREYS, J., in favour of the defendants at the trial at the Cardiff Assizes in Dec., 1927. The appellant, the plaintiff in the action, is the mother of a young man, Arthur Caswell, who was killed while working underground at the Pandy Pit of the Naval Colliery, Penygraig, belonging to the respondents. She sues under the Fatal Accidents Acts, and also as administratrix of his estate to recover damages on the ground that his death was caused by a breach of a statutory duty imposed upon the H

defendants by the Coal Mines Act, 1911, s. 55. That section prescribes that :

Every fly-wheel and all exposed and dangerous parts of the machinery used in or about the mine shall be kept securely fenced.

- A Caswell had been employed at the pit since he was 15. At the time of his death he was 22. Five days before his death he had been given the work at which he was killed. The facts of the case as they emerged in this House are as follows. They were not fully ascertained in the courts below, a circumstance which is especially unfortunate in view of the fact that the inquiry was into the conditions attending the death of a work-
- B man. The parties, however, gave every assistance to place the full facts before this House. It appears that, about 15 months before the date of the occurrence in question, the defendants had installed a system of conveyor belts which transported the coal when gotten from the face to trams, in which by a rope haulage system it was eventually conveyed
- C to the pit bottom. The conveyor belt, which directly led the coal to the trams, is the one with which this case is concerned : it was in fact fed by two other conveyor belts communicating with the face. The belt, which was rather less than 3 ft. wide, passed along the roadway, being supported on trestles with rollers until it reached the chute, down which
- D it deposited its load into trams. The trams were made up in "journeys" of 15 trams, and unloaded were drawn in turn beneath the chute which had a device to check the discharge during the interval between one tram and the next. The belt itself during the loading went on revolving. As the belt discharged its load it passed round a roller or pulley and
- E proceeded on its return journey immediately below the full portion. It was, of course, reversed so that the surface which had been uppermost and in contact with the coal was now undermost. The belt was driven by a compressed air turbine actuating three drums, pulleys or rollers, as they have been called in the case, each of 12 ins. diameter and about
- F 3 ft. in width. This engine was at the side of the roadway : the upper belt with the coal passed over it : the lower belt passed into it at the top of the engine and passing over the three rollers received its motive force. It passed into the machine at the height of about 6 ft. Originally the whole structure was enclosed, but after a year's working it was found necessary
- G to have facilities for access to the top roller, the point met by the belt, for the purpose of cleaning. It was found that when the coal was damp, portions of coal and slimy stuff adhering to the surface of the belt would cake into hard obstructions on the surface of the roller, and cause the belt to run out of alignment. For this purpose the upper portion of the
- H plate on the approach side of the engine was made detachable. The machine remained enclosed up to the height of about 4 ft. 5 in. and the remaining portion about 1 ft. 6 in. was loose, and was fitted into a slot so as to be removed and replaced without much difficulty. It was about 3 ft. wide and to remove or replace it the operator had to stand in front : apparently it could not be placed in the slot from the side. From the line

of the plate to the nearest portion of the roller was a distance of 2 ft. To the bite of the roller and the belt was 2 ft. 9 ins. Part of Caswell's duty was to clean this upper roller when necessary. For this purpose he was provided with two iron scrapers which were produced at the hearing. They were heavy implements about 4 ft. in length, shaped like a hoe, the scraper end being about 6 ins. in width; at the other end there was a rough A handle in the shape of a ring. They were sufficiently heavy to make it improbable that a man would seek to handle them with only one hand. He could not, of course, clean the roller without removing the movable plate. The machine was about 12 yds. away from the chute end of the belt. It was put in motion and off again, not at the machine itself, but B by a lever at this chute, which was in charge of an assistant foreman, at this time Christopher Williams. The remaining work of Caswell was to bale the water that accumulated at this part of the roadway. The tramway was laid on sleepers laid transversely in the usual way: but sleepers were put down by the side of the tram lines and parallel with C them to afford a footing and intervals were left between these sleepers to afford a sump or sumps from which the water could be withdrawn. For this purpose Caswell was provided with a bucket with which he baled the water into a cask on one of the trams at the beginning of the first shift: and afterwards into any empty tram that might be D standing by. As far as his duties of cleaning the roller were concerned, it was proved that he had received instruction that he was not to clean while the machinery was in motion and that he was to replace the plate when he had finished. On the day in question four journeys had been completed. The men were engaged in loading the fifth journey: they E had loaded three out of the fifteen trams; the fourth was under the chute when the machinery stopped. They went to the machine, and there they found the dead body of the unfortunate Caswell; his right hand was outstretched, caught between the belt and the roller and his head was drawn up against the roller: his neck was broken. The body was drawn F up so that his feet were two ft. from the ground, and beneath his feet and lying in water beneath his feet was one of the iron scrapers. The movable plate was standing up against the fixed plate below.

It is in these circumstances that this action was brought. It seems to me quite clear that this machinery when unfenced and in motion was G dangerous: that it was not fenced at the time and therefore was not left fenced: and that the omission to keep the machine fenced "materially contributed to the death complained of," to use the text of LORD WATSON in *Wakelin v. London & South Western Ry. Co.* (1). It would appear, therefore, that the defendants would be liable unless they proved H (i) under the terms of the Coal Mines Act, 1911, s. 108 (8) that it was not reasonably practicable to avoid or prevent the breach, or (ii) that a contributory cause of death was the negligence of the deceased workman. It will be convenient to deal with the second defence first, for the principal discussion in the case was on that topic.

There were four ways in which it was possible for Caswell to have cleaned the roller. The first, the forbidden way, was to scrape the dirt off the roller while it was in motion, *i.e.*, while the conveyor belt was actually discharging into the trams. This was, as the assistant manager proved, forbidden. The plaintiff called three trustworthily trade union officials who deposed to interviews with the manager in which he had said that this was the only way in which the roller could be cleaned. The manager deposed that he was misunderstood. He was referring to another method which is later to be described. The judge who saw the witness accepted the manager's explanation, and we cannot differ from his finding. The plaintiff also called a witness, Howells, who was at the time of the accident working at the mine. He not only spoke of this practice but said that no scrapers were provided—only a long rod : that the movable plate was always absent, and that cleaning was constantly done by hand. The trial judge entirely disbelieved this witness with good reason. The defendants' witnesses made it plain that the dirt on the roller caked into hard excrescences which could not be flicked off by the hand but had to be hit off with the scraper. There is no evidence that Caswell ever cleaned the roller while in motion : and it seems reasonably clear that, at any rate at the time of this accident, he was not doing so. It would, according to the defendants' own evidence, be very unlikely that he would be doing such a futile thing as to use his hand alone : and if he were using the scraper (i) his hand would not have got into a position to be caught, (ii) the scraper would not have been found in the position where it was, lying at his feet. The second method was to clean the roller while the trams were being loaded. It might happen that the belt would be out of alignment or even stop because of obstruction on the roller. In these circumstances, Williams, of his own accord or on a hail from the cleaner, would stop the engine. The roller would be cleaned and a half-turn given so as to expose and clean the whole, and when finished, on another shout from the cleaner, the conveyor would be started again. This involved, of course, stopping the conveyance of coal throughout the entire part of the mine served by the conveyors : and seems a course which a boy of 22 would be disinclined to take on his own initiative. On the day in question it had not been adopted, for the machinery had never stopped except during the changing of the journeys. The third method was that which the manager said gave rise to the misunderstanding at the interviews. While the machinery was stopped during the changing of the "journeys," a period of about 15 minutes, the exposed portion of the roller would be cleaned by the scraper : the cleaner would then call for another half-turn of the machine and the other half of the roller would so be exposed and cleaned. This would have been a simple method : it seems to have been assumed at the trial that it was the normal method : and I think it clear that the trial judge so thought. But on ascertaining the facts for this House it was made clear that this was not how it was done. The system of work-

ing required Christopher Williams, who was in charge of the lever operating the machine to leave the spot at the chute where the lever was and attend the outgoing journey up to the spot about 80 yards away where there were double lines of tramway, detach one end of the haulage rope from the outgoing journey, attach it to the incoming journey of empty trams and accompany the latter to the chute. During this time, A therefore, there was no one available to give the necessary half-turn : and this reasonably safe and effective system was not adopted. The fourth method was to wait until the machinery had stopped for the change of journeys and then clean the half of the roller which happened to be exposed, waiting to clean the remainder of the roller when it came B into view at a subsequent stop. This was somewhat fortuitous for the cleaned portion might come up again at the next stop. I think, however, that it is almost demonstrable that this was the method adopted by Caswell on this morning. The first method of cleaning in motion is, I think, C negatived by the evidence. The second and third were not used that morning as is shown by Williams' evidence as to the engine. As to the fourth, I think there must have been some occasion to clean. The manager said the roller required cleaning twice an hour : the movable plate had been taken off : and one scraper at least had been handled by Caswell, for it was lying at his feet and not at the side where it had been D left by the night overman at the end of the night shift.

Is there, then, any evidence that Caswell had been guilty of negligence contributing to the accident ? If there is, it must be in the fact that he had not replaced the movable plate. That he was authorised, indeed bound, to remove it from its closed position is manifest. The machine E could not be cleaned unless he did. The facts seem to show that he had been using the scraper to clean the roller while at rest. Is it proved that he was negligent in not replacing the plate ? Now it is quite plain that there was no system of signalling or calling to the cleaner before starting the engine for the new journey. It was therefore perfectly possible for F the machinery to start while the cleaner was at work at the roller. What was he then to do ? He would cease cleaning and put down his scraper. The plate could only be replaced while facing the moving machinery : and I cannot think that it was negligent on his part not to incur this particular risk once the machinery started. The plate would have to be lifted to G within about two or three inches at the most from the moving belt. I think it would be fair to conclude not only that it was not negligent to omit to replace the plate in the circumstances but that caution required that it should not be replaced. But if there was no negligence proved in not replacing the plate what other careless act of omission or commission H is proved ? Clearly none. What precisely happened is not known. It is perfectly possible, as pleaded in the alternative by the defendants themselves, that the unfortunate man slipped and stumbled with his arm through the opening and thereby was caught. Four or five minutes probably elapsed from the time the machinery started. I cannot see

that he was doing anything careless in standing near the orifice during that period or perhaps taking the preliminary steps to resume his other job of baling. I should add that I do not think he is shown to be careless by not noticing either from the lapse of time or from the passing of the journey of empty trams that the stop interval was coming to an end.

- A If closely engaged in cleaning he might well be regardless of time. I come to the conclusion, therefore, that the defendants have not established any contributory negligence on the part of the deceased man. I propose, however, later to say something on the interesting question whether any and what contributory negligence affords a defence to such
- B an action as this.

I will, however, first discuss the other defence I mentioned under Sect. 108 (8) of the Act. As to this it is plain that the defendants were entitled to entrust the cleaner with the duty of removing this guard, for the roller could not otherwise be cleaned. It was their duty, however,

- C to see that the guard was replaced : and though primarily that had to be done by the cleaner, yet it was their duty to see that such a system of working was adopted as made the performance of that duty practicable with reasonable safety. A system which involved work being done at a machine which might be set in motion without any signal to the work-
- D man engaged in cleaning it seems to me most defective. Any kind of signal could have been employed which would give the cleaner time to stop cleaning and close the fence. The defendants entirely fail, in my judgment, to show that "it was not reasonably practicable to avoid or prevent the breach."

- E Though I have come to the conclusion that in this case the defendants failed to prove negligence on the part of the deceased workman, I feel bound to say something on the topic, which was much discussed in argument, whether contributory negligence is ever a defence to an action based upon a breach of a statutory duty, or, more narrowly, based upon a
- F breach of a statutory duty to protect workmen and others imposed by such Acts as the Factory Acts, Mining Acts, etc. Authority for the proposition that contributory negligence in the ordinary sense is not a defence to such an action is to be found in the judgment of the High Court of Australia in *Bourke v. Butterfield & Lewis, Ltd.* (2). The argu-
- G ment is that safely obligations are placed upon employers for the purpose of protecting not only workmen who are careful but also those who are careless : and that the object of the legislature is defeated if the right to sue for injuries caused by the breach of the safety regulations is denied to the careless workman for whose benefit amongst others the legislation
- H was specially enacted. I venture to think that this attractive theory does not give sufficient weight to the true cause of action in such cases. The statute does not in terms create a statutory cause of action. It does not, for instance, make the employer an insurer. The person who is injured, as in all cases where damage is the gist of the action, must show not only a breach of duty but that his hurt was due to the breach. If his damage

is due entirely to his own wilful act no cause of action arises as, for instance, if out of bravado he puts his hand into moving machinery or attempts to leap over an unguarded cavity. The injury has not been caused by the defendants' omission but by the plaintiff's own act. The injury may, however, be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances. In that case the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default. On the other hand, if the plaintiff were negligent, but his negligence was not a cause operating to produce the damage, there would be no defence. I find it impossible to divorce any theory of contributory negligence from the concept of causation. It is negligence which "contributes to cause" the injury, a phrase which I take from the opinion of LORD PENZANCE in *Radley v. London & North Western Ry. Co.* (3). And whether you ask whose negligence was responsible for the injury, or from whose negligence did the injury result, or adopt any other phrase you please, you must in the ultimate analysis be asking who "caused" the injury: and you must not be deterred because the word "cause" has in philosophy given rise to embarrassments which in this connection should not affect the judge. Nor is this question of contributory negligence one that arises only in cases where the defendant is charged with negligence as though the negligences belong to the same pack and one trumps the other. In the leading case of *Butterfield v. Forrester* (4) the action was for obstructing the highway whereby the plaintiff was injured. No negligence appears to have been alleged, and the action appears to have been a simple action for a nuisance on the highway. The authority cited in argument from BULLER'S *NISI PRIUS*, 26a so describes the action. I quote from the 7th Edn. of 1817:

So if a man lay logs of wood cross a highway, though a person may with care ride safely by, yet if by means thereof my horse stumble and fling me, I may bring an action; for wherever a man suffers a particular injury by a nuisance, he may maintain an action. . .

Yet it is in such an action that LORD ELLENBOROUGH laid down the classic rule, "One person being in fault will not dispense with another's using ordinary care for himself." And the omission by the plaintiff to use ordinary care may be the sole cause of the injury as was held in *Butterfield's* case (4), or have contributed to cause the injury as in the numerous cases which appear in the books. It may be said finally that if contributory negligence is not regarded from the point of view of causation it is difficult to see how damage comes to be divided under the Admiralty rule which is adopted in ordinary cases of injury in other systems of jurisprudence, and which persons of authority think should be adopted in ours.

I cannot therefore accept the view that the action for injuries caused

by breach of statutory duty differs from an action for injuries caused by any other wrong. I think that the defendant will succeed if he proves that the injury was caused solely or in part by the omission of the plaintiff to take the ordinary care that would be expected of him in the circumstances.

- A But having come to that conclusion I am of opinion that the care to be expected of the plaintiff in the circumstances will vary with the circumstances ; and that a different degree of care may well be expected from a workman in a factory or a mine from that which might be taken by an ordinary man not exposed continually to the noise, strain and manifold risks of factory or mine. I agree with the statement of
 B LAWRENCE, J., in *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (5) at p. 140, cited by my noble and learned friend LORD WRIGHT in 1936 A.C., at p. 214 :

- C I think, of course, that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence.

- This seems to me a sensible practical saying, and one which will afford
 D all the protection which is necessary to the workman. I cannot go further with the High Court of Australia and limit contributory negligence in this kind of case to wilful or serious misconduct. I have already said that I see no ground for imputing any negligence to the deceased man in the present case judged by any standard : but in any case judging the
 E question of fact by the standard suggested by LAWRENCE, J., I think that the defence of contributory negligence inevitably failed. This appeal must be allowed : and as the amount of damages has not been determined there must be a new trial on the question of damages only. Unless the parties otherwise agree the case will be reheard at the next Assizes for the county of Glamorgan. The appellants must have the
 F costs so far incurred here and in the courts below.

My lords, I am requested by my noble and learned friend, LORD THANKERTON, to say that he agrees with the opinion which I have read.

- G LORD MACMILLAN : My Lords, this is an action of damages by the mother of a mine worker who met his death while at work in a colliery belonging to the respondents. Her case is that her son's death was due to the respondents' breach of their duty, under the Coal Mines Act, 1911, s. 55, to keep securely fenced the exposed and dangerous machinery in
 H the mine which the deceased was employed to tend.

It has to be borne in mind that the Coal Mines Act, 1911, while largely concerned with prescribing precautions to be taken for ensuring the safety of workmen in mines, does not confer any right of civil action for breach of its provisions. The statute enforces its requirements by imposing penalties of fine or imprisonment for their infringement. So

far as I am aware, the only reference in the Act to civil proceedings is to be found in sect. 102 (8), which enacts that

The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach.

Consequently a civil action for damages in respect of an accident to a miner alleged to be due to a breach of statutory duty on the part of his employers must, in my opinion, be based upon negligence, and be subject to the general principles of law which govern actions of damages for negligence. Indeed, under the Workmen's Compensation Act, 1925, s. 29 (1), it is not permissible to take proceedings otherwise than under that Act in respect of an accident to a workman unless the injury is alleged to have been due to the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible.

In such an action as that which is now before your Lordships it is therefore incumbent on the plaintiff to prove that the defendant owed a duty to the deceased workman, that the defendant failed to fulfil that duty, and that the death of the workman was attributable to that failure of duty on the part of his employers. The Coal Mines Act, 1911, does, however, materially assist the plaintiff in such a case. It absolves him from proving the existence and the nature of the employers' duty, for it imposes and defines the duty. If the plaintiff can show that there has been a breach of the statute he has established the existence of negligence. It remains for him only to prove that the accident was due to that negligence. On this latter issue the defendant is entitled to avail himself of the recognised pleas open to the defendant in an action based on negligence. He can either (i) maintain that the plaintiff's evidence has failed to show that the defendant's negligence caused the accident or (ii) prove affirmatively that the accident was caused wholly or in part by the plaintiff's own negligence.

Now in the present case the appellant starts with the advantage that the duty which the respondents owed to her deceased son is defined and prescribed by the statute and that the respondents admit that they were in breach of that duty. The only remaining questions are whether it has been sufficiently shown that the deceased's death was due to that breach of duty on the part of the respondents, and whether the respondents have proved that the deceased by his own negligence caused or materially contributed to the accident which befell him.

The mere fact that at the time of an accident to a miner his employers can be shown to have been in breach of a statutory duty is clearly not enough in itself to impose liability on the employers. It must be shown that the accident was causally associated with the breach of statutory duty.

I do not propose to rehearse the facts of the present accident. They have been fully set out by my noble and learned friend LORD ATKIN,

with whose exposition both of the facts and of the law applicable thereto I find myself in entire agreement. While the precise manner in which the deceased met his death remains unascertained because there was no eye-witness of the accident, it has been proved to demonstration that if it had not been for the respondents' breach of their statutory duty the

A accident would not have happened. The respondents' breach of duty was clearly a cause of the accident. Having thus causally connected the accident with the respondents' breach of duty, I do not think that it was incumbent on the appellant to eliminate and disprove all conjectural possibilities that the deceased may himself have been in some way careless

B of his own safety. From the facts established by the appellant it may be reasonably inferred that the respondents' breach of duty was a substantial cause of the accident. It is then for the respondents to show that the deceased himself was by his own negligence wholly or partly responsible for the accident. The respondents have been at pains to suggest grounds

C for attributing possible negligence to the deceased. These grounds have been largely conjectural. I agree with all your Lordships that the respondents have failed, as matter of evidence, to establish any of them. They have also failed to bring themselves within the statutory defence provided by the Coal Mines Act, 1911, s. 102 (8). That being so, the

D appellant is in my opinion entitled to succeed and I concur in the motion that the appeal be allowed.

LORD WRIGHT : My Lords, the precise manner in which the accident occurred cannot be ascertained as the unfortunate young man was alone

E when he was killed. The court therefore is left to inference or circumstantial evidence. Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical

F certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

In the present case there are, I think, certain known facts which

G enable some inferences to be drawn. Beyond that point the method of inference stops and what is suggested is conjecture. It is not necessary to recapitulate the facts which have been fully stated by my noble and learned friend, LORD ATKIN. I shall be content to state what I regard as proved by the method of inference, and reject what appears to me

H to be matter merely of conjecture. I take it as proved by inference that the deceased had taken off the movable plate before the accident and had not replaced it. The evidence of the man whom he relieved at the job is clear that the plate was on when he left, and there was no one else at the place between 7 a.m., when Caswell's shift began and the time of the accident, say 9.45 a.m. It is also matter of inference that the plate

was off before the accident for about six minutes after the belt began to move to load the new journey, because there is nothing to justify the inference that Caswell took off the plate after the belt began to move, and that a certain number of trams must have passed along the lines for a few minutes before the belt began to move at the side of the place where Caswell stood. These facts, I think, can be properly inferred. **A**

But there is nothing to enable the court to infer what Caswell was doing at the time of the accident. I accept the evidence that Caswell had been told not to put his hand into the space opened by removal of the plate in order to clean the roller; indeed, it is clear that the deposit was so hard caked as to make that operation not only dangerous but useless. I **B**

accept the evidence that the belt had not been stopped for cleaning operations since Caswell's shift began. I gather from the evidence that a proper, perhaps the best, opportunity to clean was when the machine was stopped during the 10 minutes or so while a journey of trams was being changed. In order to clean the roller the plate must have been **C**

removed. It is a reasonable, though perhaps not a certain, inference from the evidence that Caswell had thought it necessary to clean the roller when the machine stopped and had removed the plate to do so, but had been caught unawares with the plate off when Christopher Williams restarted the machine. I find it impossible to infer what Caswell **D**

then did. His duty was to clean the roller when necessary and to bale the water which collected in the sumps close to the machine. I infer from the position of the movable plate that at the time of the accident he was not trying to replace it. That, it seems, would have been a dangerous operation. The position in which one of the scrapers was found justifies **E**

the inference that he had been using it that morning, but not that he was using it at the time of the accident. The suggestion that he may have slipped while about to apply the scraper to the moving roller, is perhaps no more than a possibility. The suggestion that he may have been **F**

reaching up to clear the belt of coal which threatened to obstruct it, and that his hand had been drawn into the bite is a mere conjecture, with, so far as I can see, no objective fact to give it plausibility. There is no evidence where the bucket or baler, which it is assumed there must have been for him to bale with, was found. Hence it is not safe to **G**

infer that he had slipped while baling, though that is perhaps more probable than any other reconstruction. That he did slip, for whatever reason, seems to be almost the only possible inference from the evidence as a whole.

What is clear is that the absence of the movable plate, rendering the machine unfenced, was, if not the sole cause, at least a cause and a substantial cause, to adopt in this context what was called in *Swadling v. Cooper* (6), at p. 11, the crucial question in a road accident case, "whose negligence was it that substantially caused the injury?" Indeed it seems to me that the absence of the fence can properly be described as the dominant, effective, or common sense cause. It is in my opinion **H**

clear that if at the material time the machine had been fenced, the man could not have been killed, or even come to any serious harm. His death was caused by the absence of fencing. Merely to slip, unless in proximity to the unfenced machine, would have caused at most a bruising or by very bad luck perhaps a broken bone. The actual death was caused

- A because the man was drawn into the open space, that is, it was caused by the want of fencing. That there was a breach of the Coal Mines Act, 1911, s. 55, is, I think, clear. It is true that the machine was not dangerous when stationary. The danger came when it was working. The mischief came because, owing to the defective system of working, B the man who started the machine was 12 yds. from the machine, and started it in practice, as he did in this case, without knowing whether or not the guard was on and without any warning to the man at the turbine. Hence the respondents could not rely on sect. 102 (8) of the Act because they could not show that it was not reasonably practicable C to avoid or prevent the breach. That could have been done if the system of working had provided that the machine should not be started unless the guard was on. I think that the breach of sect. 55 caused, or at least substantially caused, the death.

- It follows that the onus is shifted on to the respondents to prove that D the deceased man was guilty of some misconduct or negligence which would have the effect of excluding his claim if the injury had not been fatal, and which would therefore exclude the claim in this action, because the appellant has not a higher right than the man would have had if not killed. I think for this purpose in this connection the same rule E applies as that stated by LORD WATSON in *Wakelin v. London & South Western Railway Co.* (1), at p. 47, applicable to an ordinary plea of contributory negligence.

- If the defendant's negligence or breach of duty is established as causing the death, the onus is on the defendant to establish that the plaintiff's F contributory negligence was a substantial or material co-operating cause. As LORD WATSON said, "the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favour." Here the breach of the statutory duty on the part of the respondent is established, and there is, in my opinion, no evidence justifying the inference that G Caswell was guilty of any conduct such as to bar the claim, whether or not the term contributory negligence is used. But it is necessary to consider the arguments strenuously advanced on behalf of the respondent to justify such an inference. They may, I think, be fairly summarised as follows. Let it be conceded that the man was doing nothing wrong H in removing the plate to clean the roller when the machine was stopped ; to assume that would be the view most favourable to the man. In that event his duty was to replace it in due time. He should have done so the moment the machine started or if he had not time to replace it, stopped the machine for that purpose by signalling to the man in charge of the starting lever. Or still better he should have realised at an earlier

stage that the new journey of trams was coming in as the trams passed him on their way to the point where each in turn would come in under the chute, and then he had ample warning to replace the plate. As he failed to do so, he was just as blameworthy as if he had taken off the plate when the machine was working, a course which if taken by him would have been negligence or misconduct sufficient to bar the claim. A Such are the contentions on behalf of the respondents. The answers made on behalf of the appellant are, first, that all this is mere conjecture and does not discharge the onus which arises from the established fact of a breach of the statute by the respondents, and, secondly, that even assuming the set of circumstances which the respondents put forward B as the reconstruction of the accident most favourable to the appellant's claim, the failure of the man to replace the plate was not contributory negligence or conduct such as to bar the claim even on the assumptions postulated by the respondents. It was pointed out that there was no evidence that the man had been warned what he was to do if the machine C started when the plate, having been properly removed during a stoppage, was off. To stop the machine after it had started for a journey of trams was to stop the work of the colliery, and the man might hesitate to do that and decide to wait till the next stoppage. It was not his fault that the machine started without his having an opportunity to replace it, and D if he had kept away from the aperture he would have been safe enough, whereas the attempt to replace the plate while the machine was in motion was obviously dangerous. It may be that, if he so thought, he was guilty of an error of judgment, but not one for which he was to be blamed in the particular emergency. Nor was he to be blamed for not taking note E as the empty trams began to pass him, that the machine would be starting as soon as the first tram of the journey reached the chute. There was no evidence that he had been directed to take note of that event, or that it had been recognised as constituting a warning to replace the plate. Thus, I think the answers on behalf of the appellant may be summarised. F

In my opinion the appellant is right on both points. There is, first, no sufficient evidence that Caswell was guilty of any fault, so as to displace the onus imposed on the respondents by reason of their breach of statutory duty which caused the death, and secondly, the hypotheses relied on by the respondents, if established, would not show that he was guilty of G more than an error of judgment or heedlessness or inadvertence in regard to his own safety not amounting to contributory negligence or misconduct such as to displace the claim. On this latter point I adopt, as an adequate criterion of what would bar the man's claim, the statement of LAWRENCE, J., in *Flower v. Ebbw Vale Steel & Co.* (5), at pp. 139 H and 140. He accepted, as he was required to do by the authorities, binding him, that contributory negligence was a valid defence to a claim for breach of a statutory duty such as had been committed in that case, but he proceeded to do what I think had not been done previously, i.e., to define a standard to help a jury or a judge to decide whether or not a

man had been guilty of negligence in cases of this type. The principle, he said, did not demand of "a workman in a factory a higher degree of care than an ordinary prudent workman in a factory would show." He proceeded :

A The question is then whether the plaintiff by the exercise of that degree of care which an ordinary prudent workman would have shown in the circumstances could have avoided the result of the defendant's breach of duty. I find that he could and that the proximate cause of the accident was his own disobedience of orders. . . .

I note the word "proximate" for the use of which there is support in *Swadling v. Cooper* (6). He added :

B . . . in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence.

C His judgment was affirmed by the Court of Appeal, but was reversed unanimously in this House on the ground that there was no evidence to justify the finding of disobedience to orders and that the decision of LAWRENCE, J., was based on this finding, which he described as the proximate cause of the accident, and not on the fact that the man was doing a risky thing in putting his hand as he had done inside the machine.

D In the opinion which I delivered in this House, at ([1936] A.C. at p. 210), I added, without considering whether such a plea was properly described as one of contributory negligence, some observations in explanation and support of the judge's definition of what constituted contributory negligence in such cases, which I regard as a valuable contribution to the law

E on this subject.

The circumstances under which men working in a mine or a factory are exposed to risk when machinery is unfenced in breach of statutory duty have general characteristics of their own. These have to be carefully considered when the question is whether a man was negligent. I

F think the importance of the ruling of LAWRENCE, J., is that he drew attention to these general conditions of work, and thereby gave a good practical direction and definition to help in deciding the issue of fact in any particular case. The judge did not mean that there are grades or degrees of negligence or that the plaintiff is not prevented from recovering

G by "mild" negligence, but only by "gross" negligence. Generally speaking in civil cases "gross" negligence has no more effect than negligence without an opprobrious epithet. Negligence is the breach of that duty to take care, which the law requires, either in regard to another's person or his property, or where contributory negligence is in question,

H of the man's own person or property. The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury, or the court in lieu of a jury. It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time. It may vary even in the case of the same man. Thus, a surgeon doing an

emergency operation on a cottage table with the light of a candle might not properly be held guilty of negligence in respect of an act or omission which would be negligence if he were performing the same operation with all the advantages of the serene atmosphere of his operating theatre ; the same holds good of the workman. It must be a question of degree. The jury have to draw the line where mere thoughtlessness or inadvertence or forgetfulness ceases, and where negligence begins. A

What was the standard of negligence in such cases had been left somewhat vague in the decisions before *Flower's* case (5). The word " wilful " has figured as affording some guide when applied to negligence as by LORD CAMPBELL, C.J., and WIGHTMAN, J., in *Caswell v. Worth* (7), B and many years later by SCRUTTON, L.J., in *Dew v. United British S.S. Co., Ltd.* (8) ; but wilful in this connection does not necessarily mean deliberate or intentional wrong-doing. In *Senior v. Ward* (9), LORD CAMPBELL, C.J., held that the deceased man had been guilty of gross negligence which materially contributed to his death. In *Pringle v. Grosvenor* (10), the plaintiff, a woman, was employed to clean a revolving plate while in motion. It was safe on three sides, though unfenced. She was aware of the danger if she went on the other side, but did so and was injured. The Court of Session held that as she did not go into danger wilfully or out of mere bravado, but was committing a mistake by inadvertence, she was entitled to recover because she could not have been injured if the defendant had performed the statutory duty to fence. It is, I think, clear that epithets like " wilful " or " gross " do not advance the inquiry and can well be avoided. " Wilful " is not a term of art and is often used as meaning no more than a high degree of carelessness or recklessness. It is not necessarily limited in its use to intentional or deliberate wrongdoing. C D E

I do not attempt to ascribe to the formula of LAWRENCE, J., the universality or literal sanctity which appertains to the provisions of a statute, but it is, in my opinion, not only a valuable guide, but is in accordance with the authorities which the judge considered. It also seems to me to minimise if not to destroy the practical importance of the question which was much debated whether the employers' defence in such cases is properly described as a plea of contributory negligence. That it is not properly so described was held by the High Court of Australia in *Bourne v. Butterfield & Lewis, Ltd.* (2). But I find in the conclusion of the judgment of the majority of the court delivered by KNOX, C.J., these words, at p. 361 : F G

We think that in English law the phrase " contributory negligence " is appropriate only in an action for negligence and not in an action founded on breach of a positive statutory duty ; but if no more was meant than that in such an action the plaintiff may be disentitled to succeed because of his own misconduct, we agree that that is an accurate statement of the law. H

A little earlier in the judgment, at p. 360, it is said :

Whether the conduct of an employee goes beyond mere thoughtlessness or want of care and amounts to misconduct is in every case a question of fact.

On the facts of that case I think that according to the formula of LAWRENCE, J., the plaintiff would have succeeded, as in fact he did under the judgment of the High Court of Australia. But LAWRENCE, J., would have held that there was no negligence, whereas the High Court held that there was no misconduct.

- A I do not think that an action for breach of a statutory duty such as that in question is completely or accurately described as an action in negligence. It is a common law action based on the purpose of the statute to protect the workman, and belongs to the category often described as that of cases of strict or absolute liability. At the same time
- B it resembles actions in negligence in that the claim is based on a breach of a duty to take care for the safety of the workman. The cause of action is sometimes described as statutory negligence and it is said that negligence is conclusively presumed. Thus, in *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (11), it was held that a breach of the statutory
- C duty constituted personal negligence or wilful act of the employer within the Workmen's Compensation Act, 1925, s. 29 (1). I am not prepared to agree that the defence of contributory negligence should be excluded in such cases simply on the technical ground that the cause of action is not negligence in the strict sense, whereas contributory negligence
- D presupposes original negligence. I have, however, come to the conclusion on a consideration of the English cases, that English law has accepted contributory negligence as a defence in this class of case. If the matter had been free from authority I should, I think, have thought it simpler to hold that a workman's claim for injury caused by breach of the employer's
- E statutory duty to fence and like duties, is only barred by blameworthy conduct on the man's part of such gravity and so directly causing the accident as in the judgment of the judge or jury to be properly described as the substantial cause of the accident and to shift the responsibility to him. This view would have been in accord with the general intention
- F of the statute and would have avoided the technicalities which have gathered round the doctrine of contributory negligence. But that path is closed by the line of decisions in England, and if contributory negligence is properly defined, I do not feel that the distinction is for practical purposes generally other than one of words. What is all important is
- G to adapt the standard of what is negligence to the facts, and to give due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-occupation
- H in what he is actually doing at the cost perhaps of some inattention to his own safety. In *Dew's* case (8), I question if this point of view was fully realised by SCRUTTON, L.J., when he dissented from the view of MACKINNON, J., the trial judge. The latter was of opinion, as appears from what he said to the jury, that the real effective cause of the accident was the breach of the statutory regulation, and that the man's act in

slipping was not the proximate cause of the accident. SCRUTTON, L.J., held that as the man slipped when going about his duty and thus fell into the open unfenced hatch, the slipping was negligence, because he would not have slipped if he had been more careful, and was a co-operating cause, and hence that the man was disentitled to recover. So far as I follow the facts, I should have thought that they did not show negligence A on the part of the man even if he might have walked more warily and further that slipping was not the proximate cause of the injury. The negligence to be contributory must also be, in the words of LORD CAMPBELL, C.J., in *Senior v. Ward* (9), negligence "materially contributing" to the injury. The rules of contributory negligence have been mainly developed B in connection with road accidents, but at least since *Davies v. Mann* (12), the law, in discussing contributory negligence in such cases, has disregarded as not materially contributing causes some acts of the plaintiff, which might be regarded as negligence in a sense, and treated them as of subsidiary moment in ascertaining the causation of the injury, and has C fixed attention on what was judged to be the proximate or effective cause. Hence the question was stated as it was in *Swadling v. Cooper* (6) to be what was the substantial cause. Contributory negligence involves two elements, negligence and contributing negligence. The policy of the statutory protection would be nullified if a workman were held D debarred from recovering because he was guilty of some carelessness or inattention to his own safety, which though trivial in itself threw him into the danger consequent on the breach by his employer of the statutory duty. It is the breach of statute, not the act of inadvertence or carelessness, which is then the dominant or effective cause of the E injury. This follows, I think, if the rules of contributory negligence in road accident or collision cases are suitably adapted to deal with breaches by an employer of his statutory duty.

I have dwelt on these legal questions out of respect to the very careful arguments of law with which counsel on each side have assisted the F House. On the footing that contributory negligence is the test, I repeat that the respondents have not discharged the onus of establishing it, and further that such evidence as there is goes to negative a case of contributory negligence, and finally that the hypothetical reconstruction of the facts propounded on behalf of the respondents, even if accepted, G would not show a case of contributory negligence.

I am for allowing the appeal.

LORD PORTER [read by LORD MACMILLAN]: My Lords, the facts have already been fully set out and I need not repeat them, but some H short statement of the duties of, and instructions given to, the deceased man is desirable. His death was caused as a result of his hand and arm being drawn in between a belt and roller which it was his duty to clean. At the time when the accident occurred the machine driving the conveyor belt was working and the guard covering the roller had been removed.

It was admittedly part of his duty to take off the guard and to clean the roller set behind it. His only instructions were not to clean the roller whilst the machine was in motion.

A He does not appear to have been told not to clean the roller whilst the railway trucks which had been filled by the conveyor belt were being removed and the empty journey was being drawn into position. Indeed as the manager stated in evidence, that would have been the obvious and convenient time to use for cleaning the roller, subject to the difficulty that whilst the machine was at rest half only of the roller would be exposed and the other half could not be cleaned, unless it were given
B a half turn by setting the engine in motion. But there may have been times when the half turn would be unnecessary because the removal of a lump or the cleaning of the half would effect all that was required. To have removed the guard at the time when the engine was stopped, would, in those circumstances have been part of the deceased man's
C duty, and in itself no evidence of negligence.

But, it is said, it was in any case negligent not to have replaced the guard before the engine started again. By consent of the parties and at the request of your Lordships certain information which had not been ascertained in evidence was supplied to your Lordships' House. From
D this evidence it appeared that shortly before the engine was restarted, the journey of trucks would be moved into position alongside the deceased man and it was said that this truck movement would give him ample warning of the restarting of the engine. However, it has to be remembered that the trucks are being changed many times a day ; that the young
E man would be busy cleaning or baling, and that his attention being so distracted he might well fail to notice the approach or presence of the trucks. Their arrival and removal were constantly repeated and in no sense intended to be a warning, though to one who was not engaged on other matters they might incidentally act as such. No doubt, however, once
F the engine was started again, the deceased man must have known that it was working, and if engaged in cleaning the roller, ought to have ceased to do so. The respondents maintain that it was his duty there-upon not only to cease cleaning, but also to replace the cover at once, and that he was guilty of negligence or misconduct in not doing so.
G I cannot take this view. The cover had to be replaced from the top and must touch or nearly touch the moving belt in the process.

If the machinery, when unfenced, was dangerous to one working in the vicinity, I think it was at least equally dangerous to anyone replacing the cover. Indeed to fail to replace it may have been a prudent rather
H than a negligent act. If this view be accepted the fact that the accident did not take place for five or six minutes after the engine was restarted can make no difference. Once the belt had begun to revolve, the cover might remain off without any negligence or misconduct on the part of the workman.

As to how the accident happened I think at best only a guess is possible.

Since the scrapers had been taken from the place where they had been left, and one at least was found in the water immediately below the dead man's body, it seems to be established that he must have removed the cover for the purpose of cleaning the roller. That he continued to clean the roller after the engine started is improbable. Had he been doing so the scraper would have remained inside the fixed guard, not outside. The planks on which he stood were slippery and he was baling. He may have slipped, and where a slip might carry him it is impossible to say. On the other hand it is conceivable, though not very likely, that he was attempting to brush off some of the matter adhering to the belt either inside or outside the guard and that his hand was carried on and gripped between belt and roller. In these circumstances I think the true finding is that there was a breach of statutory duty on the part of the respondents, since the guard was off at a time when the machine was working; but there is nothing to show that the workman was in any way implicated in that breach of duty. He could rightfully remove the guard whilst the engine was stopped during the time the journey of trucks was being changed, and there is no evidence that he took it off at any other time. Nor have the respondents shown, either by positive evidence or necessary implication from the facts proved, that the workman was guilty of any misconduct, negligence or any wrongful act causing or contributing to his own injury. On the other hand it has not been shown by the appellant that the deceased man was not guilty of misconduct or negligence, and if such evidence be necessary she must fail.

What is the result of this finding? The respondents say that it is the duty of the appellant to show two things (i) that there was a breach of statutory duty, and (ii) that the breach was the cause of the accident. They admit, however, that if these two facts be proved the onus is on them to show negligence on the part of the workman causing or contributing to the accident. They add, however, that in this as in any case, the facts as proved by the plaintiff may establish without further evidence either that the accident was not caused by the breach of duty or that the person meeting with an accident must have been guilty of negligence. With the first contention the appellant does not quarrel. She acknowledges that she must show a breach of statutory duty and that it was at least a cause of the accident though not that it was necessarily the sole cause. She also agrees that the evidence called on her behalf might of itself establish that the respondents' fault did not cause the accident or that the deceased man was in whole or in part the cause of his own misfortune. The principle applicable is to be found in the well-known passage from LORD WATSON'S speech in *Wakelin v. London & South Western Ry. Co.* (1), where he said, at p. 48:

If the plaintiffs' evidence were sufficient to show that the negligence of the defendants did materially contribute to the injury, and threw no light upon the question of the injured party's negligence, then I should be of opinion that, in the absence of any counter-evidence from the defendants, it ought to be presumed that, in point of fact, there was no such contributory negligence. Even if the plaintiffs'

evidence did disclose facts and circumstances bearing upon that question, which were neither sufficient *per se* to prove such contributory negligence, nor to cast the onus of disproving it on the plaintiff, I should remain of the same opinion.

If for the word "negligence" of the defendants, the words "breach of statutory duty" be substituted, the opinion is exactly applicable to the facts of the present case. Undoubtedly the absence of the guard contributed to the injury which caused the death of the workman. Had the guard been in its place the accident would not have happened. On the other hand the evidence, as I have indicated, throws no light upon the deceased man's negligence nor casts the onus of disproving contributory negligence upon the appellant. The most that can be said on behalf of the respondents is that their employee may or may not have been guilty of some wrongdoing—there is nothing to show that he was. This finding would entitle the appellant to succeed, but the argument on behalf of the appellant has gone further and her representatives have maintained that once it is shown that the respondents have been guilty of a breach of statutory duty and that that breach materially contributed to the accident, the respondents cannot succeed unless it be shown that the workman knowingly and wilfully incurred the risk.

For this contention they rely upon the judgment of LORD CAMPBELL, C.J., in *Caswell v. Worth* (7). The case itself is not, I think, an authority for the principle propounded. It happened that in that case there was not only a want of ordinary care, but wilful misconduct, and LORD CAMPBELL, C.J., fastened on that fact. He does not, however, assert that nothing less than wilful misconduct will constitute a defence, and COLERIDGE, J., in the same case, said, at p. 855

The action, however, must be subject to the rules of common law; and one of those is, that a want of ordinary care, or wilful misconduct, on the part of the plaintiff, is an answer to the action.

The italics are mine.

The appellant, however, gets her chief support for the proposition from an Australian case, *Bourke v. Butterfield & Lewis, Ltd.* (4), and in particular from the judgment of ISAACS, J., in that case.

Undoubtedly that judgment goes some way towards upholding the principle contended for, but such a contention was, I think, unnecessary for the decision, and is not supported to its full extent by the majority of the court, whose judgment was delivered by KNOX, C.J., who said, at p. 360 :

But did Parliament intend to extend that protection to every employee in every circumstance? We think not. In our opinion it would be unreasonable to attribute to Parliament an intention to impose upon the employer responsibility for an injury which the employee deliberately invites, whether by adopting the means of inflicting it, or by rejecting the means of avoiding it, or for an injury which has happened because the employee deliberately took an unnecessary risk not in the interests of the employer, but for his own purposes. It is not easy to frame an exact formula; but it may be said that the employer is responsible for the negligence, but not for the misconduct, of his employee. Whether the conduct of an employee goes beyond mere thoughtlessness or want of care and amounts to misconduct is in every case a question of fact.

The speech of LORD WRIGHT in *Flower v. Ebbw Vale Steel, Iron &*

Coal Co., Ltd. (5) is also prayed in aid of the appellant's contention, but I do not think it can be said to confirm that view. In terms the noble and learned Lord says, at p. 212 :

I shall assume, though the question is reserved for decision in this House if it should ever arise in the future, that contributory negligence, properly defined and properly established, is a defence in this action.

He then goes on to a consideration of what the proper definition of contributory negligence in such a case should be.

As against the view that contributory negligence is not a defence to a claim based on a breach of statutory duty, there are a number of *dicta* in cases beginning with *Britton v. Great Western Cotton Co.* (13), to the effect that it is such a defence. Perhaps the best-known is that contained in the judgment of VAUGHAN WILLIAMS, L.J., in *Groves v. Wimborne (Lord)* (14), at pp. 418, 419. Moreover, in three recent cases the Court of Appeal have decided in terms that in such a case the contributory negligence of the injured party is a defence. See *Dew v. United British S.S. Co. Ltd.* (8), *Craze v. Mayer-Dumore Bottlers Equipment Co., Ltd.* (15) and *Lewis v. Denye* (16).

But the question, though debated, has never been determined in your Lordships' house. Strictly speaking the phrase "contributory negligence" is not a very happy method of expressing an act of the employee which may relieve the employer from liability. Probably the phrase "negligence materially contributing to the injury" would be more accurate, but if the word "contributory" be regarded as expressing something which is a direct cause of the accident, either phrase is accurate enough, and the less accurate phrase is, I think, sanctioned by long usage.

Whatever form of words be used, I see no reason for differing from the numerous *dicta* extending over many years, or from the decision of the Court of Appeal. It was held in *Lochgelly Iron & Coal Co., Ltd. v. McMullan* (11) that a breach of statutory duty is personal negligence on the part of the employer within the meaning of that phrase in the Workmen's Compensation Act, 1925, s. 29 (1), and it is suggested that an action founded on breach of statutory duty is an action founded on negligence. Whether this be so or whether a breach of statutory duty be regarded as a cause of action in itself, the question is the same. Is the employer liable for all accidents caused by a breach of statutory duty, and if not, what is the limitation? Is it a defence to prove such negligence as would constitute contributory negligence in an action founded on a breach of common law duty, or must the employer go further and show that the workman knowingly and wilfully incurred the risk? These last are the words of LORD CAMPBELL, C.J. KNOX, C.J., in the Australian case speaks of "misconduct" *simpliciter*.

No doubt the Mines Act was intended to protect both careful and careless workmen, but neither the appellant in the present case, nor the High Court in Australia, were prepared to go the length of saying that

- no action on the part of the workman would relieve the employer, and the protection required may well be given by making the failure to fence a criminal act. I do not see why the ordinary common law rules should not apply, leaving the careless workman to his remedy under the Workmen's Compensation Acts and reserving the additional protection for
- A breach of statutory duty to those who exercise such reasonable care as a reasonable man working in the particular mine or factory would exercise. It is the reasonable man who is to be considered, not the particular individual, and therefore the degree of care will not vary from man to man, but it will, I think, vary from mine to mine and
- B from factory to factory. The skill gained by a worker may enable him to take risks and do acts which in an unskilled man would be negligence, and on the other hand the fatiguing repetition of the same work may make a man incapable of the same care, and therefore not guilty of negligence, in doing or failing to do an act which a man less fatigued
- C would do or leave undone.

The question to be determined was thus put by LAWRENCE, J., in the court of first instance in *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (5), at p. 139 :

- D The question is then whether the plaintiff by the exercise of that degree of care which an ordinary prudent workman would have shown in the circumstances could have avoided the result of the defendants' breach of duty.

- With this I agree, and I doubt if the speech of LORD WRIGHT in your Lordships' house in the same case did more than express his views as to what was the standard required in that case. The High Court in
- E Australia in *Bourke's case* (2) may have thought that it required misconduct, and not lack of the appropriate degree of care, to prevent the plaintiff from succeeding. If they did, I do not agree with them.

- There remains only to be considered the defence under the Coal Mines Act, 1911, s. 102 (8), a section which exempts the employer from liability
- F if it is not reasonably practicable to avoid or prevent a breach of sect. 55 of the Act. In *Coltress Iron Co., Ltd. v. Sharp* (17), it was held that sect. 102 (8) applied, because it was not reasonably practicable to keep the gearing which caused the accident securely fenced during the time at which it had to be observed whilst being tested.

- G So I suppose in the present case it might be argued that it was not reasonably practicable to prevent the guard from being removed—indeed, that it was necessary to do so in order to clean the roller. In a sense this contention is true. But though the absence of the guard is an inchoate danger whilst the engine is not in motion, it is only an actual
- H danger when it is working. It may be impracticable to avoid removing the guard whilst the machine is motionless, but it is not impracticable that it should be fenced whilst the machine is in motion, or at any rate to ensure that the workman shall have sufficient notice of the fact that the engine is about to be used again, and ample opportunity of replacing the guard. A bell ringing or a warning shout, and in either case a reply,

should be sufficient to avoid any danger; and so would instructions that the cleaning should only take place if the engine was stopped for that purpose, and after the necessary stop and half turn, was started again at the request of the cleaner. This failure to give adequate warning is no doubt a fault of system. But it is not a fault of system of which the workman primarily complains. His complaint is that the guard was off. The employer might have excused himself by proving it impracticable to have it on, but he cannot rely upon his own want of system for that purpose. It is not the workman who wishes to rely, as a cause of action, upon the system adopted. It is the employer who desires to use it as an excuse for failing to keep the machinery guarded. I think then that the workman has proved a breach of statutory duty, and that that breach was a cause of the accident, that the employer has proved neither that the removal of the guard was an act which the workman should not have done, nor that its absence or the accident was due in whole or in part to the negligence of the workman, much less to his misconduct. I take the view that it would be a sufficient defence to the employer to prove that the accident was in part caused by the act of the workman, in the sense that it was materially contributed to by his negligence, and by negligence I mean a failure to exercise such a degree of care as an ordinary prudent workman in that mine would exercise. But the onus of proving that defence is admittedly on the respondents, and I do not think they have discharged it. The appellant is therefore, in my view, entitled to recover, and I would allow the appeal and order the respondents to pay the costs in your Lordships' house and below.

Appeal allowed with costs.

Solicitors: *Smith, Rundell, Dods & Bockett*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the appellant); *Furniss & Co.*, agents for *Arthur J. Prosser*, Cardiff (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

Re WESTER WEMYSS, TILLEY *v.* WESTER WEMYSS.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Finlay and Luxmoore, L.JJ.), **May 24, June 6, July 18, 1939.**]

Executors—Retainer—Against costs of administration action—Discretion of court—Administration of Estates Act, 1925 (c. 23), s. 34—R.S.C., Ord. 65, r. 1.

In 1934, the appellant commenced an action against the testator's personal representative, the respondent in this appeal, in respect of a debt due to him from the testator. The estate of the testator was found to be insolvent, and the respondent claimed to be entitled to exercise the right of retainer, the money having been paid into court. Judgment was given in favour of the respondent and a declaration was made that the respondent was entitled to exercise the right of retainer in priority to the appellant's costs in the action. It was contended that the rule that the executor's right of retainer had priority

over the right of a plaintiff in an administration action to be paid his costs had been displaced by R.S.C., Ord. 65, r. 1, and that the court has, since the making of that rule of court, been entitled to make such order as it thinks just. Also, that the costs of administration are given priority by the Administration of Estates Act, 1925, s. 34 (1). It was further contended that the rule does not apply where the effect of administration proceedings has been to establish a claim having priority over the executor's debt, because the plaintiff, having preserved assets for the benefit of a preferential creditor, is entitled to his costs in priority to the claim of that creditor and therefore in priority to the right of retainer:—

HELD: (i) the appellant was not entitled to his costs on the footing that he preserved assets for the preferential creditor as there was no reason to suppose that that creditor's debt would not have been paid.

(ii) the words "subject as aforesaid" in the Administration of Estates Act, 1925, s. 34 (2), refer to the earlier part of the subsection and not to subsect. (1) and therefore the directions given by subsect. (1) as to priority of administration expenses do not affect the right of retainer.

(iii) (LUXMOORE, L.J., dissenting): the discretion of the court upon the question of costs does not affect the principles which govern the rights of retainer. The facts of the present case are not such as would justify the court (if it had a discretion) in exercising it so as to deprive the respondent of her priority.

Per LUXMOORE, L.J.: in the circumstances of this case, the court ought to exercise its discretion as to costs by ordering that the appellant's costs of the action down to and including the order on further consideration should be paid out of the funds in court except so far as such costs were increased by the appellant challenging the respondent's right of retainer.

Decision of CROSSMAN, J. ([1939] 1 All E.R., 382), affirmed.

[EDITORIAL NOTE. The personal representative's right of retainer is founded upon his disability to bring an action against himself in respect of a debt due from the estate to him in his personal capacity. The present case is exceptional, in that the claim, which would be defeated by the retainer, was one for the costs of an administration action, and, it being a claim for costs, it was alleged to be one wholly within the discretion of the court. After a consideration of the cases, it has been decided that the right of retainer is paramount to the right to the costs.

AS TO RIGHT OF RETAINER, see HALSBURY, Hailsham Edn., Vol. 14, pp. 332-337, paras. 617-628; and FOR CASES, see DIGEST, Vol. 23, pp. 370-384, Nos. 4392-4545.]

Cases referred to:

- (1) *Tipping v. Power* (1842), 1 Hare, 405; 23 Digest 373, 4427; 11 L.J.Ch. 257.
- (2) *Chissum v. Dewes* (1828), 5 Russ. 29; 23 Digest 373, 4426.
- (3) *Re Rhoades, Ex p. Rhoades*, [1899] 2 Q.B. 347; 23 Digest 374, 4429; 68 L.J.Q.B. 804; 80 L.T. 742.
- (4) *A.-G. v. Jackson*, [1932] A.C. 365; Digest Supp.; *sub nom. Re Cockell, A.-G. v. Jackson*, 101 L.J.Ch. 186; *sub nom. Re Cockell, Jackson v. A.-G.*, 146 L.T. 450; 16 Tax Cas. 681.
- (5) *Richmond v. White* (1879), 12 Ch.D. 361; 23 Digest 373, 4428; 48 L.J.Ch. 798; 41 L.T. 570.
- (6) *Re Alpha Co., Ltd., Ward v. Alpha Co.*, [1903] 1 Ch. 203; 10 Digest 809, 5162; 72 L.J.Ch. 91; 87 L.T. 646.
- (7) *Re Roby, Sherbrooke v. Taylor* (1916), 60 Sol. Jo. 291; 24 Digest 837, 8692.
- (8) *Larkins v. Paxton* (1835), 2 My. & K. 320; 24 Digest 855, 8905.
- (9) *Re Blake, Jones v. Blake* (1885), 29 Ch.D. 913; 24 Digest 782, 8135; 54 L.J.Ch. 880; 53 L.T. 302.

- (10) *Fuller v. Green* (1857), 24 Beav. 217; 24 Digest 840, 8728.
- (11) *King v. Bryant* (1841), 4 Beav. 460; 24 Digest 840, 8726; *sub nom. King v. Hammett*, 11 L.J.Ch. 14.
- (12) *Loomes v. Stotherd* (1823), 1 Sim. & St. 458; 23 Digest 371, 4401; 1 L.J.O.S.Ch. 220.
- (13) *Woodward v. Darcy (Lord)* (1558), 1 Plowd. 184; 23 Digest 370, 4392.
- (14) *Wilson v. Coxwell* (1883), 23 Ch.D. 764; 23 Digest 372, 4417; 52 L.J.Ch. 975. A
- (15) *Re Samson, Robbins v. Alexander*, [1906] 2 Ch. 584; 23 Digest 375, 4423; 76 L.J.Ch. 21; 95 L.T. 633.
- (16) *Re Harris, Davis v. Harris*, [1914] 2 Ch. 395; 23 Digest 381, 4511; 83 L.J.Ch. 841; 111 L.T. 666.
- (17) *Harloe v. Harloe* (1875), L.R. 20 Eq. 471; 24 Digest 848, 8817; 44 L.J.Ch. 512; 33 L.T. 247. B

APPEAL by the plaintiff from an order of CROSSMAN, J., dated Feb. 2, 1939, and reported [1939] 1 All E.R. 382. The facts are fully stated in the judgment of SIR WILFRID GREENE, M.R., and also in the judgment of CROSSMAN, J.

Lionel Cohen, K.C., and *G. E. Timins* for the appellant. C

F. R. Evershed, K.C., and *R. O. Wilberforce* for the respondent.

Cohen, K.C.: In a creditor's action, the plaintiff must represent all the creditors, including any preferential creditor. The judgment of CROSSMAN, J., was wrong for two reasons. First, the matter of costs is a discretionary matter, and the respondent did not, before the writ was issued, set up any right of retainer. She represented that she had no claim and did not ask for any special order as to costs. An administration action, when once commenced, cannot be stopped until further consideration. Secondly, the rule which the judge purported to follow only applies where there is no preferential creditor of higher degree than the one who seeks to exercise the right of retainer. The right of retainer has been waived by the respondent putting in an affidavit of proof of debt. The second point is that there was a preferential claim. *Re Roby, Sherbrooke v. Taylor* (7) is applicable. On the making of the order, no application was made that costs be reserved. F
The Supreme Court of Judicature (Consolidation) Act, 1925, did not alter the previous practice of the Chancery Division, so far as R.S.C., Ord. 65, r. 1, is concerned. The effect of the Act has been to make the Chancery practice applicable in the other divisions of the court. In *Richmond v. White* (5) and in *Chissum v. Dewes* (2), there does not appear to have been any preferential creditor, which thus distinguishes them from this case. Where there is a creditor of a higher degree, he is entitled to his costs. The fund in court ought to have been applied to the payment of costs in the first place, and then in payment of the preferential claim. The executor cannot exercise the right of retainer as against a creditor of a higher degree. *Chissum v. Dewes* (2) and *Tipping v. Power* (1) go no further than establishing that an executor may exercise a right of retainer, even out of a fund in court, where there is no creditor of a higher degree than himself. Where, however, there is a creditor of a higher degree than the executor, the position H

is altered. It is clear from *Larkins v. Paxton* (8) that a preferential creditor ranks in front of an executor. A plaintiff who brings an action for the benefit of that preferential creditor must be entitled to his costs because he has created the fund out of which the preferential creditor receives payment.

- A *Timins* : R.S.C., Ord. 55, r. 10, and Ord. 65, r. 1, were both introduced in 1883, and they were both considered two years later in *Re Blake, Jones v. Blake* (9). The practice which has grown up since the date of that case was correctly stated by PETERSON, J., in *Re Roby, Sherbrooke v. Taylor* (7).
- B *Evershed, K.C.* : Apart from any question of a right of retainer, it would not be right to throw upon the respondent the costs incurred by the plaintiff after he had been warned that the estate would contain nothing for the ordinary creditors. In such a case the plaintiff goes on at his peril : DANIELL'S CHANCERY PRACTICE, Vol. 2, p. 1068. I have
- C not asked for the costs of the respondent to be paid by the plaintiff, but I am entitled to do so : *Fuller v. Green* (10), *King v. Bryant* (11). The existence of a right of retainer puts an entirely different complexion upon the matter. As regards the application of *Larkins v. Paxton* (8) to the present case, the rule that the plaintiff's costs should be allowed
- D has no place when the retainer is exercised, as an executor who exercises a right of retainer is treated as if he had exercised it before the suit was commenced. Therefore, there is here no fund out of which the plaintiff's costs can be paid. It is not now denied that the respondent had a right to retain. The money either was or must be treated as having been in
- E her hands. In *Re Rhoades, ex p. Rhoades* (3), LINDLEY, M.R., said that until the executor had done some act to show which assets he retained, it was obvious that the property in them could not be changed. *Richmond v. White* (5) shows that the fact that the money was paid into court
- F by a third party, and not by the executor, does not prevent the money being treated as though it had passed through the executor's hands. The right of a creditor to have his costs is based upon the hypothesis that there is a fund available. The right of retainer, however, is not
- G affected by anything in the Administration of Estates Act, 1925, except sect. 34 (1) (2). Those subsections mean that the right of retainer is not affected subject to what is found in subsect. 1. In *Tipping v. Power* (1), the plaintiff was an equitable mortgagee. A mortgagee is
- H entitled to add to his security any costs he has incurred. The right of retainer is dealt with in WILLIAMS ON EXECUTORS, 12TH EDN., p. 648. The right of a creditor, who institutes an administration action, to be paid his costs out of a fund in court, does not affect the executor's right of retainer for satisfaction of a debt due to himself. [Counsel also referred to *Loomes v. Stotherd* (12), *Woodward v. Darcy* (Lord) (13), *Wilson v. Coxwell* (14), *Re Samson, Robbins v. Alexander* (15), and *Re Harris, Davis v. Harris* (16), and to INGPEN ON EXECUTORS AND ADMINISTRATORS, 2ND EDN., p. 379.]

Cohen, K.C., in reply: Prior to the Administration of Estates Act, 1925, the right of retainer could not be exercised until the preferential creditors had been paid or provided for. If an administration action is commenced and results in the payment of the preferential creditors, the plaintiff, as representing those preferential creditors, is entitled to be paid his costs before the executor can exercise his right of retainer. **A** Since Jan. 1, 1926, the costs in an administration action have express priority by reason of the Administration of Estates Act, 1925, Sch. I. Also, under R.S.C., Ord. 65, r. 1, the court has the widest discretion as to costs, and, in the present case, the court should exercise its discretion in favour of the plaintiff. *Re Roby, Sherbrooke v. Taylor* (7) **B** shows that the proper time to exercise the right of retainer so as to deprive a plaintiff of his costs is at the time the order is made. The discretion as to costs given by R.S.C., Ord. 65, r. 1, is now wider than it was, and there is now an absolutely unfettered discretion. [Counsel also referred to *Re Rhoades, ex p. Rhoades* (3), *A.-G. v. Jackson* (4), *C Harloe v. Harloe* (17), *Re Blake, Jones v. Blake* (9), *Larkins v. Paxton* (8), DANIELL'S CHANCERY PRACTICE, Vol. 2, p. 1067, SETON'S JUDGMENTS AND ORDERS, Vol. 2, p. 1466.] **C**

SIR WILFRID GREENE, M.R.: On May 9, 1934, the plaintiff, a **D** creditor of the testator, issued an originating summons asking for administration of his estate (which was admittedly insolvent) and on May 31 an order for administration in the usual form was made. In answer to the inquiry as to debts, a joint affidavit by the respondent, the executrix, and her solicitor was filed on Oct. 16, 1934. Among the **E** claims set out in the exhibits to that affidavit there appeared the following: (1) As "claims which ought to be proved by the claimants" two claims by the commissioners of inland revenue, one for a sum of £682 6s. 11d. in respect of income tax, and the other for a sum of £1,029 5s. 3d. in respect of surtax. (2) As a "claim proper to be allowed **F** without further evidence" the plaintiff's claim in respect of a debt of £1,000 and interest. (3) As similar claims, the respondent's claim (a) to a sum of £2,049 15s. 8d., the amount of loan and interest repaid by her to Martins Bank, Ltd., on behalf of the deceased, (b) to the value of certain stocks alleged to have been deposited by the respondent with **G** bankers as security for overdrafts and loans to the deceased, and (c) to a sum of £1,000 alleged to have been paid to the inland revenue on behalf of the deceased. On Mar. 25, 1935, the respondent filed a further affidavit in which she quantified her claims at the figure of £6,049 15s. 8d. That sum was made up of the two sums of £2,049 15s. 8d. and £1,000 already **H** referred to, together with a sum of £3,000 to represent the value of the deposited securities which had been sold by the bank. On Jan. 3, 1936, a further affidavit was filed by the respondent, in which, for the first time, she claimed to retain the whole of the assets of the deceased's estate, subject to any claims having priority, in or towards reduction of the

alleged debt of £6,049 15s. 8d. On Apr. 23, 1937, the respondent filed another affidavit dealing with her alleged debt, but there is nothing in it to which reference need be made. On July 30, 1938, the master issued his certificate. In the first schedule, part I, there appeared, as a debt entitled to priority, two sums amounting to £793 3s. 8d., part of the claim of the commissioners of inland revenue. The remainder of that claim was not entitled to priority. In part II of the first schedule there appeared among the debts allowed, the amount claimed by the appellant, and the sum of £2,049 15s. 8d. part of the amount claimed by the respondent as already mentioned. With regard to this latter sum, the certificate stated the respondent's claim to exercise her right of retainer and that

the plaintiff not admitting such right the question whether the defendant has established such right is reserved for the decision of the court on further consideration.

In the third part of the first schedule, among the claims disallowed, there appeared the respondent's claim in respect of the deposited securities and the sum of £1,000 already mentioned. Paragraph 2 of the certificate stated that of the sum of £408 2s. 5d. paid for funeral expenses, the sum of £100 only was allowed. Paragraph 3 recorded the payment into court by the respondent of a balance of £484 0s. 7d. remaining in her hands. In addition to this sum of £484 0s. 7d., there had been paid into court by the respondent as recorded in the same paragraph, two sums of £733 4s. 4d. and £1,022 19s. 1d. The outstanding property of the testator was set out in the second schedule. It consisted of certain shares and a loan which are apparently of no value, a reversionary interest which is stated in the body of the certificate to be at present unascertained, and £1,716 4s. 8d. 3½ per cent. conversion stock, and £484 0s. 7d. cash in court to the credit of the action.

When the action came before CROSSMAN, J., on further consideration two questions arose for argument. The first question was whether or not the respondent was entitled to exercise her right of retainer in respect of the sum of £2,049 15s. 8d. The argument appears to have been that the respondent must be taken by her conduct to have waived her right of retainer. This argument CROSSMAN, J., refused to accept, and, by the order made on further consideration on Feb. 2, 1939, it was declared that, subject to the payment of the claim of the commissioners of inland revenue to the sum of £793 3s. 8d., which was entitled to priority, the respondent was entitled to exercise her right of retainer in respect of the debt of £2,049 15s. 8d. There is no appeal against this part of the order. The other question related to the appellant's costs of the action. The appellant claimed that, notwithstanding the respondent's right of retainer, he was entitled to have his costs of the action paid out of the funds in court in priority to the claim of the respondent. This question CROSSMAN, J., decided in favour of the respondent, and the order contains a declaration that her right of retainer is exercisable in priority to the payment of the appellant's costs of the action. It is

against this part of the order that the present appeal is brought. The order also directed that the account of the testator's property be continued and the second further consideration of the action was adjourned. The payment schedule to the order provided for the sale of the conversion stock and for the payment of £793 3s. 8d. to the commissioners of inland revenue, and of the residue of the funds in court to the respondent.

At the hearing before CROSSMAN, J., the respondent, by her counsel, offered to allow the appellant his costs down to Jan. 3, 1936 (the date when she first claimed to exercise her right of retainer) in priority to her claim, provided that he abandoned the rest of his claim in respect of costs. This offer was declined. Before us counsel for the respondent stated that, by way of concession and not of admission, the respondent would not in any event claim priority over the costs down to Jan. 3, 1936. CROSSMAN, J., held that the general rule that the executor's right of retainer takes priority over the right of the plaintiff in an administration action to have his costs paid out of the fund, has not been displaced by Ord. 65, r. 1, which puts costs (including expressly the costs of administration proceedings) in the discretion of the court.

The argument before us fell under three heads. First, it was said that the rule, if it applied at all upon the facts of the present case, has been displaced by Ord. 65, r. 1, in the sense that the court is entitled to disregard it and to make such order as to costs as in the circumstances it thinks just. Secondly, it was said that the costs of administration are given priority by the Administration of Estates Act, 1925, s. 34 (1). Thirdly, it was said that in any event the rule does not apply to a case where the effect of the administration proceedings has been to establish a claim having priority over the executor's debt, the argument being that the plaintiff, having by his action preserved the assets for the benefit of the preferential creditor, is entitled to his costs in priority to the claim of that creditor and, therefore, in priority to the executor's right of retainer.

It is convenient to deal first with the third of these contentions. In order to arrive at the true answer to the question which it raises, the nature of the executor's right of retainer must be considered. It is stated in BLACKSTONE'S COMMENTARIES, Vol. III, ch. 2, at p. 18, that

the executor having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose.

If there are no administration proceedings in which the executor is ordered to bring money into court, no difficulty arises in the application of this rule, subject, of course, to the rights of creditors of higher degree. As against other creditors the rule is absolute. When, however, the executor is ordered to bring the money in his hands into court, the court takes the assets provisionally into its charge pending the decision of the question whether or not the right of retainer exists. However, in doing so the court acts entirely without prejudice to the right, if it is

ultimately shown to exist, and the executor in that event is put back into the same position as if the money had never been brought into court at all. This principle is nowhere more clearly expressed than in the judgment of SIR JAMES WIGRAM, V.C., in *Tipping v. Power* (1), where he said, at p. 411 :

- A The next point is on the question of retainer by the executors. They have clearly a right to retain their debt. The fact of the money having been brought into court can make no difference. The debt of the executors being a simple contract debt, the court will not allow them to keep the fund in their possession ; but the court will nevertheless ultimately place them in the same position as if they had kept it in their hands. If an executor says, " I have paid so much money in satisfaction of debts," he is not charged with it, or, if he is charged with it, he is allowed it in his discharge ; but the court does not give the same effect to the allegation, " I have retained so much for my own debt." The rule is to consider the executor as having a right to retain in a due course of administration ; but the court says, until the accounts are taken it cannot see that the right of retainer will exist. When the court has determined that there is no creditor of a higher degree than the executor, he must be remitted to his original position, to which the right of retainer was incident ; and he is entitled to retain his debt in preference to the costs of administering the fund, for to that extent he is in the same situation as a creditor whose debt was paid before the suit, and who cannot therefore be afterwards affected by the costs of administration. *Chisum v. Dewes* (2) decided this very point, and I shall follow that authority.
- B
- C

It was suggested that the penultimate sentence of this paragraph means that, where there is a creditor of a higher degree, the executor's right of

- D retainer loses its priority over the plaintiff's costs even where the plaintiff is a creditor of the same degree as the executor. I cannot so read it. The reference to the creditor of a higher degree merely means that where such a creditor exists, his claim takes priority ; it has nothing to do with the question with which we are here concerned.

- E The nature of the executor's right of retainer and the basis upon which it rests were discussed at length by this court in *Re Rhoades* (3), where SIR N. LINDLEY, M.R., in delivering the judgment of the court, said, at p. 353 :

- F It is quite plain from these authorities that the executor's right to retain assets in his hands was, as against him, treated as enforced as soon as he could properly enforce it. It would be very strange if it were held that he had lost his right because he had done nothing to assert it before there was any occasion to do so. It is only when some one seeks to take assets out of the executor's possession that it becomes necessary for him to assert his right of retainer ; and, if he asserts it then, his right must be protected, unless, of course, he has released it or done something to deprive himself of it.

- G And again he said, at p. 354 :

He has no right to retain against creditors of a higher degree than himself ; but his right to retain is a right to withdraw from the assets in his hands and distributable amongst himself and other creditors of equal degree enough to pay himself in full.

- H I may also refer for a statement of the origin and nature of the right to the opinion of LORD ATKIN in *A.-G. v. Jackson* (4), at p. 370.

That payment into court by an executor in administration proceedings is without prejudice to his right of retainer is stated in terms in the judgments delivered in this court in *Richmond v. White* (5). In that case money had been paid into court by an insurance company, but the

executor's right of retainer was held nevertheless to be exercisable. JAMES, L.J. (with whom BRETT, L.J., agreed), said, at p. 363 :

That must have been without prejudice to the right of the executor, just as much as if the form had been gone through of the money being paid to him and then paid by him into court.

COTTON, L.J., said, also at pp. 363, 364 :

The Vice-Chancellor says in his judgment, "The executor might have protected himself when the money was paid into court," that is, as I understand it, the executor might have had a clause put in the order that the money was paid in without prejudice to his right of retainer. But I am of opinion that the order must be read as if such a reservation had been contained in it. . . . The court never allows an order for payment of money into court to prejudice the rights of the person paying it in.

I may add that I have looked at the original order of this court in *Richmond v. White* (5) and the assumption of CROSSMAN, J., with regard to it is shown to have been correct. The order directs the funds in court to be applied in the first place in payment of the debt owing to the executor and the balance was paid to his solicitor on account of his costs.

I need not discuss the other authorities or the opinions of text book writers, the most important of which are referred to in the judgment of CROSSMAN, J. I may summarise what, in my opinion, is the effect of the authorities by saying that assets, in respect of which the executor is entitled to exercise and claims to exercise a right of retainer, are in effect withdrawn from the pool of assets available for the payment of debts of the same or a lower degree, that payment into court in an administration action is without prejudice to the executor's right and does not affect the substance of the situation, that payment being mere machinery for preserving the assets pending a decision upon the executor's claim, and that the inevitable result is to preserve the priority of that claim, if established, over the plaintiff's costs of action, since the result of the establishment of the claim is to put the executor back into the same position with regard to the assets in question as he would have been in if he had been allowed to exercise his right of retainer at the outset. If this view is correct, I am unable to see how the fact that there is a debt of higher degree can affect the position. If there had been no administration proceedings, the respondent's right of retainer would have extended to the whole of the funds in her hands after satisfying the claim of the Crown ; neither the appellant nor any other creditor of equal degree would have had any right to those funds. Before payment into court, the funds in the respondent's hands belonged to her subject to the right of the Crown, and payment into court was made without prejudice to her right. I am unable to see why the existence of the Crown's claim can have put the appellant into a better position as against the executrix than he would have been in if that claim had not existed. The only practical result of the proceedings has been to determine the extent of the Crown's priority as against the executrix, a matter with which the appellant and the other creditors of equal degree have no

concern whatever. The result of the plaintiff's contention, if accepted, would be to throw his costs upon the executrix, which is the very thing that a plaintiff in an administration suit is not entitled to do where the executor has a right of retainer. It is, in my opinion, fallacious to say that the plaintiff stands for this purpose in the shoes of the Crown, and

A that he is entitled to his costs upon the footing that by instituting the proceedings he preserved the assets for the Crown. There were ample funds to meet the Crown's claim, and there is no reason whatever to suppose that it would not have been duly met.

I now come to the first of the two arguments summarised above.

B I agree with the view of the judge that the discretion conferred upon the court in the matter of costs does not affect the well-settled principles which govern the right of retainer. To use the words of JAMES, L.J., in *Richmond v. White* (5), at p. 363, the right of retainer

is a well-established right of the executor which the court has to apply to the facts of this case without allowing any technicality to defeat it.

C

There is no suggestion to be found in any of the authorities or the text books that the right is affected by the Judicature Act, 1890, s. 5 (now the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50), and on principle I do not think that a discretionary power as to costs ought

D to be construed so as to enable the court to override a definite and well-established legal right such as that of retainer. Of course, the conduct of the executor may be such as to amount to a waiver of the right or to preclude him from asserting it, either absolutely or to the extent of the plaintiff's costs or some part of them. But any priority so obtained by

E the plaintiff would not be due to an exercise of the court's discretion; it would be due to the extinction of the right of retainer, in whole or *pro tanto*. If, contrary to this view, the court is entitled in a proper case to override the right of the executor, I see nothing in the facts of this case to justify it in doing so.

F Upon this branch of the argument reliance was placed upon two matters. First it was said that, in proceeding with the action, the plaintiff was carrying out the directions of the court, and that he was accordingly constrained to carry it as far as further consideration. But even if it be assumed that there was any such compulsion on the plaintiff (a view

G which I cannot accept) this argument proves too much, for it would apply to every creditor's administration action. The result would be that the plaintiff's costs of such an action would always have priority over the executor's right of retainer, unless indeed it were to be expressly stated in the decree that the proceedings were to be without prejudice to that

H right. There is, in my opinion, no warrant in principle or in authority for giving any such effect to an administration decree and the subsequent proceedings under it. The other matter relied upon was an affidavit sworn by Mr. Woolcott, a managing clerk in the employment of the solicitors to the plaintiff. In this affidavit, which was first produced in this court and was read by leave, an attempt is made to show that by

reason of certain statements made by the solicitors to the respondent at an early stage before proceedings were commenced, she ought not to be allowed to claim priority. However, this evidence appears to me to be nothing more than additional evidence directed to the suggestion (which CROSSMAN, J., rejected) that the respondent by her conduct had in some way waived her right to claim priority. If effect were given to the argument it would mean that the respondent had surrendered her priority *pro tanto*. I do not think that it is open to the appellant, having failed on the question of waiver, to put forward the same class of facts as a ground upon which the court should exercise a discretion in his favour, the result of which would be to deprive the respondent *pro tanto* of her right of retainer. In any event the facts relied on are not, in my opinion, such as to justify the court, if it has a discretion, in exercising it so as to deprive the respondent of her priority. A B

The argument based on the Administration of Estates Act, 1925, s. 34, can be dealt with quite shortly. Subsect. (1) of that section incorporating part I of the first schedule gives priority to the funeral, testamentary and administration expenses where the estate is insolvent. However, subsect. (2), after making certain provisions as to the right of retainer, continues : C

Subject as aforesaid, nothing in this Act affects the right of retainer of a personal representative, or his right to prefer creditors. D

In this paragraph the words "subject as aforesaid," in my opinion, quite clearly refer only to the earlier part of subsect. (2) and do not refer to subsect. (1), with the result that the directions given by that subsection as to the priority of administration expenses do not affect the right of retainer (see *A.-G. v. Jackson* (4), at p. 384, *per* LORD TOMLIN). E

In the result the appeal is dismissed with costs, but in view of the respondent's offer, referred to earlier in this judgment, there will be inserted, after the declaration of the prior right of the respondent, a paragraph to the effect that she consents to the payment of the appellant's costs as between solicitor and client, down to Jan. 3, 1936, being paid out of the fund in priority to her claim and a direction for taxation of those costs. The appellant must pay the costs of the appeal with the usual set-off. The necessary consequential alteration in the payment schedule must be made. F G

I am authorised by FINLAY, L.J., to say that he has read and agrees with the judgment which I have just delivered.

LUXMOORE, L.J. : This appeal is from an order made by CROSSMAN, J., on Feb. 2, 1939, on the further consideration of an action H for the administration of the estate of the late Lord Wester Wemyss.

The main question raised was, whether the plaintiff was entitled to his costs of the action down to and including the order made on further consideration, notwithstanding the right of the defendant executrix to retain a debt found to be due to her by the master's certificate in the

action. The existence of the right of retainer was challenged unsuccessfully before CROSSMAN, J., but there is no appeal from that part of his decision. CROSSMAN, J., held that the plaintiff was not entitled to have his costs of the action in priority to the defendant's right of retainer, with the result that as the assets at present available are

- A insufficient to satisfy the debt found due to the defendant, the plaintiff is deprived, at any rate for the time being, of his costs of the action. The plaintiff has appealed from this part of the order and asks that it may be varied by providing that his costs of the action down to and including the order on further consideration may be directed to be paid
- B out of the funds standing to the credit of the action, notwithstanding the defendant's right of retainer in respect of her debt, and after payment of the debt of £793 3s. 8d. due to the commissioner of inland revenue, which admittedly has priority to the right of retainer.

- C The appellant put his case in this court on three different grounds. His first ground was that the costs of an administration action, unless all questions with regard thereto are reserved by the order for administration, are a first charge on the estate which is being administered, and consequently take priority over any right of retainer exercisable by the legal personal representative. If this contention was rejected, he claimed that,
- D upon the true construction of the Administration of Estates Act, 1925, s. 34, statutory priority is, in the case of insolvent estates, given to the costs of administration and, thirdly, he claimed that under the provisions of Ord. 65, r. 1, the court has the widest discretion with regard to the costs of any action, including an action for the administration of the estate
- E of a deceased person, and that, if the right of retainer has priority over the costs of administration, the circumstances of the present case are such that the court ought, in the exercise of its discretion, to order the payment of the plaintiff's costs of action, down to and including the order on further consideration, out of the funds in court, notwithstanding the
- F existence of the defendant's right of retainer. In support of this last contention further evidence was deduced before this court to explain the material circumstances in which the action was instituted and the order for administration made. The further evidence consisted of an affidavit made by one R. H. Woolcott, the managing clerk to the solicitors
- G acting for the plaintiff, together with an exhibit marked "R. H. W." containing the original notes made by him at an interview he had with a representative of the defendant's solicitors on Apr. 26, 1934. Reference was also made to the correspondence passing between the solicitors of the plaintiff and the defendant with regard to this action. It appears
- H from the affidavit, exhibit, and correspondence, that the plaintiff, who was a creditor of the estate of the testator for a sum in excess of £1,000, being desirous of enforcing his claim, consulted his solicitors, who, by Mr. Woolcott, interviewed a representative of the solicitors acting for the defendant. At that interview Mr. Woolcott was told that the defendant as executrix had obtained probate of the testator's will, that the estate

was insolvent, the assets being sworn at £2,915 19s. 7*d.*, while the liabilities amounted to £13,734 14s. 3*d.*, that such liabilities included the debt due to the plaintiff, and that the funeral expenses amounted to £371 16s. 10*d.* Mr. Woolcott was also told that no creditor would take administration proceedings, and was given particulars of the principal creditors, among whom were the commissioners for inland revenue and certain banks. It A
 was not suggested that the defendant executrix was a creditor of the estate or had any claims against it. The affidavit for probate contains no mention of any claim by the defendant against the estate. This affidavit was produced to Mr. Woolcott in support of the statements made to him. Mr. Woolcott was also told that if the plaintiff instituted ad- B
 ministration proceedings, no opposition would be made by the defendant, and that every assistance would be given by her to get in the estate. In these circumstances the summons for administration was issued on May 9, 1934. In so doing the plaintiff was, in my judgment, entitled to rely upon the statements made to him on behalf of the defendant, and to C
 act on the assumption that no question of executor's retainer could thereafter arise, for such an assumption was the natural consequence of the information given by the defendant's solicitors. The solicitors for the respective parties appeared before the master on May 31, 1934, and, on the defendant's admission that the estate was insolvent, the master D
 made an order for general administration, as he was entitled to, in accordance with the provisions of Ord. 55, r. 15*a.* A joint affidavit by the defendant and her solicitor was filed on Oct. 16, 1934, setting out the testator's debts, which included particulars of the debt due to the plaintiff, the debts due to the commissioners for inland revenue and the debts E
 alleged to be due to the defendant. This affidavit for the first time mentioned the defendant's claims against the estate. A further affidavit was filed by the defendant on Mar. 25, 1935, in which she stated that her claims as a creditor against the testator's estate amounted to £6,049 15s. 2*d.* On Jan. 3, 1936, a further affidavit was made by the F
 defendant, in which she set up her claim to retain the whole of the testator's assets in or towards reduction of the £6,049 15s. 2*d.*, subject only to any claim having priority thereto. Before the last mentioned affidavit was sworn, the plaintiff's solicitors wrote to the defendant's solicitors on June 27, 1935 (sending to them a copy of a case for the G
 opinion of counsel and the opinion of counsel thereon) stating in effect that, in view of the defendant's claims and the value of the assets, the plaintiff did not propose to take any further steps in the action. The master, however, insisted on the action proceeding so that his certificate could be made and filed. This was done. The master made his H
 certificate on July 30, 1938. By it he certified that the debts of the testator which had been allowed amounted to £12,309 18s. 8*d.* These included three sums of £793 3s. 8*d.*, £520 0s. 5*d.*, and £412 4s. 7*d.*, respectively due to the commissioners for inland revenue, a sum of £1,083 4s. 4*d.* due to the plaintiff, and a sum of £2,049 15s. 8*d.* due to the

- defendant. The certificate found that the sum of £793 3s. 8d. due to the commissioners for inland revenue was entitled to priority over all other debts, and stated that the defendant claimed to exercise her right of retainer in respect of the £2,049 15s. 8d. but, the plaintiff not admitting such right, the question whether the defendant had established such
- A** right was reserved for decision of the court on the further consideration of the action. When the action came before CROSSMAN, J., on further consideration, the question whether the defendant was entitled to exercise her right of retainer was challenged but, as I have already stated, the judge declined to accept the plaintiff's contention that the right could
- B** not be exercised, and declared by the order on further consideration that, subject to the payment to the commissioners of inland revenue of the sum of £793 3s. 8d., the defendant was entitled to exercise her right of retainer in respect of the sum of £2,049 15s. 8d. The only matter in
- C** question on the appeal is whether the plaintiff is entitled to his costs of the action out of the estate. The defendant, while not admitting the plaintiff's right to be paid any part of his costs of the action in this court, stated that as a matter of grace the defendant would in any event pay such costs down to and including Jan. 3, 1936, the date on which the defendant claimed for the first time to exercise her right of retainer.
- D** As I have already stated there are three questions to be determined on this appeal. The first and second questions have been fully dealt with in the judgment which has been delivered by SIR WILFRID GREENE, M.R. I have had the advantage of reading that judgment and, so far as those two questions are concerned, I find myself in complete agreement
- E** with the conclusion at which he has arrived, namely, that the right of retainer has priority over the costs of an administration action, and I respectfully agree with his reasons for that conclusion. I, therefore, think it unnecessary for me to deal further with those questions.
- The other question, however, remains. I have come to the conclusion
- F** that the court ought, in the exercise of its discretion, and notwithstanding the existence of the right of retainer, to order that the plaintiff's costs of the action down to and including the order on further consideration, with an exception to which I will refer later, be paid out of the funds in court. The reasons why I have come to this conclusion are as follows.
- G** The plaintiff did not start the proceedings for administration without making proper inquiries. As the result of the conversation between the respective solicitors, the plaintiff was entitled to act on the assumption that the representations made on the defendant's behalf as to claims against the estate were correct, and that no question of the executor's
- H** right of retainer would arise, because there was a representation that the executrix had no claim against the estate. The representations, although made in good faith, were inaccurate, but I see no reason why the plaintiff was not entitled to rely upon them or why the defendant was not to be bound by them. It is to be observed that to allow the plaintiff so to do does not deprive the defendant of her right of retainer; that right still

remains. In my judgment, having regard to the nature of the representations made, it would be inequitable not to direct payment of the plaintiff's costs of the action out of the funds in court. So far as the exercise of the court's discretion as to costs is concerned, I think the plaintiff is in the same position as if the defendant had requested him to start the proceedings for administration and to obtain an order therefor with her concurrence, A on the footing that the defendant had no claim against the estate, for the plaintiff instituted his action for administration with the full knowledge and co-operation of the defendant, and the order for administration was made upon the defendant's admission that the estate was insolvent, and was made in the presence of her solicitors. After the order was made, the B administration of the estate passed out of the defendant's hands and was assumed by the court, for the order for administration directed that the testator's property should be applied in payment of his debts and funeral expenses in due course of administration. After this order, neither the C plaintiff nor the defendant could stop the proceedings, nor could the defendant, in the absence of a certificate in answer to the inquiry as to debts, have applied to the court with any hope of success, for payment to her out of the assets on the basis of her right of retainer.

The position of the court with regard to staying further proceedings in an administration action after a general order has been made containing a direction that the assets are to be applied in payment of a testator's debts in due course of administration is stated in *Re Alpha Co., Ltd., Ward v. Alpha Co.* (6). That action was what is known as a debenture holders' action, and not an action for administration of the estate of a deceased person. In it the rule with regard to the discontinuance of an D administration action was stated, and was held not to apply to a debenture holder's action. KEKEWICH, J., said, at pp. 205, 206:

... the plaintiff wishes to discontinue his action, and the question is whether he is entitled to do that after judgment. . . . The action has been likened to an administration action by a creditor, suing on behalf of himself and all other creditors, against an executor or administrator for administration. I do not pause F to distinguish between an action by a specialty creditor, or any other particular class of creditor, but I take the simple case. The creditor who is plaintiff obtains a judgment. The moment he has done that, if it is a proper judgment, he cannot possibly stop . . . for this reason, namely, that if it is a proper judgment it not only directs inquiries as to debts, etc., but also that the assets shall be applied "in a due course of administration." It is perfectly well settled that if there is not that direction as to the administration of assets the decree is not an administration decree in the proper sense of the term, and actions at law cannot be restrained. G But if that direction is given, they can be restrained, and for the reason that the court has then taken upon itself the duty of administering the assets . . . until there is a certificate that all the other debts have been paid, the plaintiff after decree is not *dominus litis*; he is, so to speak, a trustee of the action for the benefit of the other creditors.

The position in the present case is that the plaintiff was not able to stop H the proceedings. He had, with the assent of the defendant, obtained an order for administration of the testator's estate in the proper form, and the court, having by reason of such order, undertaken the duty of administering the estate, could properly refuse to make any order for payment out of the assets until after the master's certificate in answer to the inquiry

as to debts had been made. The defendant was not in a position to ask the court to allow her to exercise her right of retainer, at any rate, until the debts having priority to her claim, had been ascertained and certified. In substance, so far as the defendant is concerned, she has taken advantage of the work done by the plaintiff in this action to obtain the benefit of her right of retainer. The question whether the court should exercise its discretion as to costs in favour of the plaintiff is, I think, different from the question whether there has been any waiver of the right of retainer, and the answer to it depends upon considerations different from those to be considered on the latter question.

- A her right of retainer. The question whether the court should exercise its discretion as to costs in favour of the plaintiff is, I think, different from the question whether there has been any waiver of the right of retainer, and the answer to it depends upon considerations different from those to be considered on the latter question.
- B I am of opinion that the court ought, in order to do what is right between the parties, to exercise its discretion as to costs by ordering that the plaintiff's costs of the action down to and including the order on further consideration should be paid out of the funds in court, but with this exception. The plaintiff has challenged the existence of the
- C defendant's right of retainer and has failed. He should not be allowed any additional costs incurred in respect of this challenge. In my judgment, the order should be limited by excluding from the plaintiff's costs any increase therein occasioned by such challenge.

- D For the reasons I have given I would allow the appeal and direct that the order of CROSSMAN, J., be varied to give effect to the opinion expressed by me.

Appeal dismissed with costs.

Solicitors: *Attenboroughs* (for the appellant); *Bridges, Sawtell & Co.* (for the respondent).

- E [Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

CULL v. INLAND REVENUE COMMISSIONERS.

- F [HOUSE OF LORDS (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Wright, Lord Porter), **June 15, 16, 19, 20, 22, July 27, 1939.**]

Income Tax—Dividends—Sur-tax—Dividend paid “without deduction of tax” —Nil assessment upon company—Sum set aside to meet future tax on sum paid as dividends—Whether net or gross sum—Finance Act, 1931 (c. 28), s. 7.

- G The appellant was the holder of 20,000 ordinary shares in a company upon which for the year ending Mar. 31, 1934, a dividend of 21s. per share was declared “without deduction of tax,” the appellant therefore receiving £21,000. The company had incurred losses in previous years, with the result that it was not liable to be assessed to tax under Sched. D for the year ending Apr. 5, 1934. The dividend paid to the appellant had been paid out of a sum of £559,374 2s. 1d., in respect of which a sum of £99,114 9s. 7d. had been put to reserve as a provision for the payment of income tax thereon in a subsequent year. The question at issue was whether the appellant ought to be assessed for the purposes of sur-tax upon £21,000 or upon that sum “grossed up” to £28,000, the standard rate of tax being 5s. in the £:—
- H

HELD: as the dividend was paid without deduction of tax, the amount received was the gross sum and not a “net” sum within the

meaning of the Finance Act, 1931, s. 7 (2). For the purposes of sur-tax, therefore, the appellant should be assessed upon the sum of £21,000, being the amount actually received.

Decision of Court of Appeal ([1938] 1 All E.R. 467) *reversed*.

Inland Revenue Comrs. v. Pearson, Inland Revenue Comrs. v. Pratt (3), *overruled*.

Neumann v. Inland Revenue Comrs. (1) *followed*.

A

[EDITORIAL NOTE. The opinions in this case review in detail the decision in *Neumann's* case (1). It has been thought that that was a decision upon special facts and of limited application, but their Lordships, while they agree that the facts were special, hold that the decision itself is of general application. A shareholder is not taxed under Sched. D in respect of that part of his income which consists of dividends. The profits of the company are charged to tax in the hands of the company, and that fact is deemed to redound to the benefit of the shareholder. It therefore follows that dividends paid out of profits charged to tax, or, where no tax is payable on them (as was the case here), notionally charged to tax, cannot be "grossed up," and the sur-tax is payable in respect of the sum actually paid. There is, therefore, a distinction between a tax-free dividend and one without deduction of tax.

B

C

AS TO INCOME TAX ON DIVIDENDS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 249-255, paras. 504-518; and FOR CASES, see DIGEST, Vol. 28, p. 82, Nos. 463-468.]

Cases referred to :

(1) *Neumann v. Inland Revenue Comrs.*, [1934] A.C. 215; Digest Supp.; 103 L.J.K.B. 210; 150 L.T. 481; 18 Tax Cas. 332.

D

(2) *Fry v. Salisbury House Estate, Ltd.*; *Jones v. City of London Real Property Co., Ltd.*, [1930] A.C. 432; Digest Supp.; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; *affg.* [1930] 1 K.B. 304.

(3) *Inland Revenue Comrs. v. Pearson, Inland Revenue Comrs. v. Pratt*, [1936] 2 K.B. 533; [1936] 2 All E.R. 731; Digest Supp.; 105 L.J.K.B. 639; 155 L.T. 351; 20 Tax Cas. 433.

E

(4) *Ashton Gas Co. v. A.-G.*, [1906] A.C. 10; 10 Digest 1162, 8225; 75 L.J.Ch. 1; 93 L.T. 676; *affg. S.C. sub nom. A.-G. v. Ashton Gas Co.*, [1904] 2 Ch. 621.

(5) *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744; 28 Digest 81, 445; 92 L.J.K.B. 736; 129 L.T. 546; 8 Tax Cas. 481.

F

APPEAL from an order of the Court of Appeal (SIR WILFRID GREENE, M.R., and MACKINNON, L.J., LORD ROMER dissenting), dated Jan. 31, 1938, and reported [1938] 1 All E.R. 467, dismissing an appeal by the appellant from an order of FINLAY, J., dated June 16, 1937. The facts and the arguments are set out in the opinion of LORD WRIGHT.

G

J. Millard Tucker, K.C., and *Terence N. Donovan* for the appellant.

The Attorney-General (Rt. Hon. Sir Donald Somervell, K.C.) and *Reginald P. Hills* for the respondents.

H

LORD ATKIN [read by LORD RUSSELL OF KILLOWEN]: My Lords, this is an appeal from the Court of Appeal, SIR WILFRID GREENE, M.R., and MACKINNON, L.J., ROMER, L.J., dissenting, who affirmed a decision of FINLAY, J., reversing, upon a case stated by the commissioners for special purposes, the determination of the commissioners. The appeal to the commissioners by the present appellant was against an assessment

to sur-tax for the year ending Apr. 5, 1934, in the sum of £70,637. The question that arises is said, no doubt correctly, to be one of importance to the revenue. It was fully debated at the hearing, but inasmuch as it appears to me to be completely covered by a recent decision of this House, I find it unnecessary to deal with many of the topics of discussion.

A The appellant was the holder of 20,000 ordinary shares in Cull and Co., an unlimited company having a share capital of £800,000 divided into 700,000 preference and 100,000 ordinary shares of £1, all issued and fully paid. The company carries on business as bankers and financiers. On Mar. 13, 1934, the directors resolved :

B that the dividends on the 5 per cent. cumulative preference shares for the four years to Mar. 31, 1934, be paid on Mar. 31, 1934, and that an interim dividend for the year to Mar. 31, 1934 on the ordinary shares of 2½s. per share be paid on Mar. 31, 1934, without deduction of income tax.

In making his return of total income for sur-tax purposes, the appellant included the sum of £21,000, his dividend on his holding of ordinary shares. The assessing commissioners added £7,000 as representing income tax in respect of this dividend, thus increasing the assessment to £28,000. On appeal the commissioners for special purposes reduced the assessment by the sum of £7,000 ; and it was this determination which was reversed by FINLAY, J., and gives rise to the present appeal.

D My Lords, it is now clearly established that in the case of a limited company, the company itself is chargeable to tax on its profits, and that it pays tax in discharge of its own liability and not as agent for its shareholders. The latter are not chargeable with income tax on dividends, and they are not assessed in respect of them. The reason presumably is that the amount which is available to be distributed as dividend has already been diminished by tax on the company, and that it is thought inequitable to charge it again. At one time it was thought that the company in paying tax paid on behalf of the shareholder : but this theory is now exploded by decisions in this House : and the position of the shareholders as to tax is as I have stated it. The company may, however, in declaring a dividend, declare that it shall be paid tax-free. Such a declaration is equivalent to giving the shareholder the right to such a sum as after making the deduction of the appropriate amount attributed to tax, will produce the net tax-free dividend in fact paid. G Such larger sum in truth represents the profit to which the shareholder has become entitled from the company, and is properly returnable in his total income for sur-tax purposes : just as the gross income from which deductions of the appropriate sum for tax has in fact been made on payment is true income and is duly returnable. The right of the company to make a deduction, which is not in fact tax, for it represents a sum which is neither chargeable on the shareholder nor payable by the company to the Inland Revenue, is given now by All Schedules Rules, r. 20. Rule 20 is as follows :

H The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before

any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto.

The deduction is optional, and when it is made, the result in the instances I have given—a dividend which is paid less the reduction, and a dividend which is declared to be tax-free—is that the shareholder has suffered a deduction authorised by statute from a total sum which otherwise he would be entitled to receive in full. In 1927 sur-tax was substituted for super tax: and one of the provisions made for arriving at the total income for purposes of sur-tax is contained in the Finance Act, 1927, s. 39 (2):

In estimating under the Income Tax Acts the total income of any person, any income which is chargeable with income tax by way of deduction at the standard rate in force for any year shall be deemed to be income of that year. . . .

That provision was not apt to cover the case of the deduction which a company is authorised under r. 20 to make when paying a dividend, for, as I have said, the dividend is not in fact chargeable with tax.

No doubt to avoid this amongst other difficulties, the Finance Act, 1931, contained sect. 7 (2) upon which this case depends:

Subject as hereinafter provided, a dividend paid by a body of persons, whether before or after the commencement of this Act, shall, to the extent to which it is paid out of such profits and gains as are mentioned in subsect. (1) of this section, be deemed, for all the purposes of the Income Tax Acts, to represent income of such an amount as would, after such deduction of tax as is authorised by the provisions of the said rule 20, be equal to the net amount received . . .

The Crown contended that this subsection on its true construction applied to all cases where a deduction was authorised to be made, and was not confined to those in which a deduction had actually been made. In their submission, it, therefore, for the purposes of income, imputed to the person receiving a payment in cases where no deduction had in fact been made the receipt of a hypothetical sum calculated as though deduction had been made: what is now known in income tax slang as "grossing up." Whatever might have been said for this construction before 1934, it is impossible now to accept it, for by the decision of this House in *Neumann v. Inland Revenue Comrs.* (1), it was expressly held to be wrong. In that case *The Salisbury House Estate, Ltd.*, had been assessed to income tax upon the whole of its receipts from rents which happened to exceed the Sched. A assessment to which it had been assessed and paid tax. In the case of *Fry v. Salisbury House Estate, Ltd.* (2), it was decided that the company were not assessable on receipts in excess of the Sched. A valuation. On the question being raised between the company and the inland revenue, the company had placed to income tax reserve a sum equivalent to the amount of tax further demanded: and upon the case being decided in their favour they then distributed amongst the shareholders without any deduction, the total sum as placed to reserve. In *Neumann's* case (1) the appellant was one of those shareholders. Originally the company had declared the dividend as being free of tax, and had sent the shareholders a cheque for £4,275,

stating that it was equivalent to a gross amount of £5,343 15s. The appellant had therefore returned the larger sum as part of his total income. Later the company withdrew and stated that they had erroneously described the dividend as tax-free. Thereupon the appellant claimed to reduce his total income return, alleging that neither the smaller
A nor the larger sum had to be included in his total income return, and appealed against his assessment.

The special commissioners decided against him : on appeal FINLAY, J., decided in his favour, holding that the sum was not paid out of profits brought into charge : the Court of Appeal decided against him. On
B appeal to this House, it was held that the smaller sum had to be returned on the ground that it had been paid out of profits and gains brought into charge. But as to the larger sum, it was held that sect. 7 (2) did not apply. All the Lords held that that subsection did not operate unless there had been a deduction in fact. They were impressed with the
C apparent anomaly arising in the case before them from the fact that the whole sum, divisible amongst the shareholders and distributed by the dividend in question, was in fact paid to the shareholders, so that if there had been a "grossing up" of the dividend, the shareholder would have had imputed to him an income to which he had not and never
D could have become entitled. Seeing that the contention of the Crown led to this result, the House came to the conclusion that the subsection had not the wide meaning imputed to it. Each of the Lords construed the subsection in its general application, and each of them came to the conclusion that it had no application to a case where in fact no deduction
E had been made. The language used appears to me to be quite free from any ambiguity or qualification.

LORD TOMLIN said, at p. 231 :

If a deduction from the gross sum was authorised but was not in fact made, as was the case here, there is in my opinion nothing in the language of the subsection which entitles the inland revenue to treat the gross sum as being greater than in
F fact it was.

LORD WARRINGTON OF CLYFFE, said, at p. 233 :

... I agree with my noble and learned friend. In such a case as this, namely where no deduction is in fact made, there is no distinction between a gross sum and a net sum. The actual sum paid, and not some wholly fictitious sum, is therefore that which should be included in the return of income.

G LORD WRIGHT said, at pp. 242, 243 :

But I think the claim of the respondent fails because it ignores the word "net" in subsection. 2. That word involves the idea of deduction, which in this case must be a deduction of tax. . . . What was distributed, being £4,275, was in my judgment the gross amount : the company, though authorised to deduct tax from it, were not bound to deduct it and did not in fact do so. I cannot see any justification for
H describing the sum distributed as a "net amount" and hence I conclude that sect. 7 (2), does not apply.

My Lords, I cannot think of words more apt to convey that the members of this House were putting a general construction on the words in question, and that in their view, where no deduction was in fact made, the subsection did not apply. The position where a "tax-free" dividend was

declared was not within the purview of the decision. The construction so authoritatively stated, binds us as it bound the courts below. I find no justification for limiting it to facts precisely similar to those existing in this instance, or to cases where it might be supposed that no deduction could be made. Still more without warrant is it to put a limited construction upon the decision of the House because of the untoward results to the revenue which may result. I decline to embark upon the consideration of the question whether the decision was right or wrong : it binds me, and I necessarily accept it. If it leads to ill results the effect can be remedied by legislation. It follows from that I have said that the cases of *Inland Revenue Comrs. v. Pearson*, *Inland Revenue Comrs. v. Pratt* (3), were wrongly decided and must be overruled. The appeal should be allowed, the orders of the Court of Appeal and FINLAY, J., should be set aside, and the determination of the commissioners for special purposes of the income tax restored. The appellants should have the costs here and in the courts below.

LORD RUSSELL OF KILLOWEN : My Lords, I agree with the motion proposed. I do not restate the facts.

Our decision in this case depends, in my opinion, and depends solely upon what is the proper construction to be placed upon the Finance Act, 1931, s. 7 (2). All Schedules Rules, r. 20 enables a company, if it thinks fit, but does not compel it, before paying a dividend of its profits or gains "to be charged," to deduct "the tax appropriate thereto." The words "appropriate thereto" were subsequently made the subject of legislation by the Finance Act, 1927, s. 39, which provided by subsect. (1) that :

Such of the provisions of the Income Tax Acts as provide . . . that there may be deducted from any dividend the tax appropriate thereto . . . shall have effect as if they provided that tax may be deducted . . . at the standard rate for the year in which the amount payable becomes due.

The Finance Act, 1931, s. 7, is as follows :

(1) The provisions of Rule 20 of the General Rules, which authorise the deduction of the appropriate tax from any dividend paid by a body of persons, shall, in relation to a dividend paid by any body of persons, whether before or after the commencement of this Act, be construed as authorising the deduction of tax from the full amount paid out of profits and gains of the said body which have been charged to tax or which, under the provisions of the Income Tax Acts, would fall to be included in computing the liability of the said body to assessment to tax for any year if the said provisions required the computation to be made by reference to the profits and gains of that year and not by reference to those of any other year or period.

(2) Subject as hereinafter provided, a dividend paid by a body of persons, whether before or after the commencement of this Act, shall, to the extent to which it is paid out of such profits and gains as are mentioned in subsect. (1) of this section, be deemed, for all the purposes of the Income Tax Acts, to represent income of such an amount as would, after such deduction of tax as is authorised by the provisions of the said Rule 20, be equal to the net amount received. . . .

The first subsection of this section brought the dividend now in question within r. 20, so as to enable the company if it thought fit, to deduct tax ; but it will be observed that while the amount which it could have

deducted as the "tax appropriate thereto" has been definitely fixed at the standard rate for the year in which the amount of the dividend became due, it is in no way comparable with the tax payable by the company itself. The second subsection is the crucial one in the present case, the sole question being, as I conceive, whether upon its true construction, it does or does not apply to a dividend which is paid by a company without any deduction of tax having in fact been made by the company. My Lords, in my opinion that very question was decided by this House in the case of *Neumann v. Inland Revenue Comrs.* (1), in which, as I read their opinions, all the noble Lords who took part in the debate, expressed the view that the subsection only applied to cases where a company, after declaring a dividend of a stated amount, pays in satisfaction thereof a sum less than the stated amount of the dividend by a sum equal to tax thereon. In other words, that the subsection only applies to cases in which what the shareholder receives is a "net amount," namely, an amount reduced from a larger amount by reason of a deduction made by the company against the shareholder.

LORD TOMLIN can have meant nothing else when he said, at pp. 230, 231 :

The subsection in effect provides that it is the gross amount before deduction which is to be treated as the income for the purposes of the Acts. If a deduction from the gross sum was authorised but was not in fact made, as was the case here, there is in my opinion nothing in the language of the subsection which entitles the inland revenue to treat the gross sum as being greater than in fact it was.

LORD WARRINGTON OF CLYFFE agreed with LORD TOMLIN. He said, at p. 233 :

In such a case as this, namely where no deduction is in fact made, there is no distinction between a gross sum and a net sum. The actual sum paid, and not some wholly fictitious sum, is therefore that which should be included in the return of income.

LORD WRIGHT is quite explicit on the point. What was distributed was in his opinion the gross amount ; and he continues, at p. 243 :

... the company, though authorised to deduct tax from it, were not bound to deduct it and did not in fact do so. I cannot see any justification for describing the sum distributed as a "net amount" and hence I conclude that sect. 7 (2) does not apply. I cannot treat the word "net" as mere surplusage or as simply meaning the actual amount, whether gross or net.

It was argued that the case was decided only upon its own special facts. I cannot assent to this view. It was a decision that the section on its true construction did not apply if no deduction had in fact been made by the company before payment. Indeed, as I read the case, if the word "net" had not been in the subsection, the decision must have been in favour of the Crown. I agree with the result which was reached by LORD ROMER, although there are some statements in his judgment with which I cannot concur. In particular I do not agree with the view that the cases of *Pratt* and *Pearson* (3) were rightly decided. But I do agree with the following passage which contains the grounds upon which

he was prepared to allow the appeal ([1939] 2 K.B. at p. 135; [1938] 1 All E.R. at pp. 480, 481) :

The only question, therefore, to be determined in the present case is whether the dividend falls within sect. 7 (2). . . . In my opinion it does not. The company has made it quite clear that it has made no deduction for tax, it being expressly stated in the resolution for the dividend that it should be paid "without deduction of tax." The amount received by the appellant cannot, therefore, be regarded as being a net amount within the meaning of the subsection as interpreted in *Neumann's* case (1). For these reasons I respectfully differ from FINLAY J. He thought that there was no difference between the expression "without deduction of tax" and "tax free." In this I cannot agree with him. . . . It is, therefore, the precise opposite of "without deduction of tax." A

My Lords, for the reasons which I have given I would allow this appeal B and restore the reduction of the assessment which was made by the special commissioners.

LORD MACMILLAN : My Lords, it is now well settled that the shareholders of a company are not liable to be directly charged with income C tax at the standard rate on the dividends which they receive from the company. It is also settled that dividends received by an individual must be brought into computation in ascertaining his total income for sur-tax purposes ; they are a source of income within the meaning of the Income Tax Act, 1918, s. 4. So far as income tax at the standard rate D is concerned, dividends received by the shareholders of a company are regarded as franked by the payment by the company of income tax on its profits or gains. Companies are not, however, liable to, and do not pay sur-tax, which is levied only on individuals. Consequently, dividends received by shareholders of a company are not franked, so E far as regards sur-tax, by any payment of sur-tax by the company. The present appeal relates to the question of the proper way of treating dividends in the individual taxpayer's return of his total income from all sources for the purpose of ascertaining his liability to sur-tax. In making a return of his total income, the taxpayer has to classify the items of his F income under two main heads, namely, (i) income not taxed at the source and (ii) income taxed at the source. Income which has been received by the taxpayer without any deduction in respect of income tax, is entered at the actual amount received as income not taxed at the source ; income which has been received less a deduction in respect of G tax is income taxed at the source, and must be entered at the gross amount before deduction of tax, for income tax paid or suffered is not a permissible deduction in computing total income. A company on paying dividends to its shareholders is entitled, but not bound, to deduct income tax at the standard rate at the time of payment. If the company exercises H this right, and deducts the tax from the dividends which it pays, the shareholders must, on entering the dividends in their return of total income, add back the deducted tax to the net amount actually received. But what if the company does not exercise its right of deduction, and chooses to pay its dividends without deduction of tax ? Ought the

shareholder (i) to enter the actual sum received by him as income not taxed at the source, or ought he (ii) to enter such a sum as, after deduction of tax, would give the sum actually received, thus treating the dividends as income taxed at the source ? That is the question which the present appeal poses.

- A Apart from the terms of the Finance Act, 1931, s. 7 (2), I cannot see any justification for the second of these alternatives. The dividend has been received by the shareholder without deduction of tax. Why should he add back tax which has not been deducted ? Why should he treat as income taxed at the source, income which has not been taxed at the source ? It is said, however, that sect. 7 (2) of the 1931 Act requires this to be done, and regards every dividend received, whether tax has or has not been deducted from it, as a "net amount received."

- In my opinion this contention cannot be entertained by your Lordships in view of the decision of this House in *Neumann v. Inland Revenue Comrs.* (1). I do not read that decision as turning on the special facts of the case. It is an authoritative interpretation of the meaning and effect of sect. 7 (2) of the 1931 Act, and it gives no countenance to the argument which has been advanced on behalf of the Inland Revenue at your Lordships' bar, and which commended itself to the majority of the lords justices in the Court of Appeal. I do not feel called upon either to criticise or to justify the decision in *Neumann's* case (1), but I may at least say that it is consonant with the general scheme of computing income for tax purposes, which I have outlined. One conception which found favour with SIR WILFRID GREENE, M.R., I find myself, with the greatest respect, unable to accept as applicable to the interpretation of the critical subsection. He suggests that a shareholder who receives a dividend from which the company has not deducted tax, may, in some cases at least, be said to receive a "net amount," because he is receiving payment from a company which has already paid income tax on the fund out of which the dividend is paid. But the tax which the company pays on its profits and gains need not be the same, either in rate or in total amount, as the tax which it refrains from deducting, in paying dividends to its shareholders without deduction of tax. The company has not suffered deduction of income tax from its profits or gains ; it has paid income tax on its profits or gains. The divisible fund is diminished by that payment, no doubt, but this cannot properly be described as a deduction of tax at the source of the shareholder's dividend. The question of deduction or no deduction arises only when the company proceeds to distribute its dividends. I do not think that the word "net" in the subsection can be read as equally applicable to the amount which the shareholder receives whether the company does or does not deduct tax. So to hold would be to treat the same word as having two quite different meanings.

The case of the so-called tax-free dividend does not arise, but as it has been discussed both in this House and in the Court of Appeal,

I may point out that such a form of dividend is unknown to the income tax code, which knows only dividends from which tax has been deducted at the source, and dividends from which tax has not been deducted at the source. The expression has, however, been judicially interpreted to mean a dividend of such a sum as after deduction of tax gives the actual sum received. The tax-free dividend is not really a dividend of the amount received, but a dividend of a larger sum less the tax thereon. It is therefore treated notionally as income taxed at the source, and in the return of total income must be entered at the gross amount which, less tax, gives the actual net amount received. A

With these few observations I concur with your Lordships in holding that the appeal should be allowed. B

LORD WRIGHT : My Lords, the question in this appeal is what is the effect of the judgment of this House in *Neumann v. Inland Revenue Comrs.* (1). It was sought on behalf of the respondent to distinguish that decision on the ground that it did not lay down any general rule for the construction of the Finance Act, 1931, s. 7 (2), but was limited to the special facts of that case, and should not be applied to the facts of this case. Such was in substance the contention before your Lordships of the Attorney-General, which succeeded before FINLAY, J., and the majority of the Court of Appeal, consisting of SIR WILFRID GREENE, M.R., and MACKINNON, L.J. LORD ROMER, in dissenting, agreed with the conclusion of the Commissioners for Special Purposes of the Income Tax Act. The question can be shortly stated to be whether a dividend of £21,000 declared by Cull & Co., "without deduction of income tax," could be treated for sur-tax purposes as though it had been a dividend of £28,000 from which the company had deducted standard income tax of £7,000. The question may be stated in other words, as being whether the sum of £21,000 was a net sum which under sect. 7 (2) was to be deemed to represent income of such an amount as would, after such deduction of tax as is authorised by the provisions of All Schedules Rules, r. 20, be equal to the net amount received. The contention on behalf of the appellant was that the decision in *Neumann's* case (1) was general, and was that the subsection on its true construction did not apply unless there was in fact such an amount received as could properly be called a "net" amount, the word "net" being there used in the same sense as in the Finance Act, 1924, s. 33. That section requires that a dividend warrant should be accompanied by a statement in writing showing (i) the gross amount which, after deduction of the income tax appropriate thereto, corresponds to the net amount actually paid, (ii) the rate and amount of such tax, and (iii) the net amount actually paid. This can apply only to cases where the deduction has been made, because under All Schedules Rules, r. 20, the deduction is optional, not obligatory, and hence if the company in paying the dividend, does not choose to deduct the tax, the dividend so paid without C D E F G H

deduction of tax cannot be a net amount, but must be a gross amount, and hence it was contended that a dividend so paid without deduction of tax is in substance, and not merely in words, a different matter from a dividend paid after deduction of tax or tax-free, both of which expressions have the same meaning. For instance, if standard income tax were payable by the appellant on his dividend of £21,000, it would be in this case on a sum of £21,000, whereas if £21,000 had been paid tax-free or after deduction of tax, the gross sum, applying the computation just stated, would be £28,000. This instance shows clearly the different effect of declaring a dividend tax free and declaring a dividend without deduction of tax. In the former event the tax-free dividend does not represent income on which the standard tax is to be charged, but such a sum of net income as would, if standard income tax were chargeable, leave a net sum of £21,000, the tax being, say, £7,000. On the other hand, an income of £21,000 without deduction of tax would only pay at 5s. in the £, a tax of £5,250.

As I have come to the conclusion, after a careful consideration of the reports in *Neumann's* case (1), that this House did give a decision on the general construction of the subsection, and not a decision limited to the special facts of that case, it only here remains to decide if good reason is shown why the general construction of the subsection declared by this House should not be applied in the present case. It is not competent for your Lordships to reopen a previous decision of this House on a point of law, even if on reconsideration it should appear to be erroneous, which I am far from thinking could be said of the decision in *Neumann* (1). Nor is it open to the Court of Appeal or to a judge of first instance to go behind the decision. A judgment of the House on an issue of law, whether unanimous or by a majority, is different from a mere expression of opinion or matter of observation not necessary for the case. It fixes the law, which can then be changed only by parliament. All I intend, therefore, to do in this opinion is to explain briefly what was actually decided, and to examine the grounds which are relied on for the contentions that the decision was one limited to special facts, and that the actual facts of the present case are distinguishable, and necessitate a different conclusion. I shall therefore state first, in summary form, what I understand to have been the facts in *Neumann* (1), and the ruling of this House on the construction of the subsection.

In *Neumann* (1) the Salisbury House Estate, Ltd., had declared a dividend in favour of Neumann, a shareholder in the form, "Gross amount of dividend £4,275, income tax appropriate nil, £4,275." This dividend represented Neumann's share of a sum of £18,325, which the company had set aside to reserve out of profits, to await the decision in the case *Fry v. Salisbury House Estate Ltd.* (2). The company owned flats, and was taxed under Sched. A; but the Sched. A assessment came to much less than the actual rents collected. It was held by this House in *Fry's* case (2), that the Sched. A assessment exhausted the tax-

able capacity of the rents, and that no further assessment to standard income tax was competent under Sched. D in respect of the amount by which the rents exceeded the Sched. A assessment. The company thereupon distributed in full to the shareholders the reserve fund of £18,325 as an interim dividend. The question then arose as to the position of Neumann as a shareholder. There were two questions, A first, whether he was assessable to sur-tax at all on the £4,275, and, secondly, if he were, whether he was assessable at £4,275, or at £5,343 15s. This latter sum was the amount which would, after such deduction of tax as is authorised by r. 20, have been equal to the net amount received. On the first point, this House held that the dividend was not directly or B separately assessable to income tax in the shareholder's hands, but was still chargeable to sur-tax, because it was income tax income which had been charged to tax. The assessment under Sched. A had charged exhaustively the whole of the rents, so that the company were entitled under r. 20 to deduct the tax appropriate thereto from the £18,325 C if they had been minded to do so, though they had not, but had distributed the gross amount. On the second point this House held that the Finance Act, 1931, s. 7 (2), did not apply, because on the true construction of the subsection it only applied to a net amount, whereas the £4,275 received by Neumann was a gross and not a net amount. The D three Lords of Appeal who took part in the decision were unanimous, and their opinions agreed in substance in all respects. It will be enough here to quote the following passage from the opinion of LORD TOMLIN, who gave the leading opinion. He said, at pp. 230, 231 :

The subsection in effect provides that it is the gross amount before deduction which is to be treated as the income for the purposes of the Acts. If a deduction E from the gross sum was authorised but was not in fact made, as was the case here, there is in my opinion nothing in the language of the subsection which entitles the inland revenue to treat the gross sum as being greater than in fact it was.

LORD WARRINGTON OF CLYFFE agreed. I may perhaps be permitted to quote from the speech which I delivered, a short passage, at p. 243 : F

What was distributed, being £4,275, was in my judgment the gross amount : the company, though authorised to deduct tax from it, were not bound to deduct it and did not in fact do so. I cannot see any justification for describing the sum distributed as a "net amount" and hence I conclude that sect. 7 (2) does not apply. I cannot treat the word "net" as mere surplusage or as simply meaning the actual amount, whether gross or net. G

I must resist the temptation to develop the reasoning on which this conclusion was based. I may, however, add that sect. 7 (2) is dealing with a conventional "grossing up," as it is called, but when it comes to the amount received, that must necessarily be a fact. The subsection does not say that the amount received is to be deemed to be H net whether or not in fact deduction has been made. If the purpose of the Act is to secure that the shareholder pays sur-tax by "grossing up" whatever amount he receives in fact, whether the company has deducted tax or not, they could effect this result by a simple change of language or by making it compulsory in every case for a company to

deduct tax under r. 20, and thus avoid payment of dividends without deduction of tax. It might seem that the framers of sect. 7 (2) had overlooked the optional terms of r. 20. However, I do not pursue the subject, as all that I am concerned to do at the moment, is to point out that the decision in *Neumann* (1) was directly and expressly based
A on the construction of the language of the subsection. This House having in precise terms determined the construction, has fixed the law, which can only be changed by the legislature.

I shall now examine in a little more detail the contention strongly urged on behalf of the Crown that the decision in *Neumann* (1) was
B not based on the general construction of the subsection, but on the special facts of the case. I find it difficult to see how that contention can be seriously maintained in view of the precise language quoted above from the opinions of the Lords, in which the crucial and decisive conclusion is finally stated. Now, it is true that the facts in *Neumann* (1)
C were in some respects special. The directors were distributing £18,325 which had been specifically set aside as a reserve in case the company were held liable for the extra tax. In the event it was not required. The company might, in paying the amount, have deducted the tax when they distributed it, because it was paid out of charged profits.
D In that case they would have properly deducted the tax in *Neumann's* case (1) from £4,275, not from £5,343 15s., because they were only distributing and paying £18,325 in all, of which £4,275 was *Neumann's* share. It is with this aspect in mind that LORD TOMLIN says, at p. 230 :

Now I think it would be repellent to most minds that the appellant should be
E charged as a part of his income with a sum which not only has never come to him, but has never existed in fact. It is plain that the respondent's cross appeal which seeks to treat the sum of £4,275 as a net sum, corresponding to a gross sum of £5,343 15s., assumes that the amount divisible by the company was something in excess of anything they ever had to divide.

LORD WARRINGTON OF CLYFFE and I make similar observations. But
F it is clear on a perusal of the opinions that this matter was not the *ratio decidendi*. I said, at p. 242 :

yet however anomalous the claim it must receive effect if the actual language of the section so requires.

The final conclusion in all three opinions was based expressly on the
G actual language of the subsection. In every case, it is for the company to decide (subject no doubt to certain considerations of company law, and of policy) what sum they will set aside to declare and distribute by way of dividends. This becomes the divisible fund for this purpose. The company can also decide if the fund is to be distributed as gross or
H net. In *Neumann's* case (1) it does not appear that the company had not adequate funds outside the £18,325, or that they might not, if so advised, have distributed £18,325 as a tax-free sum, or as a sum, after deduction of income tax, in which case the nominal amount of distribution would be the larger or gross sum necessary to represent a net sum of £18,325 after deduction of the appropriate tax. There is nothing

peculiar in the facts in *Neumann* (1), except the particular circumstances and reasons which led to the setting aside of the fund, and made it natural to divide it in full. Though notionally they had paid tax on it, they had not done so in a business sense. In the opinions of this House, this aspect was merely emphasised to point the moral that dividends declared without deduction of tax may exhaust a special fund set aside to meet them. The peculiarity in *Neumann* (1) was that the fund set aside had borne the tax only in a notional and not in a business sense. However, a company, in setting aside out of profits a sum for payment of dividends, can always, even if all the profits have been taxed in full, disregard that fact, and decide not to deduct tax under All Schedules Rules, r. 20. If a declaration of dividend is made "without deduction of tax" as it may be under r. 20, and if "gross" and "net" mean what they mean in the Finance Act, 1923, s. 33, the dividend is gross even though it is paid out of taxed profits, which in another sense may be called net, and there is no scope for "grossing up" (as it is called) what is already "gross." That can only logically be done when the dividend is declared as a "net" dividend, that is, after deduction of tax or tax-free. It can then properly be "grossed up" to the larger amount as specified in sect. 7 (2). It is true that the practice of declaring a gross dividend and then deducting the appropriate tax does not affect the sum which the shareholder receives. The same is true of a tax-free dividend as it is also indeed of a dividend without deduction of tax; but owing to the language of the Acts it does affect the sur-tax.

I can now pass to consider the case under appeal. The company in that case had made in the year of assessment large profits, which were not in that year liable to assessment. They did, however, set aside £99,114 as a reserve because these profits would be brought into computation and would attract tax in the following year. That left £559,374, which was carried on the balance sheet as a balance of net profit. It was the balance of profit and gains, though in fact it had paid no tax. Out of that sum various appropriations were made, in particular a sum of £105,000 to satisfy an interim dividend of 21s. a share to be declared "without deduction of income tax." The appellant having been assessed to supertax on the basis of a "gross" or "grossed up" dividend at the rate of 28s. a share, succeeded in his appeal to the Commissioners for Special Purposes who held as follows:

In the case before us it is contended on behalf of the Crown that in the resolution of Mar. 13, 1934, the words "without deduction of income tax" should be read as after deduction of income tax and that the dividend is a "tax free" dividend. In our opinion the words without deduction of income tax qualify the words "be paid" and mean that no deduction on account of income tax is to be made on payment of the dividend of 21s. per share. Accordingly we hold that the dividend is not a "tax free" dividend, that no income tax has been deducted by the company and that no addition to the dividend should be made on account of income tax. We accordingly reduce the assessment by the sum of £7,000.

In my opinion the commissioners correctly applied to the facts of the case the law laid down by this House in *Neumann* (1). I cannot

- see any distinction in the facts which is material to the question. The company's profits for the year were not assessable to income tax because there had been no profits of the trading in the previous year, but they would be chargeable in another year, that is, the following year, so that under the Finance Act, 1931, s. 7 (1), the company were
- A** authorised to deduct the tax, just as the directors might have deducted the tax, if so minded, in *Neumann's* case (1). The dividends were thus notionally charged to tax. It is not necessary or relevant to speculate why the directors did not deduct tax ; it is enough that in fact they did not do so. Nor is it material that in *Cull's* case the company had
- B** available profits of the year far in excess of the amount which they decided to distribute as dividend on the ordinary shares. The amount distributed in dividends may and generally will have no relation at all to the profits earned in the year ; it may be taken in whole or in part from a reserve fund for the equalisation of dividends or from any profits
- C** which have been earned in previous years, and charged at a rate of tax different from the rate current when the dividend is declared ; it may be a small proportion of the profits earned in the year. It is this want of correlation between the dividends and the profits of the year which has led to the provision of the Finance Act, 1927, s. 39, which (*inter alia*)
- D** provides that the deduction if made on account of income tax shall be at the standard rate of the year of declaration irrespective of the rate or rates at which the company paid tax on the profits which may have accrued in other years. These are some of the circumstances which have led to the rule now well established and finally affirmed in *Neumann's*
- E** case (1), that the shareholder is not taxed under Sched. D in respect of that part of his income which consists of dividends. The profits have been charged to tax in the hands of the company and that fact is deemed to redound to his benefit. I have already explained why the special reason which induced the company in *Neumann's* case (1), to set aside
- F** the special reserve, does not affect the position any more than does the special reason which in any case influences a company in deciding what part of its profits it will set aside for paying dividends. The essential fact is that in *Cull's* case, as in *Neumann's* (1), the company did not exercise its optional authority to deduct income tax, but paid without
- G** deduction.

- It now becomes necessary to examine the reasons which induced FINLAY, J., and the majority of the Court of Appeal to reverse the decision of the special commissioners. As FINLAY, J., followed the decision of LAWRENCE, J., in *Inland Revenue Comrs. v. Pearson*, *Inland*
- H** *Revenue Comrs. v. Pratt* (3), these cases must first be considered. The companies in these cases had not deducted tax in paying the dividends, though the dividends were paid out of profits charged to tax. It is not material that in the former case they were paid out of accumulated profits. The special commissioners in each of these cases held, as they did in *Cull's* case, that the dividends paid were gross sums, and that

the Finance Act, 1931, s. 7 (2), did not apply. The contention of the Attorney-General is summarised in the following terms :

Where the company's profits have been taxed as here and the company has power to deduct tax from the shareholders' dividends, the sum paid is a net sum to which must be added for purposes of sur-tax the amount of tax appropriate to the profits distributed in dividend.

I may note that the same might be said of the facts in *Neumann's* case (1). LAWRENCE, J., acceded to the contention of the Attorney-General, and reversed the decision of the special commissioners. He seems to have been influenced by the consideration that if the decision of the commissioners were right, any company could ensure that its shareholders should be taxable to sur-tax only on the actual amount received in cash, by the simple process of declaring dividends without deduction of tax. That may be the result of the decision in *Neumann's* case (1), but it follows from the fact that the deduction of tax by a company in paying dividends is optional, not obligatory. He seeks to distinguish *Neumann's* case (1), because in that case the tax was not charged "pound for pound" on the profits distributed under Sched. A, whereas in the cases before him it had been charged "pound for pound" under Sched. D, at some time or another on the company's profits. However, that distinction is immaterial; all that is material under r. 20 is that the profits should have at some time or other, duly borne the appropriate tax, whatever it was. This was equally true in *Neumann's* case (1). LAWRENCE, J., also sought to distinguish *Neumann* (1), because the dividends paid exhausted the specially segregated fund, whereas that was not so in the cases before him. I have commented on that point, which in my opinion is not a true basis of distinction. The judge further held that the cases before him were governed by the *Ashton Gas Co.'s* case (4), and not by *Neumann's* case (1) at all. With the greatest respect for the judge, I am bound to say that I do not think that the *Ashton Gas* case (4) throws any light at all on the problems now being considered. It was an entirely different case. It was not a tax case at all. The company there was a statutory undertaking, the special Act of which provided that the profits divisible in any year divided among the ordinary shareholders should not exceed a given rate. The company declared and paid a dividend at the full permitted rate without deducting tax, and in doing so obviously divided more of their profits than they would have done if they had paid the profits after deducting income tax, and exceeded the divisible rate. BUCKLEY, J., put the question thus, at p. 625 :

The whole question is, Are the profits thus divided among the shareholders in excess of 10 per cent. on the capital? I think they are. It is exactly as if the company declared a dividend of 10 per cent., and the amount of the income tax, so that when the statutory deduction of the income tax is made the shareholder shall have a clear 10 per cent.

This decision was affirmed by the Court of Appeal and the House of Lords. THE EARL OF HALSBURY, L.C., said it was perfectly clear. The question was simply whether the company was dividing more of its

profits in paying the dividends than it was permitted to do. It was held in effect that, in arriving at the permitted rate of dividend, the profits ought to be calculated as inclusive and not exclusive of the amount payable for the year in respect of the income tax on the profits proposed to be divided. It cost the company more profits to pay 10 per cent. without deducting income tax than to pay 10 per cent. less income tax. When LORD WRENBURY in *Bradbury v. English Sewing Cotton Co.* (5), concisely, though not with all necessary qualifications, expressed the now accepted view of the immunity of a shareholder in regard to income tax in the words at p. 766 :

- B The corporator bore his share of the tax by the deduction of the appropriate share of the collective tax paid by the corporation from his dividend . . .
- he showed no consciousness that he was contradicting what he had said in the *Ashton Gas* case (4). I cannot see how that case throws any light on the true construction of the Finance Act, 1931, s. 7 (2). It was cited to this House in *Neumann's* case (1), but no member of the House thought fit to refer to it. I think that on such questions as have to be considered here, it should be disregarded once and for all. I observe that the *Ashton Gas Co.* decision (4) is not mentioned in any of the judgments in the Court of Appeal in the present case. With all deference to the judge, I cannot but think that the cases of *Pearson* and *Pratt* (3) were wrongly decided. FINLAY, J., followed the decision of LAWRENCE, J. He attached importance to the *Ashton Gas* case (4), and seemed to emphasise expressions to be found in that case to the effect that the shareholder who gets 10 per cent. on his share gets not merely £10 but an immunity from tax. That, I think, is inconsistent with the settled principle that a dividend is not directly assessable to tax on what the shareholder is paid. The actual amount which he is paid differs according as the company does or does not deduct tax in paying, but what is paid is in itself immune from standard tax in the shareholder's hands. He needs no added immunity. FINLAY, J., also finds himself unable to draw a distinction between the words "free of income tax" and the words "without deduction of tax." I venture to think, however, that the distinction was clearly pointed out by the House of Lords in *Neumann* (1), in the sense which I have explained above. I cannot with respect assent to the reasoning of FINLAY, J., any more than to that of LAWRENCE, J., whose judgment he followed.

- The judgment of FINLAY, J., was affirmed by SIR WILFRID GREENE, M.R., and MACKINNON, L.J. SIR WILFRID GREENE, M.R., is impressed by the far-reaching results of the decision in *Neumann* (1), which he says the legislature can scarcely have intended. I venture to repeat the comment on this contention which I made earlier in this opinion. The argument *ab inconvenienti* is no doubt of weight when the words of the Act are equally open to one or other of two constructions, but once the construction is settled, the argument becomes inadmissible. It is no doubt true that the purpose of the legislature may have been to

bring into sur-tax by means of the shareholders' dividends the profits of the company which in the hands of the company are not subject to sur-tax, but the steps taken to achieve that result have been opportunistic and lacking in a clear or comprehensive scheme. I am almost tempted to say that the draftsmen may have overlooked that a dividend might be not merely tax-free or under deduction of tax, but without deduction A of tax, that is, might be either gross or net, though in either case it is paid out of taxed profits of the company. If the consequences of the *Neumann* decision (1) are so serious, it is for the legislature to change the law. Nor can I agree with the view of SIR WILFRID GREENE, M.R., that the dividend is net whenever it is paid out of profits which have B suffered payment of tax. This, I think, involves in another form the failure to distinguish between the company's profits and the tax on them on the one hand, and on the other hand the dividend and the sur-tax on it. A dividend paid out of net profits of the company (as it must generally be) can be either gross or net, according as it is paid tax-free or without C deduction of tax. In such latter cases the question is between the shareholder and the revenue. The payment by the company of its income tax is a matter between the company and the revenue. A dividend is not net because it is not independently chargeable to standard tax. Nor do I agree with SIR WILFRID GREENE, M.R., in his view that the language D in *Neumann's* case (1) was used with specific reference to the fact that to "gross up" the dividend in question would have involved the false assumption that the total fund of profits which the company had to distribute was greater than in fact it was. That fact, though naturally adverted to in opinions of this House, was, as I have explained, in truth E irrelevant to the general construction of the subsection. SIR WILFRID GREENE, M.R., further was of opinion that, as in the present case, the dividend paid amounted to far less than the total profits which the company had to distribute, there was no difficulty in regarding the amount received by the appellants as a net amount. With the utmost respect, F the matter seems to me to be irrelevant. I cannot, as I have explained, hold that it is in any sense material to the question at issue whether the company distributed the whole or a greater or less proportion of its available fund of profits. All that is material is whether the company declared the dividend as with or without deduction of tax. I think the G word "deduct" or "deduction" is used both in r. 20 and in the material sections of the Finance Acts of 1927 and 1931, in its ordinary sense of a sum being declared, a sum taken away from it, and a smaller sum left to be paid. It is true that in the result the process only affects the sur-tax payer. If, however, there is no deduction under r. 20, there is a case in H fact to which by its terms sect. 7 (2) does not apply. The judgment of MACKINNON, L.J., does not differ in substance from that of SIR WILFRID GREENE, M.R., and accordingly I need not repeat what I have already said as to the reasons why, with all deference, I feel constrained to take a different view. It will also be apparent from what I have already said

that while I agree with the conclusion of my noble and learned friend, LORD ROMER, there are certain matters on which I do not see eye to eye with him.

I think the appeal should be allowed.

My noble and learned friend, LORD PORTER, authorises me to say that A he agrees with the opinions which have been delivered in this appeal.

Appeal allowed with costs.

Solicitors: *Freshfields, Leese & Munns* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

B

PARDY v. PARDY.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Finlay, L.JJ.), July 21, 28, 1939.]

C

Divorce—Desertion—Separation deed—Husband's failure to perform covenant to pay—Repudiation of deed—Acceptance of repudiation by wife.

The petitioner was married to the respondent on Sept. 24, 1928. They lived at the house of the husband's parents. The marriage was a failure almost from the commencement, the husband staying out at night and drinking heavily. In May, 1932, the spouses executed a separation deed, and thereafter lived apart. Under the deed, the husband agreed to pay to the wife £1 5s. per week for her maintenance. The husband made payments under the deed until Sept., 1932, but after that date only £2 10s. was paid in all, no payments being made from 1934 onwards. In 1933, the husband wrote two letters to the wife asking forgiveness and promising help, to which letters no answer was made. The parties met in 1937 in a spirit of neutrality to discuss the future, but without result:—

D

E

HELD: (i) where the original separation was by mutual consent, desertion may supervene without the necessity of a resumption of cohabitation.

(ii) this can happen where on the part of the spouse alleged to be in desertion there is repudiation of the agreement under which separation takes place, no step taken towards the resumption of cohabitation in fact and, in addition to repudiation, the *animus deserendi* and on the part of the spouse alleging desertion there is not only no insistence on the terms of the separation agreement, but a *bona fide* willingness to resume cohabitation without regard to its terms.

F

(iii) whether or not these conditions exist during the relevant period is a question of fact in each case the answer to which depends upon the true inference to be drawn from the words and conduct of the parties.

G

(iv) once these conditions are fulfilled, all the elements necessary to constitute a state of desertion are present, namely, *de facto* separation, *animus deserendi*, and absence of consent on the part of the spouse alleging desertion.

(v) on the facts, these conditions were fulfilled in the present case, the desertion was proved, and a decree *nisi* should be granted.

H

Decision of LANGTON, J. ([1939] 2 All E.R. 258) reversed.

[EDITORIAL NOTE. The enunciation of the doctrine of desertion in *Fitzgerald v. Fitzgerald* (1), which was to a great extent adopted by the Court of Appeal in *R. v. Leresche* (2), has been much discussed for many years now. The recent extension of the grounds of divorce to include desertion for 3 years and upwards has given a greater importance to this discussion. In the present case the Court of Appeal

have re-stated the conditions under which a finding of desertion can be made, and the old doctrine that desertion must bring to an end an existing state of cohabitation can now be regarded as finally overruled. All that is necessary to establish desertion is separation in fact accompanied by an intention to desert; and this intention may be formed at or after the commencement of the separation.

AS TO DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-659, paras. 963-969; and FOR CASES, see DIGEST, Vol. 27, pp. 306-319, Nos. 2837-2977.] A

Cases referred to :

- (1) *Fitzgerald v. Fitzgerald* (1869), L.R. 1 P. & D. 694; 27 Digest 307, 2845; 38 L.J. P. & M. 14; 19 L.T. 575; subsequent proceedings (1874) L.R. 3 P. & D. 136.
- (2) *R. v. Leresche*, [1891] 2 Q.B. 418; 27 Digest 313, 2910; 60 L.J.M.C. 153; 65 L.T. 602. B
- (3) *Pratt v. Pratt*, [1939] 3 All E.R. 437; Digest Supp.; 161 L.T. 49.
- (4) *Moore v. Moore, Chadwick & Griffiths* (1887), 12 P.D. 193; 27 Digest 326, 3045; 56 L.J.P. 104; 57 L.T. 568.
- (5) *Smith v. Smith*, [1915] P. 288; 27 Digest 317, 2949; 85 L.J.P. 16; 113 L.T. 1166. C
- (6) *Watson v. Watson*, [1938] P. 258; [1938] 3 All E.R. 770; Digest Supp.; 107 L.J.P. 160; 159 L.T. 523.
- (7) *Starkey v. Starkey*, [1938] 3 All E.R. 773; Digest Supp.; 159 L.T. 490.
- (8) *Tate v. Tate*, [1938] 4 All E.R. 264; Digest Supp.
- (9) *Crabb v. Crabb* (1868), L.R. 1 P. & D. 601; 27 Digest 228, 1992; 37 L.J. P. & M. 42; 18 L.T. 153. D
- (10) *Pape v. Pape* (1887), 20 Q.B.D. 76; 27 Digest 317, 2945; 57 L.J. M.C. 3; 58 L.T. 399.
- (11) *Hussey v. Hussey* (1913), 109 L.T. 192; 27 Digest 317, 2948.
- (12) *Looker v. Looker*, [1918] P. 132; 27 Digest 317, 2951; 87 L.J.P. 72; 118 L.T. 654.
- (13) *Ratcliffe v. Ratcliffe*, [1938] 3 All E.R. 41; Digest Supp. E
- (14) *Stockley v. Stockley*, [1939] 2 All E.R. 707; Digest Supp.
- (15) *Eaves v. Eaves*, [1939] 2 All E.R. 789; Digest Supp.; 161 L.T. 119.
- (16) *Sifton v. Sifton*, [1939] P. 221; [1939] 1 All E.R. 109; Digest Supp.
- (17) *Shaw v. Shaw*, [1939] P. 269; [1939] 2 All E.R. 381; Digest Supp.; 161 L.T. 63.
- (18) *Clark v. Clark* (No. 2) [1939] P. 257; [1939] 2 All E.R. 392; Digest Supp.
- (19) *Mitchell v. Mitchell*, [1931] S.L.T. 484. F
- (20) *Herod v. Herod*, [1939] P. 11; [1938] 3 All E.R. 722; Digest Supp.; 108 L.J.P. 27; 159 L.T. 530.
- (21) *Jordan v. Jordan*, [1939] P. 239; [1939] 2 All E.R. 29; Digest Supp.; 160 L.T. 368.

APPEAL by the petitioner from an order of LANGTON, J., dated Mar. 27, 1939, and reported [1939] 2 All E.R. 258, dismissing her petition for divorce on the ground of desertion for a period of at least 3 years immediately preceding the presentation of the petition. The facts are fully stated in the judgment of SIR WILFRID GREENE, M.R. G

D. P. Maxwell Fyfe, K.C., H. B. Durlay Grazebrook, K.C., and W. R. K. Merrylees for the appellant. H

The respondent was not represented and did not appear.

Maxwell Fyfe, K.C. : The deed is not conclusive as to whether the parties separated under it and because of it. The authorities relied upon by LANGTON, J., in holding that he could not go behind the deed are

- cases in which it was held that the separation was either under the deed or by mutual consent. There is authority for saying that where there is a deed entered into *bona fide*, the court may go behind it and say that the separation was not under or because of the deed. If the conduct of one party was such that separation was inevitable, the court can say that that
- A conduct was the cause, and that the parties were not really separated under the deed. Desertion begins as soon as a man has formed the intention of ending the matrimonial state. The vital point is that the husband should have formed the intention of terminating the matrimonial state. Where there are acts constituting constructive desertion,
- B the husband cannot answer by producing a deed which he has repudiated, and the court will not seek to do so either. In the present case, the deed was entered into in 1932, and payments were made by the husband up to Nov., 1934. Assuming that there was a repudiation, the husband could not be heard to say that the deed was a protection to him. There
- C is evidence of acceptance of repudiation from the time of repudiation. On the facts of the case, there is proof of constructive desertion. Alternatively, there is sufficient evidence to show that the matter should be fully considered. The letters written by the husband do not bring the case within *Pratt v. Pratt* (3). In *Moore v. Moore*, *Chadwick &*
- D *Griffiths* (4), it was held that the deed was not a bar to a claim for judicial separation on the ground of desertion, the necessary time having been completed before the deed was entered into. In *Smith v. Smith* (5), there was a deed executed. The husband afterwards went abroad and ceased to make payments. The court decided that there had been
- E desertion on the ground that the husband had threatened to break up the home, whereupon the wife agreed to leave him, and also that the husband, after making a few payments under the deed, repudiated it. *Watson v. Watson* (6) shows that the existence of a deed does not prevent the court from looking at antecedent circumstances and from holding
- F that there may be desertion in spite of the deed. In *Starkey v. Starkey* (7), it was held that the desertion had continued from the time of separation, notwithstanding a deed. These cases show that the court may consider what the facts are. *Tate v. Tate* (8), shows that the court looks at the facts and, if a deed is treated by a husband as though it were non-existent
- G and it was the acts of the husband which caused the separation, desertion may be established. All the cases which have been decided under the Matrimonial Causes Act, 1937, have been decided on their special facts. [Counsel also referred to *Crabb v. Crabb* (9), *Pape v. Pape* (10), *Hussey v. Hussey* (11), *Looker v. Looker* (12), *Ratcliffe v. Ratcliffe* (13), *Stockley v.*
- H *Stockley* (14), *Eaves v. Eaves* (15), *Sifton v. Sifton* (16), *Shaw v. Shaw* (17), *Clark v. Clark* (18), *Mitchell v. Mitchell* (19), *Herod v. Herod* (20) and *Jordan v. Jordan* (21).]

SIR WILFRID GREENE, M.R. : In this case the appellant sought dissolution of her marriage on the ground of desertion by her husband

without cause since Nov. 5, 1934. After less than four years of unhappy married life the spouses on May 30, 1932, executed a separation deed under which the respondent agreed to pay to the appellant the sum of £1 5s. per week for her maintenance so long as she should lead a chaste life. Payments were made under this deed until a date in Sept., 1932, when the respondent stopped payment. Some two years later he paid A to the appellant 10s., in Sept., 1934, and on Nov. 5, 1934, he paid her £2, after which he made no further payments. These payments were not what the deed provided for.

In July, 1935, and thereafter on several occasions, the appellant committed adultery, and the liability of the respondent to make payments B under the deed would accordingly have ceased. LANGTON, J., would have felt no difficulty in exercising his discretion in her favour if he had thought that she was otherwise entitled to a decree, and I agree with the view which he took upon this matter. He held, however, that the continued separation of the spouses must be referred to the separation C deed, and not to desertion by the respondent, and he accordingly refused to make a decree.

The argument for the appellant fell under two heads. First, it was said that in view of the respondent's treatment of the appellant before the execution of the separation deed, she would have been justified D in leaving him; that had she done so the case would have been one of constructive desertion; and that, notwithstanding the execution of the deed, the disruption of the matrimonial home must be attributed to an act of desertion by the husband. I am unable to accept this argument. The conduct of the respondent was, I think, such that, if the appellant E had left him, there would have been constructive desertion. However, she did not leave him until the execution of the separation deed, and it is impossible to say that the separation was other than consensual. The second argument was that even though the separation was originally F consensual and not due to an act of desertion on the part of the respondent, it subsequently changed its quality and became desertion. The date given in the petition as the beginning of desertion, was Nov. 5, 1934, when the last payment of money by the respondent was made. It would, however, be sufficient for the purposes of the appellant's case if desertion G began at any time before May 19, 1935.

The first question which arises is whether or not it is possible in law for a separation, which began by being consensual, to acquire the character of desertion without a previous resumption of cohabitation. Looking at this question on principle and apart from authority, I can see no reason why the answer to it should not be in the affirmative. H The word "desertion" may describe an act, or it may describe a state. For the act of desertion both the *factum* of separation and the *animus deserendi* are required. A *de facto* separation may take place without there being an *animus deserendi*, but if that *animus* supervenes, desertion will begin from that moment unless, of course, there is consent by the

other spouse. Thus a husband who leaves his wife for a business voyage may nevertheless become guilty of desertion without the necessity of a previous return. All that is required to establish desertion in such a case is the presence of a supervening *animus deserendi* (a matter to be inferred from the words and conduct of the deserting spouse), a continuance
A of the *de facto* separation, and the absence of consent by the other spouse. I do not see why, in a case where the original separation was due to the agreement of both spouses to live apart, it should be impossible in law for a similar change in the quality of the separation to take place without there being any previous resumption of the common life. In such a
B case the burden of proving that the change has taken place may not be easy to discharge, but this is no reason for saying that the court must refuse to admit the possibility. It appears to me that the first question which the court ought to put to itself is "Was the separation which
C *de facto* existed during the relevant period attributable to the agreement under which the parties separated, or was it due to a supervening *animus deserendi* on the part of the respondent?" The existence of such an *animus* is a matter of inference from the facts of the case. If, for example, a husband who has left his wife under the terms of a separation deed subsequently repudiates the deed but continues to live apart from his
D wife, it would be easy to infer that his intention to live apart, which was originally based on the consent of both parties, had become an intention to desert. It is, however, on the side of the spouse alleging desertion that the practical difficulty arises in such a case, since, in order that a separation which began by being consensual may be changed into
E desertion, it must lose its consensual element on both sides. Thus, if the spouse alleging desertion has during the relevant period affirmed the continuing validity of a separation deed, for example, by suing for maintenance under it, there cannot be desertion, since the necessary lack of consent on his or her part cannot be shown. If, on the other
F hand, one spouse has repudiated the deed and the other can show that during the relevant period he or she has not had any intention of relying on the separation deed and was always ready and willing, in spite of it, to resume cohabitation, it appears to me that it would be completely unreal to say that he or she still consents to the separation. In such a
G case the separation is no longer due to the consensus of the parties. The one is willing to resume cohabitation, the other is not; the original consent to the separation was given on the footing that the separation deed would regulate the relations of the parties. Is one spouse to be held to that consent against his or her will, when the other spouse by repu-
H diating the agreement, has destroyed the whole basis upon which the separation took place? I do not find myself forced to any such conclusion, since, in the case assumed, the separation deed has ceased to have any influence upon the mind of the conduct of either party, and has for all relevant purposes become a dead letter.

I here quote a passage from the judgment of LANGTON, J., which

sums up his conclusions 'upon these matters. He says ([1939] 2 All E.R. at p. 264) :

... where spouses are living apart under a deed of separation, the relationship begun by consent cannot be changed into desertion by a mere refusal of one party to resume cohabitation or by a breach of the covenants of the deed. Such a metamorphosis could only, as I understand it, be effected by a complete repudiation by one party, which had been accepted as such by the other, in such circumstances that the proper inference to be drawn from all the facts of the case is that the spouse by whom the repudiation is being accepted is willing to return to cohabitation and is both in a position to insist on his or her conjugal rights and is in fact reasserting them.

I am prepared to accept this as an accurate statement of the law subject to certain qualifications. I agree that there must be a complete repudiation of the deed by one party if the word "complete" means no more than that the repudiation must be of the whole deed. The question whether or not the conduct of the party concerned ought to be treated as a repudiation falls to be answered in accordance with ordinary principles. Breach of a particular covenant by itself may not amount to repudiation ; on the other hand, the breach may be so fundamental, or so persistent, or may have such a significance when regarded in the light of all the circumstances of the case as to justify the inference that repudiation is intended. This is the case with commercial contracts, and I see no reason for thinking that any different principle is applicable in relation to a separation deed. Passing to the attitude of the spouse alleging desertion, the judge says that the repudiation must have been accepted as such. It is true that an ordinary contract is not discharged by unilateral repudiation ; the other party must "accept" the repudiation in the sense that by words or conduct he must bring it to the mind of the repudiating party that he elects to treat the repudiation as discharging the contract. I do not think, however, that this principle can be applied to the case of alleged desertion following upon a separation deed. It is true that if the party alleging desertion affirms the continued existence of the deed, for example, by suing under it or otherwise showing an intention to treat it as still on foot, he or she is necessarily consenting to the continuance of the separation. The significance of such a step is that it is evidence of continuing consent. However, in my opinion, the only thing required on the part of the spouse alleging desertion, is that he or she should not be a consenting party to the continuance of the separation. Whether or not he or she does remain a consenting party, must be a question of fact, and no doubt "acceptance" of the repudiation and, to take another phrase used by LANGTON, J., "reassertion of conjugal rights" would be the strongest evidence of the absence of consent. I cannot, however, agree that without them the fact that consent has come to an end is in law incapable of proof. In considering whether or not the mental elements necessary to constitute a case of desertion are present in the case of both parties, the whole of their conduct and their words may be taken into account, and I am not prepared to accept the proposition that certain acts and certain words

are a *sine qua non*. In the case of an ordinary contract, acceptance of repudiation is necessary for what may be called commercial reasons, since the party repudiating must be in a position to know whether or not the other party is holding him to the contract. In the cases with which we are concerned, the spouse who repudiates the separation deed does so in such circumstances as to show not that he repudiates the deed, in the sense that he regards himself as free to resume the cohabitation which the deed prohibits, but that he does not propose to resume cohabitation, that is, that he intends to desert, which is something more than mere repudiation. A person who repudiates a commercial contract indicates thereby that he does not propose to do the thing which he has agreed to do, or that he considers himself free to do that which he has agreed not to do. In the case of the repudiation of a separation deed, coupled with the *animus deserendi*, the repudiating party is showing that he proposes to do the very thing which under the deed he agreed to do, namely, live apart, but to do it of his own free will and not under the compulsion of his covenant. The conduct of the other spouse therefore cannot affect his conduct in any way so far as regards his intention to desert—it is only important as affecting the question of the intention of the other spouse, which is a different matter altogether.

I do not find anything in the authorities which were cited to us which in any way conflicts with what I have said, except some much discussed passages in the judgment of LORD PENZANCE in *Fitzgerald v. Fitzgerald* (1). He says, at page 697 :

Desertion means abandonment, and implies an active withdrawal from a cohabitation that exists . . .

and again, at page 698 :

No one can “desert” who does not actively and wilfully bring to an end an existing state of cohabitation. . . . But if the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, “desertion,” in my judgment, becomes from that moment impossible to either, at least until their common life and home have been resumed.

These words of LORD PENZANCE have been critically examined more than once. In his judgment in the present case, LANGTON, J., refers to these criticisms, and adds some penetrating observations of his own, with which I find myself in agreement. I also agree with his comments upon the decision of this court in *R. v. Leresche* (2), in which the observations of LORD PENZANCE were referred to with approval. As already appears, my real criticism of the judgment of LANGTON, J., is that it does not go far enough.

I may summarise my opinion by saying (i) that where the original separation was by mutual consent, desertion may supervene without the necessity of a resumption of cohabitation ; (ii) that this can happen where (a) on the part of the spouse alleged to be in desertion there is repudiation of the agreement under which separation took place, no

step taken towards the resumption of cohabitation in fact and, in addition to repudiation, the *animus deserendi* and (b) on the part of the spouse alleging desertion there is not only no insistence on the terms of the separation agreement, but a *bona fide* willingness to resume cohabitation without regard to its terms—in short, if it can be said that both parties are during the relevant period in truth regarding the agreement as a dead letter which no longer regulates their matrimonial relations; (iii) that whether or not these conditions exist during the relevant period is a question of fact in each case, the answer to which depends upon the true inference to be drawn from the words and conduct of the parties; (iv) that once these conditions are fulfilled all the elements necessary to constitute a state of desertion are present, namely—*de facto* separation, *animus deserendi*, and absence of consent on the part of the spouse alleging desertion.

The question then remains whether or not these conditions are fulfilled in the present case. Two subsidiary matters may be mentioned. The first is that in 1933, two letters were written by the respondent to the appellant asking her to return if he could find a job. To these letters she made no reply. This incident took place some two years before the commencement of the three year period, and in any event I do not regard it as having any real bearing on the question what was the state of affairs during the three years. However, in all the circumstances of the case, I think that the appellant was entitled to regard these requests as not made in good faith. The other matter is that the appellant herself was guilty of adultery, a fact unknown to the respondent. On this matter I agree with the judge that if he had known the true facts the respondent would not have behaved differently. The important facts which bear upon the main question are as follows. The husband's treatment of his wife during the period of cohabitation was calculated to drive her from the house and, as I have already said, would have led to constructive desertion if it had not been for the separation deed. The wife from the first regarded the separation deed as merely a temporary matter designed, so far as she was concerned, to "bring him to his senses," and she made it clear at the time that if her husband would make a home for her she would join him, notwithstanding the deed. The husband's payments under the deed were continued for only a short period, and then stopped. After an interval of two years two further payments were made which were not in the amounts stipulated for in the deed, and should, I think, be regarded as casual, and not as covenanted, payments. Thereafter no payments were made, nor did the wife ask for any. On July 5, 1937, an incident took place which throws light upon the attitude of the parties in relation to the separation deed during the relevant period. The appellant had learnt that the respondent was again in practice, and thought that it might not be then too late for reconciliation. With this end in view she made an appointment with him and made it clear to him that she wanted him to provide a home

for her, but he made no offer whatever. In my opinion it is permissible on these facts to infer, and I do infer, that the parties during the relevant period were both regarding the separation deed as a dead letter, and that the continuance of the separation was not in any way attributable to its existence. In the result the appeal is allowed and there will be a decree *nisi*.

MACKINNON, L.J. : I agree and have nothing to add.

SIR WILFRID GREENE, M.R. : I have the authority of FINLAY, L.J., to say he has read the judgment which I have just delivered, and agrees with it.

Appeal allowed and decree nisi granted.

Solicitors : Robbins, Olivey & Lake (for the appellant).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

SKINNER AND OTHERS v. ATTORNEY-GENERAL.

(*Re* WHITE, SKINNER v. ATTORNEY-GENERAL.)

[HOUSE OF LORDS (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Wright, Lord Porter), **June 12, 13, 15, July 25, 1939.**]

Estate Duty—Testator domiciled in Northern Ireland—Annuity given to widow—Property locally situate in Northern Ireland at testator's death and duty paid there—Part of property locally situate in England at widow's death—Liability to duty—Whether exemption still applicable—"Property upon which estate duty already paid"—Finance Act, 1894 (c. 30), ss. 2 (1) (b), 5 (2)—Finance Act, 1914 (c. 10), s. 14—Government of Ireland Act, 1920 (c. 67), ss. 8, 61—Government of Ireland (Adaptation of Taxing Acts) Order, 1922 (S.R. & O., 1922, No. 80).

The testator, who died on July 27, 1923, domiciled in Northern Ireland, had, by a testamentary disposition dated Dec. 2, 1920, given an annuity of £7,500 to his wife. At the date of his death, only property to the value of £66 was locally situate in Great Britain, and no estate duty was then payable in Great Britain. Duty was, however, paid in Northern Ireland. On Feb. 6, 1936, the testator's widow died, and at that date the property charged with the payment of her annuity consisted in part of investments locally situate in England, in part of investments locally situate in Northern Ireland, and in part of property situate in the United States of America. A claim was put forward for estate duty in England in respect of the English investments as property deemed to pass on the death of the widow. It was contended (i) that the widow had no interests in these investments, but only a right to bring an administration action in Northern Ireland, and (ii) that, by the operation of the Finance Act, 1894, s. 5 (2), no duty was payable on the death of the widow, as estate duty had been paid on the death of her husband :—

HELD : (i) the annuity was an interest within the meaning of the Finance Act, 1894, s. 2, in the property situate in England, and it was therefore property which must be deemed included in property passing on her death.

(ii) the estate duty which was paid in Northern Ireland on the testator's death was not "estate duty" within the meaning of the Finance Act, 1894, s. 5 (2), and therefore no exemption from duty under

the Finance Act, 1914, s. 14, was available in respect of the English investments deemed to pass on the death of the widow. Estate duty leviable in Northern Ireland and estate duty leviable in Great Britain are two separate and independent duties.

Decision of Court of Appeal ([1938] 2 All E.R. 691) *affirmed*.

[EDITORIAL NOTE.] The decision here, affirming the previous decisions in this case, settles quite definitely that an annuitant, whose annuity is charged upon residue, has an interest, for the purposes of death duties, in the different items which from time to time form the residuary estate. It also settles quite definitely that estate duty paid in Northern Ireland and that paid in Great Britain are, as from Nov. 22, 1921, separate and distinct duties, so that an estate upon which duty has been paid in Northern Ireland cannot, for that reason, be said to be an estate upon which duty has been paid in answer to a claim for such duty in Great Britain.

AS TO THE SCOPE OF DEATH DUTIES IN GREAT BRITAIN, see HALSBURY, Hailsham Edn., Vol. 13, pp. 226, 227, paras. 211-213; and FOR CASES, see DIGEST, Vol. 21, p. 17, Nos. 89-96.]

Cases referred to :

- (1) *A.-G. v. Watson*, [1917] 2 K.B. 427; 21 Digest 10, 37; 86 L.J.K.B. 1034; 117 L.T. 187.
- (2) *Sudeley (Lord) v. A.-G.*, [1897] A.C. 11; 21 Digest 122, 917; 66 L.J.Q.B. 21; 75 L.T. 398; *affg.* S.C. *sub nom.* *A.-G. v. Sudeley (Lord)*, [1896] 1 Q.B. 354.

APPEAL from an order of the Court of Appeal (SIR WILFRID GREENE, M.R., SCOTT and MACKINNON, L.JJ.), dated May 10, 1938, and reported [1938] 2 All E.R. 691, affirming an order of CLAUSON, L.J., dated Jan. 25, 1938, and reported [1938] 1 All E.R. 378. The facts are fully set out in the opinion of LORD RUSSELL OF KILLOWEN.

J. M. Whitaker, K.C., and *L. C. Curran* for the appellants.

The Attorney-General (Rt. Hon. Sir Donald Somervell, K.C.) and *J. H. Stamp* for the respondent.

LORD ATKIN : My Lords, I have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend, LORD RUSSELL OF KILLOWEN. I entirely agree with it, and I have nothing to add.

LORD RUSSELL OF KILLOWEN : My Lords, two questions were argued in this case. The first was whether estate duty was chargeable at all in England upon that part of the estate of John Campbell White (to whom I will refer as the testator) which at the death of his widow consisted of what were termed English securities. The second question was whether if estate duty was so chargeable, any relief could be claimed under the Finance Act, 1894, s. 5.

The testator died, domiciled in Northern Ireland, on July 27, 1923. By his will, dated Dec. 6, 1918, he appointed the appellants, and one McMillan, now deceased, to be the executors thereof. He bequeathed sundry specific and pecuniary legacies including an annuity of £5,000 for her life to his wife, and (by cl. 5) devised and bequeathed his property in the following terms :

I devise and bequeath all my property both real and personal and wheresoever

situate not hereby otherwise disposed of unto my two nephews Edward John Skinner and Robert Skinner in equal shares subject to and charged with the payment of my debts funeral and testamentary expenses and all Crown duties and the legacies and annuities which are bequeathed by this my will.

By a codicil dated Dec. 2, 1920, he increased the amount of his wife's annuity to £7,500. Probate of the will and codicil was granted to the
A four executors in Northern Ireland, and was subsequently resealed in England.

The testator's estate at his death consisted of real and personal estate in Northern Ireland, personal estate in the Irish Free State, and real and personal estate in the United States of America. There was also
B a small amount of personal estate in England, but of such little value that no estate duty was payable here in respect thereof. From time to time during the lifetime of the testator's wife, portions of the real and personal estate in the United States were sold, and the proceeds were invested by the executors. Except as hereinafter stated, all funeral
C and testamentary expenses, duties, debts and legacies were paid, and the balance (except a sum of £7,000 Belfast corporation stock) amounting to £231,713, was during the lifetime of the testator's wife, invested in English securities, and still remained so invested at her death, which occurred on Feb. 6, 1936. The estate had not, however, even then been
D fully administered. A claim for estate duty by the revenue authorities in the United States was still outstanding, and was not finally settled and paid until Sept. 23, 1936. The legal costs incurred in connection therewith were subsequently paid. Some real and personal estate in the United States has not yet been got in, but is still outstanding.

In these circumstances, a claim has been made by the authorities
E here that estate duty became payable on the widow's death under the Finance Act, 1894, s. 2 (1) (b), in respect of the testator's estate in so far as it was then represented by English securities, upon the ground that it was property in which the widow had an interest ceasing on her
F death, and was therefore property which must be deemed included in property passing on her death. That an annuitant such as the widow in this case has an interest in the residuary estate within the meaning of the section, was the subject of decision many years ago in *A.-G. v. Watson* (1): and the interest is certainly not diminished where, as here,
G the entirety of the estate out of which the annuity is payable is expressed to be charged with the annuity. The appellants, however, contended that the widow had no interest in individual items forming part of the general estate, but that the only interest which she had, was an interest in the residuary estate as a totality, namely, a right to have that totality
H administered, and that since that totality was what was termed, "a Northern Ireland residuary estate," it was not property in respect of which estate duty was payable in this country.

My Lords, I have throughout experienced great difficulty in appreciating this argument, which depended, it was said, for its efficacy upon the decision of this House in *Sudeley v. A.-G.* (2). It appears to

me to be beyond question that an annuitant, whose annuity is payable out of a testator's estate, and who is therefore interested in the whole estate, is necessarily also interested in all the parts which compose the whole; and that her right to take proceedings (if necessary) to have the estate administered for the purpose of providing her annuity, is merely the right of enforcing or realising that interest which she has in the whole and its parts. Nor can I find any foundation for the appellants' contention in *Sudeley v. A.-G.* (2). That case was concerned with probate duty. The executors of the testator's widow sought to escape probate duty (in respect of her one-fourth share of the residuary estate of the testator) to the extent of a one-fourth share of certain mortgages of real estate in New Zealand, upon which a portion of the testator's residuary estate was invested. They sought to establish that the widow had a proprietary interest in, and was the owner of, a share of the mortgages, namely, of property situate in New Zealand in respect of which no probate duty would be payable here. They failed because the mortgages did not, nor did any share in them, constitute an asset of the widow's estate. The testator's estate had not been administered, nor had any appropriation to the widow's share been made. The whole point of the decision was that the widow did not own any part of the mortgages. As LORD HERSCHELL pointed out in his opinion, the whole fallacy of the argument of the widow's executors rested on the assumption that she or they were entitled to any part of the mortgages as an asset—she in her own right or they as executors. He said, at p. 18:

I do not think that they have any estate, right, or interest, legal or equitable, in these New Zealand mortgages *so as to make them an asset of her estate.*

My Lords, I emphasise the last ten words of that sentence, which show clearly that the interest which was being repudiated was a proprietary interest. The case is not in any way a decision that the widow or her executors had no interest in the mortgages, and it is certainly no authority against the view that an annuitant whose annuity is charged on the estate of a testator "has an interest" in the different items of which that estate from time to time consists. I feel no doubt that the appellants fail upon the first question.

The second question depends, I think, for its answer on an appreciation of the state of affairs which has resulted, in regard to estate duty, from the operation of the relevant sections of the Government of Ireland Act, 1920, and the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922. The Act I will refer to as the Act of 1920. The order I will refer to as the order in council.

By the Act of 1920 a separate Parliament and a separate executive government were set up in Northern Ireland, and by sect. 20, an Exchequer and Consolidated Fund of Northern Ireland were established separate from those of the United Kingdom, all sums paid into that Exchequer forming the Consolidated Fund of Northern Ireland to be

appropriated by Act of Parliament of Northern Ireland to the public service of Northern Ireland. By sect. 21 the proceeds of all taxes which the Parliament of Northern Ireland has power to impose (and these include death duties) must be paid into that Consolidated Fund. Sect. 28 (to which I refer later) contains provisions in relief of death duties payable both in Northern Ireland and Great Britain on the same property. Sects. 61 and 69 must be (so far as relevant) cited *verbatim*. They are in the following terms :—

61. All existing laws, institutions, and authorities in Ireland, whether judicial, administrative, or ministerial, and all existing taxes in Ireland, shall, except as otherwise provided by this Act, continue as if this Act had not passed, but with the modifications necessary for adapting them to this Act, and subject, as respects matters within the powers of the Parliaments of Southern Ireland and Northern Ireland, and after the date of Irish Union within the powers of the Parliament of Ireland, to repeal, abolition, alteration, and adaptation in the manner and to the extent authorised by this Act.

69. His Majesty may, by orders in council (in this Act referred to as Irish Transfer orders), make such regulations as seem necessary or proper for setting in motion the Parliaments and Governments of Southern and Northern Ireland, and when established the Parliament and Government of Ireland, and also for any other matter for which it seems to His Majesty necessary or proper to make provision for the purpose of bringing this Act into full operation or for giving full effect to any provisions of this Act or to any future transfer under or by virtue of this Act of a reserved service; and in particular His Majesty may by any such order in council—

(a) make such adaptations of any enactments so far as they relate to Ireland as may appear to him necessary or proper in order to give effect to the provisions of this Act, and also make any adaptations of any enactments so far as they relate to England or Scotland, as may appear to him necessary or proper as a consequence of any change effected by the provisions of this Act . . .

The order in council was made on Jan. 31, 1922. It recites (*inter alia*) sect. 69 (a) of the Act of 1920, and that for the purposes of the provisions of that Act relating to the transfer of services, Nov. 22, 1921, has been fixed as the appointed day as respects Northern Ireland in relation to the financial provisions of the Act, including taxation. It contains (amongst other provisions) the provision (sect. 2) that as from Nov. 22, 1921, the enactments to which the several parts of the order apply, shall have effect subject to the adaptations and modifications set out in those parts respectively, save where inconsistent with the Act of 1920, or the provisions of any subsequent order in council under that Act, and subject as respect matters within the powers of the Parliament of Northern Ireland to repeal or alteration by Acts of that Parliament. Part III of the order consists of sects. 12, 13 and 14, of which sect. 13 is a transitory provision, and may be disregarded. Sects. 12 and 14, so far as relevant, run thus :

12. This Part of this Order applies to the Death Duties Acts, that is to say, the Probate and Legacy Duties (Ireland) Act, 1814, the Probate Duty (Ireland) Act, 1816, the Succession Duty Act, 1853, Part III. of the Customs and Inland Revenue Act, 1881, Part II. of the Customs and Inland Revenue Act, 1889, and Part I. of the Finance Act, 1894, and the enactments amending those Acts or otherwise relating to death duties as defined in the Finance Act, 1894, s. 13.

14. As respects death duties leviable in Northern Ireland and in the rest of the United Kingdom respectively on or with reference to deaths occurring on or after the appointed day, the Death Duties Acts shall apply subject to the following adaptations :—

(a) In those Acts, in their application to Northern Ireland—

(i) references to the chief office of the Commissioners of Inland Revenue in London

shall be construed as references to the chief office of the Minister of Finance for Northern Ireland for purposes of inland revenue :

(b) References to the United Kingdom in the Revenue (No. 2) Act, 1864, s. 4, in the Customs and Inland Revenue Act, 1881, ss. 28, 33 (1), in the Finance Act, 1894, ss. 2 (2), 7 (2), (3), 20 (3), and the Savings Bank Act, 1920, s. 8, shall, in the application of those provisions to Northern Ireland, be construed as references to Northern Ireland, and, in the application of those provisions to the rest of the United Kingdom, shall be construed as references to the United Kingdom exclusive of Northern Ireland :

(d) The Finance Act, 1894, s. 7 (2), shall have effect as if for the words "in the foreign country or British possession" there were substituted the words "in the country" ;

My Lords, it will thus be seen that estate duty became leviable both in Northern Ireland and in the rest of the United Kingdom (which I will call Great Britain) by two independent executives, the proceeds being applicable for two different public services. The further question remains whether the two executives levy one and the same tax in which each is or may be entitled to share, or whether each executive levies a separate tax, the power to levy which is vested in the executive of Northern Ireland under or by virtue of one law in force in and applying to Northern Ireland, and in the executive of Great Britain under or by virtue of another law applying to and in force in Great Britain. The importance of the difference becomes apparent when I explain how the appellants' claim to exemption arises, which I now proceed to do.

By the Finance Act, 1894, s. 5 (2), it is provided that if estate duty has already been paid in respect of any settled property since the date of the settlement, estate duty shall not be payable in respect thereof until the death of a person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property. The relief afforded by this section was abolished by the Finance Act, 1914, s. 14, but not in the case where estate duty has been paid on the death of one of the parties to a marriage, so far as regards the payment of estate duty on the death of the other party to the marriage. If, therefore, the estate duty which is leviable and payable in Northern Ireland is one and the same as the estate duty which is leviable and payable in Great Britain, the exemption would apply in the present case as regards the English securities, except in so far as they represented proceeds of sale of real estate in the United States, in respect of which no estate duty had been levied or paid in Northern Ireland on the testator's death. If, however, estate duty leviable in Northern Ireland and estate duty leviable in Great Britain are two separate taxes leviable under separate statutory provisions as before indicated, the exemption would not apply, because the estate duty paid in Northern Ireland on the death of the testator under the law in force in Northern Ireland would not be estate duty within the meaning of the Finance Act, 1894, as adapted and applicable to Great Britain after the coming into operation of the Act of 1920.

For myself I feel no doubt that the true view as regards estate duty is that whereas before the Act of 1920 and the order in council, the

six counties and Great Britain were parts of one country, which had power to levy one tax for the purpose of raising revenue for one set of public services, the effect of the Act of 1920 and the order in council was to split that country into two countries (namely, Northern Ireland and Great Britain) each with power to levy its own tax for the purpose of raising revenue for its own public services. In my opinion the effect of sects. 12 and 14 of the order in council as regards the Finance Act, 1894, is that with reference to deaths occurring on or after the appointed day estate duty becomes leviable in Northern Ireland under one set of statutory provisions, namely, the Finance Act, 1894, as adapted and applicable to Northern Ireland, and in Great Britain under another set of statutory provisions, namely, the Finance Act, 1894, as adapted and applicable to Great Britain. The different statutory provisions are made applicable severally to the two countries.

It was urged before us that because the order in council did not in terms refer to or in any way purport to adapt or modify the Finance Act, 1894, s. 5, the right to relief thereunder must remain unaffected. In my opinion no express reference to or adaption or modification of sect. 5 was necessary. All that was necessary was the modification of the specified subsections by altering the construction thereof as provided in the order in council. Everything else follows as of course. A separate estate duty became leviable by each country for its own purposes, the amount thereof in each case being arrived at after a different and separate aggregation of properties, and being ascertained in each case by reference to the principal value of a different and separate estate, the value being determined in each case by the valuation of a separate and independent authority.

Any other view leads to insoluble difficulties, of which two examples may be sufficient. Sect. 28 of the Act of 1920 is in the following terms :—

(1) Where the commissioners of inland revenue are satisfied that estate duty or any duty in the nature of estate duty is payable in Southern Ireland or Northern Ireland by reason of a death in respect of any property situated in Southern Ireland or Northern Ireland and passing on such death, they shall allow a sum equal to the amount of that duty to be deducted from the estate duty payable in Great Britain in respect of that property on the same death.

(2) Where the department of the Government of Southern Ireland or Northern Ireland corresponding to the commissioners of inland revenue are satisfied that estate duty is payable in Great Britain by reason of a death in respect of any property situate in Great Britain and passing on such death, they shall allow a sum equal to the amount of that duty to be deducted from the estate duty or duty in the nature of estate duty payable in Southern Ireland or Northern Ireland in respect of that property on the same death.

That section shows that estate duty is payable both in Great Britain and in Northern Ireland on the same property on the same death. It plainly contemplates two separate and possibly overlapping duties. I do not see how that can be reconciled with the Finance Act, 1894, s. 7 (10), except upon the footing that the estate duty leviable in Northern Ireland and the estate duty leviable in Great Britain are two separate independent duties. Again, take sect. 4 of the last-mentioned Act.

If there is only one estate duty leviable in the two countries, and not two separate duties leviable as to one in Northern Ireland and as to the other Great Britain, the property in both countries would have to be aggregated under that section in order to arrive at the rate payable in each.

In these circumstances, it is not, in my opinion, possible to hold that the estate duty which was paid in Northern Ireland on the death of the testator was estate duty within the meaning of the Finance Act, 1894, s. 5 (2), as adapted and applicable to Great Britain after Nov. 22, 1921. No relief can, therefore, be claimed by the appellants under that section, and the appeal should be dismissed.

My Lords, my noble and learned friend, LORD PORTER, has asked me to say that he agrees with the opinion which I have read.

LORD MACMILLAN : My lords, I concur.

LORD WRIGHT : My Lords, I also concur.

Appeal dismissed.

Solicitors : *Russell & Arnholz* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondent).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

HICKMAN v. POTTS.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), July 13, 14, 25, 1939.]

Distress—Priority—Distress for rent and distress for rates.

Rates and Rating—Distress for rates—Rent in arrear—Claim by landlord for rent out of proceeds of distress—Whether distress is an execution—Landlord and Tenant Act, 1709 (c. 14), s. 1.

The appellant was the owner of a house which was let on a quarterly tenancy. The tenant fell into arrears with her rent and the appellant obtained an order for leave to distrain. In the meantime the respondent, a bailiff for the corporation of Wolverhampton, had levied on the tenant under a warrant of distress for rates. The appellant claimed that the amount due for rent was a first charge on the proceeds of the sale of the distress, basing his claim on the Landlord and Tenant Act, 1709, s. 1. The respondent contended that the term "execution" in that section did not include a levy for rates :—

HELD : the Act applies to all forms of execution, including a distress for rates.

[EDITORIAL NOTE.] The question here is whether a landlord is entitled to be paid his arrears of rent for a period up to one year out of the proceeds of a distress for rates. This turns upon the construction of the Landlord and Tenant Act, 1709, s. 1, the point being whether a distress for rates is an execution within the meaning of that section. Although that Act was passed 230 years ago, this point has never been raised before, but it is certainly one of the greatest importance both to landlords and to local authorities.

AS TO PROVISION FOR PAYMENT OF RENT ON EXECUTION, see HALSBURY, *Hailsham Edn.*, Vol. 14, pp. 63, 64, para. 109 ; and FOR CASES, see DIGEST, Vol. 21, pp. 521-524, Nos. 963-977.]

Cases referred to :

- (1) *Storey v. Robinson* (1795), 6 Term Rep. 138 ; 18 Digest 443, 1796.
- (2) *Simpson v. Hartopp* (1774), Willes, 512 ; 18 Digest 288, 247.
- (3) *Re Fanshaw & Yorston, Ex. p. Birmingham & Staffordshire Gas Light Co.* (1871), L.R. 11 Eq. 615 ; 5 Digest 957, 7344.
- (4) *R. v. Benn & Church* (1795), 6 Term Rep. 198 ; 18 Digest 403, 1431.
- (5) *Harper v. Carr* (1797), 7 Term Rep. 270 ; 18 Digest 398, 1390.
- (6) *R. v. Speed* (1702), 12 Mod. Rep. 328 ; 18 Digest 429, 1664.
- (7) *Hutchins v. Chambers* (1758), 1 Burr. 579 ; 18 Digest 358, 956 ; *sub. nom. Hutchins v. Whitaker*, 2 Keny. 204.
- (8) *Vinkinstone v. Edden* (1698), Carth. 357 ; 18 Digest 427, 1650.
- (9) *Brandling v. Barrington* (1827), 6 B. & C. 467 ; 18 Digest 344, 802.
- (10) *Isherwood v. Oldknow* (1815), 3 M. & S. 382 ; 31 Digest 422, 5631.
- (11) *Swaffer v. Mulcahy, Hooker v. Mulcahy, Smith v. Mulcahy*, [1934] 1 K.B. 608 ; Digest Supp. ; 103 L.J.K.B. 347 ; 150 L.T. 240.
- (12) *Altham's Case* (1610), 8 Co. Rep. 150 b ; 1 Digest 8, 50.
- (13) *Henchett v. Kimpson* (1762), 2 Wils. 140 ; 21 Digest 522, 965.
- (14) *Greaves v. D'Acastro* (1725), Bunb. 194 ; 18 Digest 347, 840.
- (15) *Dixon v. Smith* (1818), 1 Swan. 457 ; 18 Digest 343, 792.
- (16) *Taylor v. Lanyon* (1830), 6 Bing. 536 ; 18 Digest 343, 793 ; 8 L.J.O.S. C.P. 180.
- (17) *Manchester Corpn. v. Lyons* (1882), 22 Ch.D. 287 ; 33 Digest 551, 342 ; 47 L.T. 677.
- (18) *Wimbledon Local Board v. Underwood*, [1892] 1 Q.B. 836 ; 7 Digest 151, 819 ; 61 L.J.Q.B. 484 ; 67 L.T. 55.
- (19) *Lee v. Lopes* (1812), 15 East. 230 ; 5 Digest 829, 7041.
- (20) *Seaman v. Burley*, [1896] 2 Q.B. 344 ; 18 Digest 422, 1603 ; 65 L.J.M.C. 208 ; 75 L.T. 91.
- (21) *McCreagh v. Cox & Ford* (1923), 92 L.J.K.B. 855 ; 18 Digest 397, 1334 ; 129 L.T. 567.

APPEAL by the plaintiff from a decision of His Honour JUDGE TEBBS given at Wolverhampton county court and dated Jan. 27, 1939. The facts of the case are fully set out in the judgment of the court which was delivered by GODDARD, L.J.

- F *A. T. Denning, K.C.*, and *J. C. Whitehead* for the appellant.
R. M. Montgomery, K.C., and *G. E. P. Thorneycroft* for the respondent.
Denning, K.C. : The term "execution" includes the levy of a sum by seizure and sale of goods under a warrant or authority issued out of a court of law. It therefore includes a distress for rates. In 1700, SIR G JOHN HOLT, C.J., said "when a statute says money shall be paid under a distress, that is an execution" : *R. v. Speed* (6). See also *Hutchins v. Chambers* (7), *Harper v. Carr* (5), *R. v. Benn & Church* (4) and *Swaffer v. Mulcahy* (11). The word "suit" in the section does not mean "action." In 1700 one sued out an execution. It means an application to the court asking that execution should issue. See COKE ON LITTLETON, Vol. 2, p. 289a, and *Altham's Case* (12). The word "plaintiff" means the party at whose suit execution is sued out. It includes "defendant." The statute should have a liberal interpretation. [Counsel referred to *Henchett v. Kimpson* (13).] The words "execute his judgment" mean enforce the order which the court has pronounced in his favour. [Counsel

referred to *Greaves v. D'Acastro* (14), *Dixon v. Smith* (15) and *Brandling v. Barrington* (9).] Where the statute uses the word "extent," it includes proceedings such as this. An extent at common law lay on a debt due under Statute Merchant or Statute Staple. A merchant took his debtor before the mayor and the debtor made a recognisance before the mayor; and if the debtor did not pay, the creditor could execute on his commodities; he could get a writ of extent. In the reign of Henry VIII an Act was passed allowing the Crown to use a writ of extent, and great use was made of this. See COMYNS' DIGEST, pp. 295, 296; WEST ON EXTENTS, 1817 Edn., pp. 1, 14, 316; and BLACKSTONE'S COMMENTARIES, 7th Edn., Vol. 3, p. 420. A distress for rates is indistinguishable from any other form of execution, and this appeal should be allowed. A

Montgomery, K.C. : This statute is 230 years old, but there has never yet been any attempt made to apply it to poor rate. That would make one think that the purpose of the Act, when it was passed, was so well known to lawyers that there was no doubt about it. No single case that has been cited relates to a levy for a rate or for a tax. The term execution has always been understood as not including the case where money is owing for rates. It applied to cases where one could recover money due on a debt. [Counsel referred to *Taylor v. Lanyon* (16).] The third party has always been a party who could have sued on an *indebitatus* count; that cannot be done in the case of a poor rate; that is not a debt at all. C D

CLAUSON, L.J. : In the Bankruptcy Act, 1913, s. 33, rates are called a debt.

Montgomery, K.C. : That may be so, but they are not a debt in the old sense of the word. The word "execution" in the Act only refers to debts due on an *indebitatus* count, and cannot apply to a sum of money that could not be sued for. A saving clause cannot be used to extend the meaning of an enactment: *Manchester Corporation v. Lyons* (17). The question of whether distress was the equivalent of execution was considered in *Wimbledon Local Board v. Underwood* (18); it was held that distress did not include execution for rates. [Counsel also referred to *Lee v. Lopes* (19).] The purpose of this statute was to prevent a tenant from taking steps to prevent his landlord from recovering rent. This was very important for landlords, and if it covered distress for rates, one might expect a reference to that in the text books. But in the first edition of CHAMBERS ON LANDLORD AND TENANT, which was published in 1823, although six pages (671-676) are devoted to this statute, there is no suggestion that a landlord can claim priority. Proceedings to recover poor rate differ from execution: *Seaman v. Burley* (20). The meaning of the word "debt" was considered in *McCreagh v. Cox & Ford* (21). H

Execution does not include a distress under a justice's warrant for poor rate. The section ends with the words "may proceed to execute his judgment"; in the case of a distress for rates, there is no judgment.

Denning, K.C., in reply : It is said that there is no precedent, but the matter has never been disputed before, and there is nothing one way or

the other. BULLEN ON DISTRESS in 1842 does not refer to it either. Even if this be a criminal matter, it may still be execution.

- GODDARD, L.J. [delivering the judgment of the court]: The plaintiff in this case is the landlady of 366, Dudley Road, Wolverhampton, let on a quarterly tenancy to one Townsend at a rent of £5 7s. per quarter. The tenant got into arrear with the rent, and, as the house is controlled under the Rent Restriction Acts, the plaintiff on Aug. 10, 1938, applied to the county court under those Acts and obtained an order for leave to distrain, which order, however, was suspended so long as the tenant paid 15s. per week off the arrears, and the rent as it became due. The tenant having made default, the plaintiff was on Sept. 29, in a position to distrain for a sum agreed at £15 11s. Meanwhile, on Sept. 20, the defendant, as bailiff for the corporation of Wolverhampton, levied on the tenant under a warrant of distress for rates, granted by a justice of the peace for the borough, on Aug. 11, pursuant to the Distress for Rates Act, 1849. The plaintiff's solicitors on Oct. 4, gave notice to the defendant that their client claimed the amount due for rent as a first claim on the assets, by which was obviously meant the proceeds of the sale of the distress, and, as the defendants refused to recognise this claim, this action was brought. The plaintiff's claim was based on the Landlord and Tenant Act, 1709, and the only point which falls to be determined, is whether the levying of a distress for rates under a justice's warrant is an execution within sect. 1 of that Act. The county court judge has held it is not ; hence this appeal.
- Sect. 1 of the Act is as follows :

- For the more easy and effectual recovery of rents reserved on leases for life or lives, term of years, at will or otherwise ; Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in Parliament assembled, and by the authority of the same, That from and after May, 1, 1710, no goods or chattels whatsoever, lying or being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, term of years at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution ; Provided the said arrears of rent do not amount to more than one years rent, and in case the said arrears shall exceed one years rent, then the said party, at whose suit such execution is sued out, paying the said landlord or his bailiff, one year's rent, may proceed to execute his judgment, as he might have done before the making of this act ; and the sheriff or other officer is hereby impowered and required to levy and pay to the plaintiff as well the money so paid for rent, as the execution money.

- Before considering the meaning of the section, it may perhaps be as well to mention that the lien thus given to the landlord has been the subject of certain subsequent enactments. The Execution Act, 1844, s. 67, limits the claim of a landlord in the case of weekly tenancies to four weeks' rent, and in the case of other tenancies for a term of less than a year, as in the present case, to arrears accruing during four such terms or times of payment. The Bankruptcy Act, 1914, s. 35, modifies the

Act of 1709 in certain respects where the goods of a debtor are concerned. These sections do not affect the present case.

The County Court Act, 1888, s. 160, provides that sect. 1 of the Act of 1709 shall not apply to goods taken in execution under the warrant of a county court, but the landlord may give the bailiff notice of rent in arrear, and the latter is then to distrain for the rent so claimed, as well as levy for the amount of the judgment, and out of the proceeds of sale is to pay the landlord four weeks' rent in the case of a weekly tenancy, two terms of payment for any other term of less than a year, and one year's rent in any other case. It seems clear, therefore, that execution in the Act of 1709, is not limited to the process of the superior courts, and levy by a county court bailiff would have been an execution within the Act of 1709, but for the provisions of this section, although at the time when the Act was passed the modern type of county court did not exist.

It is, indeed, remarkable that though the Act has been in force for 230 years, there is no trace of any case in which the question which now falls for decision has ever been raised. Moreover, as far as researches of counsel can find, no text writer on the law of landlord and tenant has considered or mentioned it. In recent editions of *STONE'S JUSTICES MANUAL*, a work of the utmost value as a manual of practice, but not a work of authority on the branch of the law we are considering, the editors have expressed the opinion that the Act in question does not apply to a distress for rates, but no reasons or authorities are advanced in support of this opinion.

It thus becomes necessary to get a clear conception both of a distress and of an execution, the more so because, as will appear hereafter, the term "distress" has often been, and still is, applied to a process which is a distress in name only, and is in reality an execution. A distress is a remedy probably as old as the common law itself. From its earliest history it always had two peculiar elements: (i) it was a measure of self help, a remedy given by the law to the party, for the exercise of which he required no permission from any court; and (ii) that which was seized thereunder, had to be held by the distrainer as a pledge or security, and no right of sale or of using the property seized was given to him. It was not till 1690 that a right of sale of a distress for rent was conferred by the Distress Act, 1689, while to this day animals distrained damage feasant cannot be sold to provide compensation for the distrainer. They can only be sold to recoup the distrainer for the cost of providing them with food and water, a duty which was laid upon him by the Cruelty to Animals Act, 1849. Distress has been the subject of many statutes, both by way of extending the remedy in favour of landlords, and of limiting it in favour of tenants and of persons, for example, lodgers, whose property may be on demised premises. For the purpose of the present case it may be said that the most important enactments are those which have conferred exemptions from distress upon certain goods or

- chattels of the tenants. Thus, beasts of the plough were exempted unless no other sufficient distress could be taken, by the Act 51 Hen. III, and by later legislation such things as wearing apparel, bedding, and tools have been protected, while at common law things in a man's actual use, such as a horse on which he is riding (*Storey v. Robinson* (1)), or a
- A loom in use by a weaver (*Simpson v. Hartopp* (2)), cannot be distrained; whereas goods belonging to others but on the tenant's land could, by the common law, be distrained (unless brought within certain definite exceptions in favour of trade), so that in modern times legislation has been passed to give protection to lodgers and others from the rigour of the law.
- B Now let us compare this state of things with an execution. While there is no protection from the sheriff for beasts of the plough or the horse which the debtor may be riding, the sheriff could never lawfully seize goods which did not belong to the debtor, though they might be in his house. An execution is essentially the process of a court; it is the
- C final step in a cause, and proceeds from a judgment. A distress has been said to be neither an execution nor a legal process, as no legal process is necessary, and a landlord may distrain with his own hands. (See *Re Fanshaw & Yorston, Ex p. Birmingham & Staffordshire Gas Light Co.* (3).) In the case of a judgment of a superior court, execution is effected by a
- D writ issued by the court which has given judgment, directed to the sheriff, and if he or the under-sheriff does not personally execute the writ, as in practice they never do, a warrant is issued by the sheriff to a bailiff to levy execution. It seems that the execution creditor may nominate to the sheriff a special bailiff to execute the writ, and in that
- E case could nominate himself, but then he would levy by virtue of the sheriff's warrant, unlike the distrainer, who can, if he pleases, distrain by his own hand or by his appointed bailiff.

- We have now to consider the nature of a distress for rates, which is a purely statutory proceeding. Now regulated by the Distress for Rent
- F Act, 1849, it had its origin in the Poor Law Relief Act, 1601, which empowered the overseers to obtain a warrant from two justices of the peace authorising them to enforce payment of rates and arrears by distress and sale of the offender's goods, that is, the goods of those who had failed to contribute as they had been assessed. This is probably the
- G first occasion on which justices were authorised to issue a warrant for the recovery of money, and also the first time when a power of sale was conferred by statute in the case of what is called a distress. There the matter stood till the Act of 1849. The principal changes which that Act effected were that it enabled a warrant to be issued by one justice;
- H it enabled the overseers to recover the costs of distraining; it provided for committal to prison for want of distress, and it prescribed the form of complaint, summons and warrant.

What we have to determine is whether in 1709, when the Landlord and Tenant Act was passed, the levying of a distress for rates would have been regarded by the lawyers of the day, and therefore presumably

by Parliament, as an execution. The first thing to consider is, did the issue of the warrant result from a decision of a court? No doubt in the reign of Elizabeth, justices out of session acted far more as administrative and executive, than as judicial, officers, but SIR JAMES FITZJAMES STEPHENS has pointed out in his HISTORY OF THE CRIMINAL LAW that, from their first institution, a number of statutes have authorised, A in some cases one justice, and in other cases two, to inflict penalties in a summary way on a great variety of offenders. So they must have been capable of forming a court of law. Then it was decided, in *R. v. Benn & Church* (4) and in *Harper v. Carr* (5), that the issue of a distress warrant for rates was a judicial and not a ministerial act. B These cases were decided in 1795 and 1797 respectively, but, if in those years the issue of a warrant under the Poor Relief Act, 1601, was a judicial act, it must equally have been so in 1709. Why, then, was the process in 1601 called a distress? One rather tempting argument that suggests itself is that the warrant was directed to the overseers them- C selves, and not to a sheriff or other officer, and so the execution of the warrant, being left to the party obtaining it, was in that respect analogous to a distress. Probably the true reason is to be found in *R. v. Speed* (6). Both in the argument, and in the judgment of HOLT, C.J., it appears that the process issuing out of such courts as a court baron D and a court leet, was called a distress. In the case of a court baron, it is said there was no power to sell, though in the case of a court leet there was, as it was a court of record. What therefore was more natural than that in giving power to an inferior court, not a court of record, the legislature should describe its process by the terms used for that of E courts of similar standing? Moreover, in that case, decided only some ten years before the Act we are now considering was passed, and in which the Poor Relief Act, 1601, was cited in argument, HOLT, C.J., at p. 330, lays down in terms that:

When a statute says money "shall be levied by distress" this is an execution . . . F

Without going into deep research of old statutes, it is clear from that case that it was common to use the word "distress" in relation to sums of money to be recovered, even as penalties. The statute against deer stealing under consideration in *Speed's* case (6) apparently provided for a year's imprisonment in case of failure of distress to the value of thirty G pounds. Even apart from the clear statement of HOLT, C.J., it must be obvious that the levying of a penalty imposed by a court of criminal jurisdiction is a form of execution.

We come next to the case of *Hutchins v. Chambers* (7), where the whole question was whether beasts of the plough were privileged from distress H for a poor rate, and it was held they were not. LORD MANSFIELD cited the judgment of HOLT, C.J., in *Vinkinstone v. Ebben* (8), a case of distress for tolls, and quoted with approval a passage in 3 Salk., at p. 136, as follows:

. . . the rule of the common law which exempts utensils, tools, instruments of

husbandry, etc., from distress, holds only in distresses for rent-arrear, amerciaments, etc., but doth not extend to cases where a distress is given in the nature of an execution, by any particular statute; as for poor's rates.

Therefore, adds LORD MANSFIELD, it is more analogous to an execution than to a distress at common law, and there (in cases of execution) *averia caruce* may be distrained, although there may be other sufficient

A distress.

Now the Act of 1709 applies to any execution on any pretence whatsoever, and it is indeed difficult to see how a process can be for some purposes an execution and for others something different. It is true that the Act lays a duty on the party at whose suit the execution is sued out, and it is also true that it has been recently held in this court that no action lies at the suit of the rating authority to recover rates, and that the only remedy is that given by the statute. Why may not the rating authority be the party at whose suit the execution is sued out? To obtain the process—to use a neutral word—proceedings have to be begun in the court of competent jurisdiction. The form of proceeding is prescribed in the Act of 1849. There is first a complaint by the overseers, for whom recent legislation has substituted the rating authority. A complaint is the appropriate method of starting proceedings before justices where an order and not a conviction is sought, just as proceedings in a county court are instituted by a plaint, and in the high court by a writ. The complaint is followed by a summons, so that the justices may hear the respondent, and act judicially, and if the summons results in the issue of a warrant, a levy takes place, which the cases just cited decide is an execution. That execution, it would seem to follow, was sued out at the suit of the rating authority. It is to be remembered that courts of summary jurisdiction make many orders for the recovery or payment of money, sometimes by way of penalty, sometimes by way of debt or damages. The Summary Jurisdiction Acts, 1848 and 1879, contain a code of sections dealing with this, and always the process of execution is called distress. The statutory Summary Jurisdiction Rules, 1915 and 1926, contain a schedule of forms, among them forms applicable to proceedings for the recovery of a civil debt. Form 80 is the complaint, Form 81 the summons, Form 83 is the judgment, which states that it is adjudged that the defendant pay a sum for debt or damages, and Form 86 is the distress warrant. It would be hardly possible to argue that process under that warrant was not an execution sued out at the suit of the complainant. The reality is that this process issuing from justices is distress in name only, and is in fact execution.

H It is, however, necessary to say a word with regard to *Brandling v. Barrington* (9), especially as the town clerk relied on this case in the correspondence before action, as showing that the Act did not apply. When properly understood, that case decided no more than that the Act did not apply to an execution levied by way of mesne process. The writ of *pone per vadios* was the equivalent, in the Chancery Court of the County

Palatine of Durham, to the writ of *distringas* in the courts at Westminster. It was a method of compelling appearance. The sheriff was commanded to put the defendant by gages and safe pledges that he be before the court to answer the plaintiff's claim. The sheriff obeyed the writ, as he did the writ of *distringas*, by attaching the defendant's goods. If the latter appeared, the goods were at once released pending trial, but if A he was in default the goods were forfeited, and no doubt the plaintiff thereby got satisfaction. But, as LITLEDALE, J., put it [at p. 478], the writ was not an execution, though in some cases it may have the effect of (that is, the same result as) an execution. The court held that the execution must be one following a judgment, and not one merely to B compel appearance. That decision affords no assistance in the present case. The final decision of justices in a matter in which they have jurisdiction is as much a judgment as that of any other court. Having decided that the person summoned is liable to pay the rate, they issue their warrant for the execution of their judgment; the resulting process C has none of the characteristics of distress; it is execution pure and simple.

It remains for us to deal with what was the main strength of the argument of counsel for the respondent, that this point has never been taken in the 230 years during which the Act has been in force. Now, D this is not a case in which an appellate court is asked to reverse a decision of long standing on the faith of which persons have acquired rights and ordered their affairs. It is one in which we have to decide for the first time a question which might well have arisen before, but never has done so. It is fruitless to attempt an inquiry as to the reason for this E silence, not only of decided cases, but of text writers. Certainly one would have thought that *Hutchins v. Chambers* (7) would have encouraged landlords to raise it, or text writers to discuss it. Even if we assume that those whose business it is to levy distress for rates have been long of opinion that the Act does not apply, this affords no ground for per- F petuating the error. "*Communis error facit jus*" is a maxim of very limited application; it is truer to say—as was said by LORD ELLENBOROUGH, C.J., in *Isherwood v. Oldknow* (10) [at p. 396]—"communis opinio is evidence of what the law is," but here there is no trace of a *communis opinio* among lawyers. And if there has been prevalent an erroneous G view of the Act, it is clear that no one has acquired rights in consequence; the most that can be said is that landlords have perhaps been induced to refrain from exercising the right given them by the Act in the particular case of distress for rates. Whether it is desirable in modern conditions that the landlord should have a preference over the rating H authority is a matter for the legislature, and not for the courts. We are bound to decide the case according to what we believe to be the true view of the law.

The result is that the appeal will be allowed with costs, and judgment entered for the plaintiff with costs on the same scale as were allowed by

the county court judge at the hearing. The case is one of obvious importance and novelty, and if the defendants so desire, leave to appeal to the House of Lords will be given.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Simon, Haynes, Barlas & Ireland*, agents for *Feibusch & Wells*, Wolverhampton (for the appellant); *Sharpe, Pritchard & Co.*, agents for *J. Brock Allon*, Town Clerk, Wolverhampton (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

B BARNES (INSPECTOR OF TAXES) v. HELY HUTCHINSON.

[HOUSE OF LORDS (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Wright), **June 22, 23, 26, July 27, 1939.**]

C *Income Tax—Double taxation—Relief—Shares in English company held by Indian company—Dividends of English company suffering tax—Relief to preference shareholder in Indian company—Income Tax Act, 1918 (c. 40), Sched. D, Case V, r. 1.*

D The respondent was a preference shareholder in an Indian company. The Indian company was a shareholder in two English companies, the profits of each of which had suffered United Kingdom taxation. The dividends received by the Indian company from the two English companies formed 44·12 per cent. of the total profits of the Indian company, and the respondent contended that he was to be treated as having borne 44·12 per cent. of the tax upon the dividends received by him from the Indian company:—

E HELD: as the principle against double taxation applies only to the payment of tax by the same person in respect of the same income, and as the respondent received the full dividend to which he was entitled on his preference shares, he was not entitled to the relief claimed.

Decision of Court of Appeal ([1938] 3 All E.R. 98) reversed.

F **EDITORIAL NOTE.** In the courts below, the circumstances of this case were treated as within the principle of the decision in *Gilbertson v. Fergusson* (2). Their Lordships have, however, decided that no question of double taxation arises in the present case, since the shares were preference shares, and the shareholder had received all that he was entitled to receive by way of dividend under the contract with the company. The question of the correctness of the decision in *Gilbertson v. Fergusson* (2) was not really in issue in the present appeal, but it would seem that that case may now be of limited application even in the case of ordinary shares.

G As to *Gilbertson v. Fergusson* RELIEF, see HALSBURY, Hailsham Edn., Vol. 17, p. 195, para. 399; and FOR CASE, see DIGEST, Vol. 28, p. 79, No. 431.]

Cases referred to:

- (1) *Cull v. Inland Revenue Comrs.*, [1939] 3 All E.R. 761; Digest Supp.
- (2) *Gilbertson v. Fergusson* (1881), 7 Q.B.D. 562; 28 Digest 79, 431; 46 L.T. 10; 1 Tax Cas. 501.
- H (3) *Neumann v. Inland Revenue Comrs.*, [1934] A.C. 215; Digest Supp.; 103 L.J.K.B. 210; 150 L.T. 481; 18 Tax Cas. 332.
- (4) *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744; 28 Digest 81, 445; 92 L.J.K.B. 736; 129 L.T. 546; 8 Tax Cas. 481.
- (5) *London County Council v. A.-G.*, [1901] A.C. 26; 28 Digest 73, 392; 70 L.J.Q.B. 77; 83 L.T. 605; 4 Tax Cas. 265; *revog. S.C. sub nom. A.-G. v. London County Council*, [1900] 1 Q.B. 192.

APPEAL from an order of the Court of Appeal (SIR WILFRID GREENE, M.R., SCOTT and CLAUSON, L.JJ.), dated June 2, 1938, and reported [1938] 3 All E.R. 98, dismissing an appeal by the appellant from an order of LAWRENCE, J., dated Oct. 8, 1937, and reported [1937] 4 All E.R. 286, whereby an appeal by the appellant upon a case stated by the Commissioners for the General Purposes of the Income Tax for the city of London was dismissed and the decision of the commissioners was affirmed. The facts and the arguments are fully set out in the opinions of LORD ATKIN and LORD WRIGHT. A

The Attorney-General (Rt. Hon. Sir Donald Somervell, K.C.) and Reginald P. Hills for the appellant. B

Roland Burrows, K.C., and Terence N. Donovan for the respondent.

LORD ATKIN [read by LORD RUSSELL OF KILLOWEN]: My Lords, this is an appeal from the Court of Appeal affirming a decision of LAWRENCE, J., who dismissed an appeal from the Commissioners for the General Purposes of the income tax for the city of London, who had allowed an appeal by the respondent against an assessment for income tax. It will thus be seen that the inspector of taxes has been held to be wrong all along the line. Nevertheless I venture to think that he is right and that his appeal should be allowed. The respondent is the holder of 525 preference shares of Rs. 1,000 each in George Henderson & Co., Ltd., entitling the holder to a fixed cumulative dividend at the rate of 8 per cent. per annum. The company is registered in Calcutta, and has also issued ordinary share capital. It is the holder of ordinary shares in two companies registered in England, the Barnagore Jute Factory Co., Ltd., and the Hunwal Tea Co., Ltd. The whole of the profits of these British companies were assessed to British income tax, and when they paid dividends to George Henderson & Co., Ltd. (the Indian company) they deducted the appropriate amount of tax according to All Schedules Rules, r. 20. The Indian company also received income which had not suffered deduction for British income tax, and the proportion of taxed to untaxed income for the year in question was for this case agreed to be 44·12 to 55·88. The respondent on June 22, 1931, was paid as dividend upon his preference shares the sum of Rs. 42,000. It was paid to him direct by the company and without any deduction for income tax. He was assessed under Case V, r. 1 on the full amount of the dividend. He contended that such part of the dividend as was paid out of profits and gains which had already borne British income tax (namely, 44·12 per cent.) could not again be subjected to British income tax and that its assessment should be reduced accordingly. It is this contention which has been successful in the courts below. C D E F G H

The position of a shareholder in a foreign company so far as income tax is concerned, is entirely different from that of a shareholder in a British company. So far as the latter is concerned, he is not liable to be charged or assessed for income tax on his dividends at all: though he

is liable in respect of them for sur-tax. The position of such a shareholder has been discussed in the case recently heard of *Cull v. Inland Revenue Comrs.* (1), and need not here be further expounded. The shareholder in a foreign company is charged under Schedule D, namely, in respect of the annual profits or gains arising to any person residing in the United Kingdom from any property whatever, whether situate in the United Kingdom or elsewhere, and specifically under Case V which relates to "Tax in respect of income arising from possessions out of the United Kingdom." Case V, r. 1, provides as follows :

B The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I, whether the income has been or will be received in the United Kingdom or not. . . .

The provision as to the three years' average has been altered by the Finance Act, 1926, s. 29, by substituting the amount of the preceding year. It is obvious, therefore, that as far as the statute is concerned the respondent was chargeable on the whole dividend received : and it is not suggested that his claim to an abatement rests upon any statutory provision. His case depends upon a decision of the Court of Appeal in *Gilbertson v. Fergusson* (2). In that case the persons charged were members of the English committee of the board of directors of the Imperial Ottoman Bank, a Turkish corporation which carried on business in this country and abroad. The management of this business in this country was entrusted to the English members of the general committee of management, who would correspond to the board of directors. The bank earned profits both in this country and abroad : and on the profits made in this country the bank was charged with income tax through the English committee, who were in fact the parties assessed. Dividends were declared out of the total profits of the bank : and the dividends due to British shareholders were paid to them by the English committee. In respect of dividends so paid, the English committee were assessed to income tax under the provisions of the Income Tax Act, 1842, s. 2, and the Act of 1853, s. 10, which provided that all persons entrusted with the payment of dividends, were to pay the duties on the dividend on behalf of the persons entitled to the same out of the moneys in their hands. In respect of this last assessment the London committee complained that they should not be assessed upon the whole of the dividends paid by them to the English shareholders, but only on a proportionate part, namely, the proportion that the profits made abroad bore to the profits made in England : for they said that, on the profits made in England, tax had already been paid to the Crown. I have omitted other subsidiary issues which do not bear upon the point in question. The majority in the Exchequer Division, HUDDLESTON and POLLOCK, BB., KELLY, C.B., dissenting, and the Court of Appeal, BRAMWELL, BRETT and COTTON, L.JJ., accepted the view of the London committee that the assessment should be proportionately reduced.

The reason for the decision appears from the judgment of BRETT, L.J., at p. 570 :

By the statute the government are entitled to receive the income tax upon all the profits made in respect of the business carried on in England, and also beyond that on all dividends paid in England, whether in respect of profits made in England or in Turkey. Now it may be true that there are no specific words in this statute which point out that the government are not to receive the tax twice over, but it would be so clearly unjust and obviously contrary to the meaning of the statute that the government should have the tax payable twice over by the same person in respect of the same thing, that I should say it was a necessary implication that that could not be right.

COTTON, L.J., says, at p. 572 :

It must be conceded that if there are any shareholders who reside in England and receive dividends there they are chargeable under the Act, and are bound to make a return and pay the tax on what they so receive. There is no exception in their case in respect of so much of their dividends as is attributable to or arising in respect of profits made in England, but I take it there would be this implied exception, that when duty is charged as against the person in one part of the Act he is not to be charged again under another part applying no doubt in terms to him, but intended to include those who have not been charged under the preceding part.

It will be seen that there, as in the present case, the shareholders were liable to pay tax on foreign dividends, though in that case the tax was paid "on behalf of them" by the persons entrusted with money to pay the dividends. As far as the company had been taxed on its profits made in England, it seems to me plain that the reasoning proceeded on the theory then prevailing, that the company paid tax on its profits on behalf of its shareholders, a theory which, as was pointed out in *Cull's* case (1), can no longer be maintained. It seems equally plain, however, that the exception which the courts were able to imply was based upon this very ground, the injustice that would prevail if the tax were payable twice over by the same person in respect of the same thing. Whatever the grounds of the decision, it has stood to the present day, and the Attorney-General did not seek to dispute its validity in facts such as those found in that case. There has been much legislation in income tax matters since the date of its decision, and this House would hesitate long in these circumstances, before infringing a decision of such long standing, and so often acted upon. But does the decision affect the present case? In that case, no doubt, as in this, the shareholder was being charged in respect of dividends in a foreign company. In that case the foreign company had been directly charged with income tax on its English profits. In the present case the foreign company had not been, and could not be, charged with income tax on its dividends derived from the British companies. The fund out of which profits had been declared by the British company, had no doubt been diminished by the incidence of the British tax: and the Indian company had suffered the deduction from their dividends in respect of "tax" which the British companies were entitled to make if they chose, the nature of which I have mentioned in *Cull's* case (1). I think that this distinction makes it difficult to apply the decision in *Gilbertson v. Fergusson* (2), now to the case of ordinary shareholders in the Indian company. Where

does the inquiry end in the case of a shareholder in a foreign company ? If he can inquire which of the dividends received by that company had suffered British tax, can he go on to inquire what proportion of those dividends were derived from income that had suffered tax and so *ad infinitum* : and what fraction of a fraction of a fraction has eventually
A to be calculated and verified ?

Even if the implied exception could be adopted for the ordinary shareholder, I am at a loss to understand any reasons for its applying to a preference shareholder, or in what possible sense it can be said that to him an injustice has been done of making tax “payable twice over
B by the same person in respect of the same thing.” The preference shareholder who receives his full dividend, has suffered nothing directly or indirectly. That a larger sum of profits out of which he receives his dividend is diminished by tax is nothing to him, as long as there is sufficient left to pay him the sum which the company has contracted to
C pay. I can see nothing either unjust or contrary to the statute in exacting tax for the first time from him ; and I think that his claim for a proportionate abatement fails.

I should add that I am not myself prepared to accept the view that some implied exception arises where a “fund” is taxed, a principle
D which appears to have found favour in the Court of Appeal, and was much pressed before us on behalf of the respondent. Funds are not taxed ; the analogy of one or more bags into which the Inland Revenue inserts its fingers seems to me, with respect, to be inaccurate. Persons are charged in respect of profits : and if they are to have the benefit
E of an implied relief from the plain words of the statute, it appears to me that it must be shown to be unjust for those persons to be taxed, in other words that either directly or perhaps indirectly they are being taxed twice. In the present case I think that the respondent on his full assessment will only be taxed once. I think, therefore, that the orders of the
F Court of Appeal and of LAWRENCE, J., and the determination of the Commissioners for General Purposes should be set aside and that the original assessment in the sum of £6,045 should be restored. In accordance with the terms imposed when the Court of Appeal gave leave to appeal to your Lordships’ House, the appellants should pay the costs here
G as between solicitor and client.

LORD RUSSELL OF KILLOWEN : My Lords, I have been given the opportunity of considering the opinion which I have just read, and also the opinion about to be delivered by my noble and learned friend, LORD
H WRIGHT. They indicate exactly the views which I entertain on the subject of this appeal. It is merely from a desire to avoid repetition, and not from any want of respect for the courts from which we are differing, that I content myself with concurring in the motion proposed, without recording any separate opinion of my own.

LORD MACMILLAN : My Lords, I also concur.

LORD WRIGHT : My Lords, the respondent, a British taxpayer, has received Rs.42,000, or £3,150, remitted to him from India as dividends on 52s 8 per cent. preference shares of Rs.1,000 each in an Indian company named George Henderson & Co., Ltd., resident and carrying on business in India. The company's profits for the year were as to 44½ per cent. derived from dividends paid to the company by two British companies A in which it was a shareholder. The profits of these companies had borne British income tax. The question in the appeal is whether the respondent is entitled to relief to the extent of 44½ per cent. in respect of British income tax on the sum which he has actually received from India. He has succeeded in that contention before the revenue judge and the Court B of Appeal. It would certainly seem strange that the respondent, who has received his 8 per cent. in full without any deduction either in England or in India, should not bear the same tax on this piece of income as any other taxpayer who is subject to British income tax. It is not suggested that there is any express statutory provision which reduces his liability. C On the contrary, the words of Sched. D, Case V, seem to provide specifically to the contrary effect. Case V deals with tax in respect of income arising from possessions out of the United Kingdom. The preference shares in the Indian company are beyond question foreign possessions, and the dividends are income arising from them. Hence D under Case V, r. 1, the tax in respect of that income is to be computed on the full amount thereof. It is not suggested that any deduction is permissible under Case IV, r. 1, in respect of income tax in the place where the income has arisen, or on any other ground. The contention which has found favour with the courts below is that as the income E of the Indian company has borne British income tax to the extent of 44½ per cent., in the sense that dividends in these companies were paid under deduction of British income tax, the preference dividends received by the respondent must be held to have borne British income tax in the same proportion ; otherwise, it is said that, if it is now taxed in full, it F will be doubly taxed in the hands of the same person. The analogy is invoked of a shareholder in a British company, who, according to the principle now well settled, is not taxed separately on his dividend to standard income tax. The dividend is deemed to have already borne G tax, because tax has been paid on the company's profits as a whole. This rule is explained in *Neumann v. Inland Revenue Comrs.* (3). Reliance is also placed on behalf of the respondent on *Gilbertson v. Fergusson* (2).

I do not think, for several reasons, that the analogy of dividends of an English company applies, and I see no sufficient ground in a case like the present for relieving the respondent from what is expressed to be his liability under Case V. I think the dividends in question are properly H to be regarded as individual pieces of income, received by him in this country. I apply here the words of LORD PHILLIMORE in *Bradbury v. English Sewing Cotton Co.* (4), which seem to me to describe accurately, at least in a case like this, the position of a British taxpayer who receives

annual sums from foreign possessions, whether the foreign possessions are land or goods or shares in a foreign company. LORD PHILLIMORE said as to the dividends, at p. 770 :

A The periodic sums which are so remitted to him must be entered by him in his return, and are liable to assessment and taxation, not because they are dividends on shares in foreign companies, but simply because they are remittances from foreign sources. The officers of the Crown do not know and do not care what is the character of the sources from which the money comes.

I do not stop to enquire if this statement is universally applicable, but it is accurate at least in regard to preference dividends from a foreign company such as those in question here. I cannot see any sufficient
B ground to justify such exemption or abatement as the respondent claims.

Preference dividends in an English company would generally be taxed by deduction under All Schedules Rules, r. 20. The company is treated as having the right to deduct the appropriate tax because it is deemed to have franked the dividends in the hands of the shareholder, by paying
C the tax on the totality of its own profits. If the English company does deduct tax under r. 20, as would be the case if the preference dividends were declared under deduction of tax or tax free, the dividends would be free of standard tax, and equally if the dividends were declared without deduction of tax. However the same rule or fiction cannot, in my opinion,

D be applied to the dividends on these preference shares in the Indian company, which are remitted in full to this country. It cannot be said that the Indian company has paid English tax on its profits or any part of them in such a way as to frank the preference dividends, in whole or in part, in the hands of the English recipient. The rule or fiction has never
E been, nor can it be, extended so far. It is said, however, that the total fund of the Indian company's profits has been reduced because the dividends from its shares in the two British companies have been paid under deduction of British tax. That is true, but that does not mean that the actual dividends paid to the respondent were affected. All it
F means is that the divisible profits of the Indian company were proportionately less on that account. The Indian company did not directly pay any British tax or deduct anything on that account from the sums paid to the respondent. All these matters seem to me to be entirely irrelevant to him. He got the full amount of the dividends just as if the
G dividends from the two British companies had not been paid under deduction of tax. If, as a result of the deduction of British tax on the dividends received from the British companies by the Indian company, the latter's net profits had been reduced so as not to suffice to pay the respondent his 8 per cent. dividends in full, the amount of the foreign
H remittances sent to him would or might be so much less. In that event his liability for income tax under Case V would be proportionately reduced. It is contended that he is affected because the fund out of which his dividends are drawn is reduced to the extent that the Indian company's dividends on the shares in the British company were reduced by the deduction of British income tax ; but the tax assessed on the respondent is

not levied on the Indian company's fund of profits but on the foreign income arising from them to the respondent. That income is, in the facts of this case, completely unaffected. In truth, at least in a case like the present, the analogy of an English company is misleading ; but, even when what is being considered is the taxation of the dividends of an English company, it is not correct to say that it is anything but the shareholder's income as represented by the dividends which is taxed. The English company is taxed on the balance of its profits or gains, that is, on its income ; the shareholder is taxed on his own income. The shareholder is never taxed on the company's fund of profits, but only on the dividend which comes to him in payment of the debt which is created when the company declares the dividend. The tax is in every case on the individual's income, not on a fund possessed by another person, the company, even though it is the fund of profits of that company, from which the individual's income or part of it will be paid. The effect of All Schedules Rules, rr. 19, 20 and 21, is in no way inconsistent with this fundamental principle, nor is the rule according to which English dividends are not separately assessable to standard income tax. This principle must not be obscured by reason of the circumstance that, in the way already noted, the dividend is treated as franked by the tax paid by the company. The fund which is taxed in the hands of the company, and the dividend which is declared by the company and paid to the shareholder, are separate items for taxation law. It is only the latter which is the shareholder's income. Notwithstanding the elaborate reasoning in the court below, I cannot see any sufficient ground why the respondent should escape the full tax on these preference dividends.

The case of *Gilbertson v. Fergusson* (2) has been much relied on in argument. I do not desire to express any final opinion on the exact decision in that case, which differed from the present, because it dealt not with preference, but with ordinary, shares, and also because the Ottoman Bank, which was the foreign company, had been trading in England and had been directly taxed on the profits of its English trading. The claim in the action was two-fold, first a claim against the company represented by its London agency in respect of the profits of its English trading, and secondly a claim also against the London agency, in respect of the moneys entrusted to them to distribute as dividends to English shareholders. In the latter claim, the agency was in truth assessed as representing the English shareholders. It was held that the latter assessment should be reduced in respect of so much of the dividends as represented profits arising within the United Kingdom. However, in that case the dividends were ordinary, and not preference, dividends, so that the amount of the ordinary dividends might, in fact or in theory, have been reduced by the English taxation. There was the further difference that the Indian company, unlike the Ottoman Bank, was not carrying on business in England and was not directly assessable or assessed

- in England. Its contribution to British taxation was indirect, in the sense that there had been the deduction made by the two British companies in paying their dividends to the Indian company. Thus it may be said that the Indian company occupied the same position for this purpose as did the English shareholders in the Ottoman Bank case (2), whereas
- A the respondent is one stage more remote. The Indian company is interposed between the respondent and any question of British taxation on the Indian company's income. Logically the process of tracing back profits of a foreign company to ascertain if they have, however remotely, indirectly borne British tax, should not stop at a single stage, but I
- B need not point out the practical difficulties of going back beyond the simple stage at which the foreign company has directly borne British tax. It is not, however, necessary here to examine *Gilbertson's* case (2) in principle or in detail. It raises questions perhaps of great importance, but questions not material to this appeal. Your Lordships were told that
- C it has been followed in practice, and it has certainly stood for many years. If it is ever after this lapse of time to be reconsidered, that should be done, when occasion arises where the facts are analogous. In the present case the circumstances are so different that a decision can be arrived at without finally exploring *Gilbertson's* case (2).
- D I may add in conclusion that I do not think this case involves any question of double taxation. In LORD DAVEY's words in *London County Council v. A.-G.* (5), at p. 43 :

. . . the Crown . . . cannot demand the tax twice over on the same income.

- E LORD DAVEY illustrates the rule by instances such as those of mortgagee or annuitant, where the owner of the property and the annuitant are entitled to the income between them, and, if the Crown receives tax from the owner on the whole income, it has no further claim against the annuitant on whose account the owner is deemed to have
- F paid as well as on his own. The same principle has been said, but not accurately, to apply to the case of dividends of an English company, a matter to which I have adverted above. In *Gilbertson's* case (2), at p. 570, BRETT, L.J., said that it would be clearly unjust and obviously contrary to the meaning of the statute that the govern-
- G ment should have the tax payable twice over by the same person in respect of the same thing. Whatever the precise scope of the rule against double taxation, it must at least involve that it is the same income, that it is the same person in respect of the same piece of income that is being doubly taxed whether directly or indirectly, and that the
- H double taxation is by British assessment. In this case nothing of the sort can be predicated. The income in question is the amount of preference dividends received by the respondent. That income, which is the income of the respondent, has not been taxed in India. If it is now taxed in England there cannot, in my opinion, be said to be double taxation. The British tax, which the Indian company has indirectly

borne on 44·12 per cent. of its profits, has not, in my opinion, been borne by the respondent in any sense.

With all respect to the distinguished judges who have in this case taken a different view, I would allow the appeal.

Appeal allowed.

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *Sanderson, Lee & Co.* (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

PAINE & CO., LTD. v. ST. NEOTS GAS & COKE CO. B

[COURT OF APPEAL (Scott, Finlay and Luxmoore, L.JJ.), **June 9, 12, 13, July 27, 1939.**]

Easements—Title to easement—Licence granted by proprietors of common rights to sink a well on common—Right of proprietors to make grant—Inclosure Acts dealing with common—Nuisance—Pollution of water by third party—Grantees' right of action. C

The plaintiffs were manufacturers of malt extract, and for that purpose they required a large supply of pure water. Their premises and those of the defendants adjoined a common, and on this common the plaintiffs had sunk a well, from which they carried water through a defined pipe to their mill. After they had been using this well for some years, the water supply became contaminated as a result of ammonia escaping from the defendants' works, discharging into the gravel sub-soil, and, in the course of time, reaching the well on the common. The plaintiffs rested their right to the water on a so-called lease, granted in 1935 by five persons described as proprietors of common rights in, *inter alia*, the common upon which the well was situated. These five persons were not all the commoners entitled to rights over the common, but there had been a meeting of the commoners at which the request for the lease had been agreed to. The Acts relating to the common conferred no rights upon the commoners, or upon any person, to make wells or to allow other people to do so, or to lease rights in the soil to persons not commoners. Nor did they contain any provision giving a number power to act in the name of the whole. It was contended by the defendants that the alleged grant was no more than a licence, unenforceable by the licensees as against a third party, that it did not in law create an easement, as there was no dominant tenement, and, further, that the five grantors under the alleged lease had no power under the Inclosure Acts to make any such grant. It was also contended that the possession of the easement was sufficient to found a claim for disturbance :— D

HELD : (i) the plaintiffs had failed to prove that the grantors had power to make the grant under the deed of 1935.

(ii) *per* SCOTT, L.J. : there was no sufficient proof of possession to found the claim based thereon.

Per LUXMOORE, L.J. : *de facto* possession of an easement is not sufficient to found a claim for disturbance. Such a right of necessity excluded the possibility of possession of the servient tenement. E

Decision of GODDARD, L.J. ([1938] 4 All E.R. 592) *affirmed.* G

[**EDITORIAL NOTE.** The action in respect of the disturbance of an easement is an action in nuisance, but it differs from an ordinary action of nuisance in that the existence of the easement has first to be proved. Where the title to the easement is a grant by deed, a necessary part of the proof is to show that the grantor in the

deed had power to make the grant. A *profit a prendre*, on the other hand, includes the right to take something away from the servient tenement, and the dominant owner has such a possessory right as will enable him to sue in trespass or in nuisance. The defendant, therefore, cannot set up *jus tertii*; that is to say, he cannot set up the title of a third person unless he claims under such person.

AS TO ACTIONS FOR INTERFERENCE WITH EASEMENTS, see HALSBURY, Hailsham Edn., Vol. 11, pp. 374, 375, para. 659; and FOR CASES, see DIGEST, Vol. 19, pp. 184-186, Nos. 1340-1371.]

Cases referred to :

- (1) *Chasemore v. Richards* (1859), 7 H.L.Cas. 349; 44 Digest 34, 252; 29 L.J.Ex. 81; 33 L.T.O.S. 350.
- B (2) *Ballard v. Tomlinson* (1885), 29 Ch.D. 115; 44 Digest 5, 7; 54 L.J.Ch. 454; 52 L.T. 942; *revsg.* (1884), 26 Ch.D. 194.
- (3) *Fitzgerald v. Firbank*, [1897] 2 Ch. 96; 19 Digest 196, 1497; 66 L.J.Ch. 529; 76 L.T. 584.
- (4) *Holford v. Bailey* (1849), 13 Q.B. 426; 19 Digest 208, 1592; 18 L.J.Q.B. 109; 13 L.T.O.S. 261.
- C (5) *Nicholls v. Ely Beet Sugar Factory*, [1931] 2 Ch. 84; Digest Supp.; 100 L.J.Ch. 259; 145 L.T. 113.
- (6) *Race v. Ward* (1855), 4 E. & B. 702; 19 Digest 145, 997; 24 L.J.Q.B. 153; 24 L.T.O.S. 270; *subsequent proceedings* (1857), 7 E. & B. 384.
- (7) *Aldred's Case* (1610), 9 Co. Rep. 57 b; 19 Digest 133, 904.
- (8) *Higgins v. Betts*, [1905] 2 Ch. 210; 19 Digest 123, 829; 74 L.J.Ch. 621; 92 L.T. 850.
- D (9) *Holywell Union & Halkyn Parish v. Halkyn Drainage Co.*, [1895] A.C. 117; 19 Digest 17, 48; 64 L.J.M.C. 113; 71 L.T. 818.
- (10) *Westminster Corpn. v. Southern Ry. Co., Railway Assessment Authority & Smith & Son, Ltd., Westminster Corpn. & Kent Valuation Committee v. Southern Railway Co.; Railway Assessment Authority & Pullman Car Co., Ltd.*, [1936] A.C. 511; [1936] 2 All E.R. 322; Digest Supp.; 105 L.J.K.B. 537.
- E (11) *Foster v. Warblington Urban Council*, [1906] 1 K.B. 648; 19 Digest 57, 323; 75 L.J.K.B. 514; 94 L.T. 876.
- (12) *Graham v. Peat* (1801), 1 East, 244; 19 Digest 505, 3635.
- (13) *Chambers v. Donaldson* (1809), 11 East 65; 43 Digest 408, 303.
- F (14) *Dyson v. Collick* (1822), 5 B. & Ald. 600; 43 Digest 388, 132.
- (15) *Hastings Corpn. v. Ivall* (1874), L.R. 19 Eq. 558; 44 Digest 72, 532.
- (16) *Tyler v. Bennett* (1836), 5 Ad. & El. 377; 19 Digest 145, 996.
- (17) *Clore v. Theatrical Properties, Ltd., & Westby & Co., Ltd.*, [1936] 3 All E.R. 483; Digest Supp.
- (18) *Manning v. Wasdale* (1836), 5 Ad. & El. 758; 19 Digest 162, 1131; 6 L.J.K.B. 59.
- G (19) *Re Simeon & Isle of Wight Rural District Council*, [1937] Ch. 525; [1937] 3 All E.R. 149; Digest Supp.; 106 L.J.Ch. 335; 157 L.T. 473.
- (20) *Dickinson v. Shepley, etc., Sewerage Board* (1904), 68 J.P. 363; 44 Digest 16, 78.
- (21) *Hill v. Tupper* (1863), 2 H. & C. 121; 19 Digest 23, 91; 32 L.J.Ex. 217; 8 L.T. 792.
- H (22) *Keppell v. Bailey* (1834), 2 My. & K. 517; 19 Digest 22, 89.
- (23) *Jackson v. Anglo-American Oil Co.*, [1923] 2 K.B. 601; Digest Supp.; 92 L.J.K.B. 1000; 129 L.T. 792.

APPEAL by the plaintiffs and cross-appeal by the defendants from a decision of GODDARD, L.J. (sitting as an additional judge), dated Nov. 24, 1938, and reported [1938] 4 All E.R. 592. The facts are fully

stated in the judgment of SCOTT, L.J. In so far as the appeal concerned Well No. 1, the questions at issue turned upon the proper interpretation of certain correspondence between the parties, and the case is not reported on that point.

R. M. Montgomery, K.C., and *Arthur Capewell* for the appellants.

Roland Burrows, K.C., and *H. M. Abrahams* for the respondents. A

Montgomery, K.C.: When an easement is in relation to land, it is sufficient if one is in possession to give a right against anyone interfering with its enjoyment. Here there is occupation of so much of the land as is required for the well and pipes. The test is could anyone who had come on the common, and injured the well, have been sued in trespass? B It is undoubted that the occupier of land can sue for trespass, and his title cannot be questioned. I submit likewise that one may be in possession for the purpose of enjoyment of an easement: *Holywell Union & Halkyn Parish v. Halkyn Drainage Co.* (9), *Westminster Corpn. v. Southern Ry. Co.* (10). [Counsel referred to *Foster v. Warblington Urban Council* (11), *Graham v. Peat* (12), *Chambers v. Donaldson* (13), *Dyson v. Collick* (14), *Hastings Corpn. v. Ivall* (15), *Tyler v. Bennett* (16), *Clore v. Theatrical Properties, Ltd.* (17), Gas Clauses Act, 1847, s. 21.] C

Burrows, K.C.: An easement is a right over another's land. The appellants by their claim to an easement disclaim any right to the servient land. There can be no property in running water as such any more than there is property in the air. A person may appropriate water. While it is in his cistern no doubt it is his, but if it escapes he cannot sue anyone who takes it. It is well settled that there cannot be a *profit a prendre* of water. The right the appellants claim cannot be founded on mere possession. They must prove a definite title. They claim to derive their right from persons who had no power to grant it. The plaintiffs may be entitled to the water they have collected in the well, but they cannot complain of its condition at the time it came into the well. It is admitted that if there had been any evidence that the company had fouled the water after it had been appropriated, the appellants would have had a right of action. The appellants are not in possession of the land in any true sense. The well and the pipes are affixed to the soil and become the property of the owners of the freehold. The trial judge was right in holding there was no evidence of title. G [Counsel referred to *Manning v. Wasdale* (18), *Re Simeon & Isle of Wight Rural District Council* (19), *Dickinson v. Shepley, etc., Sewerage Board* (20), *Hill v. Tupper* (21), *Keppell v. Bailey* (22).] F

As to the cross-appeal, we could not admit the fact of pollution because of the danger of a penalty under the gas statutes. The judge was wrong in giving the unsuccessful plaintiffs costs on this issue. [Counsel referred to *Jackson v. Anglo-American Oil Co.* (23).] H

SCOTT, L.J.: In this case the appellants, plaintiffs below, are the owners of a factory and surrounding land at St. Neots, in Huntingdon-

A shire, where they make malt extracts, and require for that purpose a considerable and regular supply of pure water. They and their predecessors have carried on the same business for 100 years. The defendants are the St. Neots Gas Co., making gas, and operating under a local Act and the Gas Works Clauses Act, 1847. Their premises lie immediately to the west of the plaintiffs' land.

B The appeal is by the plaintiffs, who by writ issued on Nov. 5, 1937, had brought an action against the defendants for polluting their water supply, and claimed damages and an injunction. GODDARD, L.J. (sitting as an additional judge of the King's Bench Division), tried the case in Nov., 1938. He found the issues of pollution in fact in favour of the plaintiffs, but gave judgment in favour of the defendants. This court is not concerned with the issues of fact as to pollution, for the respondents did not challenge the conclusions of GODDARD, L.J., on them. From 1914 to 1929 the plaintiffs used town water, but in the latter year they were warned by the town authorities that their supply might have to be restricted, so they constructed a well (called in this litigation "well No. 1") on their own land in proximity to their factory, and drew from that source a supply of pure water till the early part of 1932. The water was then found to be polluted by chemicals from the defendants' gas works; and as the defendants did not succeed in stopping the pollution, the plaintiffs, after waiting for a time to give the defendants a chance of effecting a remedy, during which they again resorted to the use of town water from the St. Neots' urban district council, at a considerable cost to themselves, set out to procure a new well at a distance from the gas works. To the west of the defendants' land, separated only by a road running north and south, is an area of ancient common lands. This position the plaintiffs thought would ensure a permanent source of pure water safe from the defendants' works. Therefore, from certain "proprietors of common rights"—a description to which I shall return—the plaintiffs obtained leave to make a well upon the common about 140 yds. west of their land, and lay a pipe thence to their factory. They then promptly proceeded to construct the well (called in the litigation "well No. 2") and a pipe line, and duly obtained from that source a supply of pure water. This supply continued good till Aug., 1937, when it, too, became polluted by the defendants' works, and the present action was brought. Although GODDARD, L.J., decided the issue of fact as to pollution in favour of the plaintiff company, he held that the plaintiffs were not entitled to relief because they had never acquired any rights upon which to found a cause of action against third parties, nor were they able to sue on the footing of *de facto* possession.

H The plaintiffs' claims in respect of well No. 2 stand on a very different footing from well No. 1. In regard to well No. 1, sunk in the land of which the plaintiffs owned the freehold, their rights are clear: they possessed and still possess, if not abandoned, the ordinary right of land-owner A to use underground water which percolates through the strata

and flows into any well he chooses to sink, and also if some neighbour B allows polluting matter to escape from the surface of his land into the water-bearing stratum underneath, so that it contaminates the percolating water to which A has access, to sue B for damages for nuisance and *prima facie* for an injunction : *Chasemore v. Richards* (1) and *Ballard v. Tomlinson* (2). The same reasoning applies not only to the use of percolating water as an incident of A's right of property in his land, but also to an easement to a supply of water which A as the owner of tenement A¹ may have had granted to him by B, the owner of tenement B¹. I can see no reason why the owner of an easement for the supply of water should not have a right of action for its pollution just as much as the owners of a fishery, although a fishery is *profit à prendre*, and a mere water right is not. A B

In the present case the plaintiffs claimed that they had obtained one or other of these alternative titles to use the water at well No. 2 and were therefore entitled to sue for the pollution of that source of supply. The defendants' reply was both in the court below and before us, that the plaintiffs may have honestly believed that they had obtained a good title on one or other of those two grounds, but that they were mistaken in their belief because the instruments which they regarded as their documents of title, two deeds called "leases," executed in 1932 and 1935 by certain "proprietors of common rights," were no more than licences, and did not even purport to confer any title to anything. The defendants also submitted that even if these deeds could be construed as leases, the commoners who purported to make the grant had themselves no title, which they could transfer, either at common law or under the Inclosure Acts of 1770 and 1774, by which their commonable rights were created and defined. In substance, GODDARD, L.J., adopted the defendants' arguments, and based his rejection of the plaintiffs' claim on their submissions. An alternative basis of claim was also urged by the plaintiffs, namely, that actual possession even without proof of title is sufficient as against a third party who causes damage by nuisance, but has no title of his own on which to rely, just as in the case of trespass the trespasser is barred from setting up the *jus tertii*. GODDARD, L.J., was, however, against the plaintiffs on this issue also, as he held, without discussing the question as to whether the plaintiffs had established possession in fact or not, that the plaintiffs could not sue without proof of some title. I am in agreement with his decision that the plaintiffs failed to show any title in respect of well No. 2, and therefore that in so far as their claim depends on proof of a title they must fail in the action. In regard also to the issue of possession, I agree with his conclusion that the plaintiffs fail ; but I do so because I cannot see that they ever established their case of possession in fact. That being so, I prefer to express no opinion on the question whether, if in any case possession could be proved, the *jus tertii* can be set up by the person who in fact pollutes except to say this, that it is not easy to picture a case where the facts are sufficient to establish real possession of a water supply, but do not at the same time disclose C D E F G H

either a title of some sort to the soil of the well, or an easement, sufficient to confer a right of action based on title.

I confess that I reach the conclusion that the plaintiffs must fail, with some reluctance, as they evidently believed that they had made their position safe. Under the Act of 1774, provision was made for an annual
A meeting of "the proprietors of common rights," as created or defined by the two Acts, and for the election of "a treasurer" for the ensuing year, who was to have certain powers of management. In 1932 and 1935, the then treasurer happened to be a solicitor. The plaintiffs no doubt thought that they could rely on him to keep them right on legal matters,
B and imagined that by the deeds of 1932 and 1935, both drawn by him after sanction at the annual meetings, they had obtained an enforceable right to an adequate supply of pure water, and my sympathy is with them. As far as I can see, they behaved all through very reasonably towards the defendants. For that reason I have perused with particular
C care the two old Inclosure Acts under which the common lands in question are still regulated, and have also considered the fact—apparently a chance coincidence—that Mr. Rowley the first "proprietor of common rights" who executed the 1932 "lease" of the well, happened also to be the lord of the manor, and the further fact that his son (who had upon his father's
D death in the meantime succeeded to the manor) was by his agent present at the statutory meeting of the commoners in 1935, when it was decided to grant the second "lease"; but I have failed to find any ground for drawing a conclusion that the plaintiffs ever got any title. In deference, however, to the arguments of counsel for the appellants, I will state
E shortly what they were, and my conclusion upon them.

In their statement of claim the plaintiffs claimed to be entitled to the water flowing into their No. 2 well in virtue of the "lease," dated Aug. 1, 1935, executed by certain named "proprietors of common rights." As
F causes of action they alleged alternatively negligence, nuisance, trespass and breach of statutory duty under the Gas Works Clauses Act, 1847, s. 21. The "lease" recited (a) the earlier "lease" of July 28, 1932, and (b) that the plaintiffs had agreed to surrender it, and that "the proprietors had agreed to accept the surrender and also to grant a new lease; and to this recited agreement the deed purported to give effect. The
G new "demise" was for a term of 11 years from May 1, 1935, thus in the result extending the original term by another 7 years, and it provided for the same rent of £5 5s. a year. By the 1932 lease, the then grantors had purported to "grant and demise . . . the full and free liberty and privilege for the company . . . to make . . . and maintain the well,"
H it having in fact been already constructed pursuant to oral leave. The grant in the 1935 lease was in these words :

the proprietors do hereby severally and respectively so far as they lawfully may or can by these presents grant and demise first full and exclusive right and liberty to and for the company to take and use for the purposes of the undertaking of the company all the water which from time to time may be in the said well marked "A" on the plan annexed hereto through the covered pipe leading from the said well

to the company's mill aforesaid, which pipe is coloured blue on the said plan and secondly for the purpose of exercising and enjoying the right and liberty aforesaid full right and power for the company their servants and agents at any time or times to come upon the said common for the purpose of repairing and cleansing and maintaining the said well and covered pipe therefrom and the two manholes constructed upon the course of the said pipe.

Both deeds contained a covenant by the company to maintain the well, and a covenant for quiet enjoyment by "the proprietors." The first point to notice is that the parties executing the two deeds were not all the same. The grantors of the first deed were G. F. Rowley, R. Maddy, W. Freshwater and A. Cambers. They were described as "proprietors of common rights over the Islands Common Islands Meadow and Hawkesden Leys common," these being different parts of the common land within which the well and pipe-line lay. In the 1935 deed there were five grantors described in the same terms as the grantors in the 1932 deed. Of the grantors in the earlier deed R. Maddy and A. Cambers were party also to the second deed, but Rowley and Freshwater were not. In their place were A. F. Towgood, J. R. Smith and C. Maddy. G. F. Rowley owned 27 of the "common rights" created by the two Acts and the award of the inclosure commissioners in 1771, and as such owner was just as much a commoner as the other signatories. However, counsel for the appellants relied on the fact that he also was lord of the manor of St. Neots, and therefore presumably owned the freehold of all common lands within the manor. He contended that for this reason the deed should be treated as effecting a demise of the well by the lord of the manor, and submitted that as the parties to the second deed did not include all the parties to the first, particularly the lord of the manor, it could not operate as a surrender of the demise which, he argued, had been effected by the first. A
B
C
D
E

The statement of claim did not mention the first deed at all, and as it was not pleaded, counsel for the respondents submitted that we were not entitled to consider it. Counsel for the appellants, however, pointed out that it was before GODDARD, L.J., as part of the evidence tendered by the plaintiffs, and was recited in the second deed. On both these grounds I think it must be treated as being before the court below as part of the plaintiffs' case. Counsel for the appellants asked us to construe it as a lease by the lord of the manor of the ground where the well was already situate, urging that the words "lease," "demise" and "rent" imported a true demise, but he wholly failed to account for the expressions which pointed the other way, namely, that the so-called "rent" was payable to the commoners and not to the lord of the manor, and that the words describing the parcels, namely, "the right and privilege to make and maintain a well" are inappropriate language to express a lease of land. They are, however, quite appropriate to a license by commoners, in the sense of an undertaking which would bind them personally not to interfere with the grantees, and I think that this is the correct construction of them. It is noticeable that the deed prefaced the so-called "grant and demise" by the limiting words "so far as they lawfully may or can"; F
G
H

and I therefore, without hesitation, agree in the conclusion of GODDARD, L.J., that these deeds conferred no title on the plaintiffs.

Counsel for the appellants, however, put forward a rather indefinite contention that under the Acts of 1770 and 1774 "the proprietors of common rights" had authority to give the plaintiffs an easement for
A the supply of water, or at least to put them and maintain them in actual possession of the supply. I am not sure that I have fully understood the argument, and therefore in deference to him, will state why I have come to the conclusion that the Acts in question could have no such intention. The common land which contains the site of the well is a
B part of what was a rather larger area of common land used as such in conjunction with arable land. The history no doubt goes back several centuries. The total area with which the legislation of 1770 and 1774 dealt was just under 1,400 acres, but the commons with which alone this appeal is concerned were only a comparatively small part of this
C whole. I gather from the Act of 1774 that previously the arable lands had been cultivated on the old English open field system of strip cultivation in three courses, with common lands attached to the arable fields for the supplementary common pasturing of stock. It is irrelevant for present purposes to investigate the legal nature of the old rights of the
D "strip" owners, who might own either in freehold or copyhold. The common field system is explained in PROFESSOR HOLDSWORTH'S HISTORY OF ENGLISH LAW, Bk. II, pp. 56 *et seq.*, and in the books cited in the footnote on page 56. The Inclosure Act of 1770 was passed (I think, in a form common to such Acts) in order to get rid of the common field
E system and re-divide the strip lands in severalty. It recited that Lord Sandwich the lord of the manor of St. Neots was

proprietor of great part of the open fields within the said parish and that various other named persons were seised or possessed of the residue . . .

and that

F several persons in respect of their cottages and homesteads were entitled to right of common in upon and over the said open and common fields, common pastures and other commonable grounds at certain times of the year

and then proceeded to appoint a commission which was to make a survey of the said lands, to deal with tithes, to preserve to the proprietors of
G cottages and homesteads their strictly commonable rights of pasture over "the islands, and the Hawkesden Leys" and also "the Islands Meadow" (somewhere in which lies the site of the plaintiffs' No. 2 well)—and finally by an award, to re-divide the strip lands at their discretion in accordance with previous proportions of quantity and quality, the
H new holdings to be freehold or copyhold according to the nature of the previous tenure. There were supplementary provisions for certain conversions of commonable rights into several ownerships, but they do not affect the common lands where the well is situate, which remain common lands as before the Act. This Act at any rate conferred on the commoners no such powers of dealing with the freehold as counsel for

the appellants needs. By their award made in 1771, after referring to the statutory survey, the commissioners divided up the strip lands amongst named persons in severalty ; set out a series of roads and paths ; and then dealt with

" the proprietors of common rights " in upon and over the commons in question called Hawkesdon Leys and the Islands Meadow [I think " the Islands " must have been omitted here by a clerical error] and found that there were " 154 common rights or shares of common " belonging in varying numbers to the various persons in their list—to the Earl of Sandwich 27, to Elizabeth Reynolds 5 and so on, the majority only getting one " right." A

This explains the phrase in the two leases " proprietors of common rights," which are in substance only commoners' rights of pasture. B

The Act of 1774 was passed to explain and amend the Act of 1771, and

for regulating the usage of the commonable lands and commons in St. Neots.

It directed that the several proprietors of common rights (that is, as determined by the award) should meet on the first Wednesday in April every year and appoint a treasurer for the purpose of collecting a rate (out of which the expenses of administration of the common would be paid) and C

of putting the rules and orders contained in the said award and this Act and also such rules and orders as shall be made at the said meeting into execution. D

It contained various provisions for regulating the pasturing rights of the proprietors and also authorised the treasurer to dig sand, gravel, mould and earth off the common and sell it to the inhabitants of St. Neots, but it said nothing about selling water or granting water rights ; indeed, E water was not mentioned in either Act, except from the point of view of fair distribution of springs and streams as between the various " proprietors of common rights," which was to be dealt with by the commissioners in their award. No express provision was made in regard to water which " the proprietors of common rights " might from time F to time in their annual meeting consider surplus to the requirements of the proprietors either generally or in some particular locality. It is thus quite clear that there are no statutory provisions in this Act which would entitled the " proprietors of common rights " either in a body or by G representatives to grant any easement of water, and much less any title in the soil round the well owned by the lord of the manor. In short, there is no justification for the plaintiffs' argument on the Acts.

There remains the question of *de facto* possession. The reason why I reject the contention that the plaintiffs ever came into such actual possession as might raise the question of law into which I have refused H to enter, is that " possession " of percolating water which is ever flowing in and out of a well is in truth only a metaphor. Possession of the ground surrounding the sides of the well is possible, and through that possession it may be possible to speak of possession of the water, but I cannot see that either constructing the well or keeping a pipe in the water of the

well through which a pump sucks it out is the same thing as having possession of the ground round the well. And there is the additional objection that the commoners could not hand over possession of the ground below the surface for the simple reason that they never had it.

A For the reasons I have given, I agree with FINLAY and LUXMOORE, L.JJ., that the appeal as to well No. 2 must be dismissed, and I do not think it necessary to refer to any of the numerous cases which were cited to us. With regard to the cross-appeal also, I agree with the decision of FINLAY and LUXMOORE, L.JJ.

B

FINLAY, L.J.: I think that both the appeal and the cross-appeal fail here.

C LUXMOORE, L.J.: The plaintiffs instituted this action against the defendants for an injunction to restrain them from causing or permitting certain chemical substances to pollute the water in certain wells situate at St. Neots in Huntingdonshire, and for damages for pollution. GODDARD, L.J., dismissed the action, and the plaintiffs have appealed to this court.

D It is necessary to consider the claim in respect of well No. 2. GODDARD, L.J., has held that the plaintiffs have established that the water coming to this well has been contaminated by the defendants, but he refused to give any relief, because the plaintiffs had failed to prove that they had any legal title to take the water from well No. 2. The E plaintiffs contend that relief ought to have been granted, because they were *de facto* in enjoyment of the water from well No. 2, or, alternatively, were *de jure* entitled to that enjoyment.

Well No. 2 was constructed by the plaintiffs in 1932, at the time when the question already referred to arose with regard to the pollution of F well No. 1. Well No. 2 is not on property belonging to the plaintiffs, but on a site some 140 yds. to the west thereof, and the water from it is carried by a pipe-line to the western boundary of the plaintiffs premises, and from thence by a continuation of the pipe-line to the plaintiffs works. It is situate on common land, and was sunk by the plaintiffs in con- G templation of the execution of a deed of July 28, 1932, expressed to be made between four persons, G. F. Rowley, R. Maddy, W. Freshwater and A. Cambers, who are together described in the deed as being

the proprietors of common rights or rights of common or pasturage in upon and over the Islands Commons Islands Meadow and Hawkesden Leys common and the several ways and roads leading to and from the same in St. Neots in the county of Hunting- H don of the one part and the plaintiff company of the other part.

It is described as a lease, and it recites that the plaintiffs are desirous of constructing a well upon "the said common" and of laying a pipe from the said well to their mill in Bedford St.

which the proprietors have agreed to allow them to do upon the terms and subject to the conditions following.

This recital is followed by the operative part of the deed which is contained in seven numbered clauses. Cl. 1 contains a grant or demise by the proprietors for a term of seven years from May 1, 1932, to the plaintiff company of

the full and free liberty and privilege for the company and their agents servants and workmen from time to time to make and construct and afterwards repair cleanse and maintain a well at the point marked A on the plan annexed hereto, and a covered pipe-line from the said well along the line coloured blue on the said plan to the eastern edge of the common, A

and certain other works. A yearly rent of £5 5s. payable on May 1 in each year during the term is reserved by the same clause. Cl. 2 contains a number of covenants by the plaintiffs, including a covenant at the expiration or sooner determination of the term to fill in the well and remove the pipe-line if required by the proprietors so to do. Cl. 5 contains a covenant by the proprietors for quiet enjoyment by the plaintiffs of "the liberties and privileges hereby granted." Cl. 6 empowers the plaintiffs to determine "this present lease" by three calendar months' previous notice in writing. B
C

On Aug. 1, 1935, the plaintiffs entered into a second deed with five persons, who are again described as being the proprietors of common rights in precisely the same words as are used in the earlier deed. The second deed is also described as a lease. The proprietors who executed it are five in number: of these only two, R. Maddy and A. Cambers executed the first deed, the three other persons being A. F. Towgood, J. R. Smith and G. Maddy. Neither G. F. Rowley nor W. Freshwater, who executed the first deed executed the second deed. The second deed contains a recital to the effect that the plaintiffs had under and by virtue of the first deed constructed a well upon the common and had laid a pipe-line therefrom to their mill in Bedford St., and also a further recital that the proprietors had at the request of the plaintiffs agreed D
E

to accept the surrender of the said lease [that is, the first deed] and to grant a new lease to the company for the term and upon the conditions hereinafter appearing. The operative part of the second deed is contained in eight clauses. By cl. 1 the proprietors F

"so far as they lawfully may or can" grant and demise "first full and exclusive right and liberty to the plaintiff company to take and use for the purposes of the undertaking of the company all the water which from time to time may be in the said well—through the covered pipe leading from the said well to the company's mill aforesaid . . . and secondly for the purpose of exercising and enjoying the right and liberty aforesaid full right and power for the company their servants and agents at any time or times to come upon the said common for the purpose of repairing and cleansing and maintaining the said well and covered pipe therefrom and the two manholes constructed upon the course of the said pipe to hold and enjoy the said rights and liberties hereinbefore expressed to be hereby demised unto the company during the term of eleven years from May 1, 1935." G
H

A rent of £5 5s. payable on May 1 in each year of the term is reserved, and the rest of the deed is in substance in the same form as is the first deed.

The plaintiffs did not attempt to prove at the trial on what particular common or part thereof well No. 2 and the pipe-line and other works

- are constructed and placed, nor did they attempt to prove in whom the soil of the land in which the same are situate was vested at the date of either deed, nor to establish that the persons described therein as the proprietors had any legal right to grant any easement or other right to sink place and maintain a well and its accessories upon or to take water
- A from any common land in which the proprietors were interested. They contended that it was not necessary to prove any of these facts or to establish any legal right in the proprietors to grant any of the rights claimed, and argued first that they were in actual possession of some part of the land in which well No. 2 was sunk and the pipe-line and other
- B works were laid and constructed. In support of this argument, reliance was placed upon certain cases relating to the liability of water companies for rates in respect of wells and pipe-lines used in connection with their undertakings, but in my judgment none of these cases has any bearing on the questions to be determined in this case. Counsel for the appellant
- C also relied upon the decision in *Fitzgerald v. Firbank* (3). In that case it was held that one in actual enjoyment of a *profit à prendre* can maintain an action of trespass against a person who disturbed his enjoyment. The basis of the decision is the fact that a *profit à prendre* is an interest capable of being assigned and dealt with according to the ordinary rules
- D of property, being of a possessory nature and capable of existing in gross. Its owner can bring an action for trespass at common law for its infringement: see also *Holford v. Bailey* (4), *Nicholls v. Ely Beet Sugar Factory* (5). I agree with GODDARD, L.J., that this argument has no application to the present case, for it is well settled that a right to take water cannot
- E be the subject of a *profit à prendre*: see *Race v. Ward* (6). What, then, is the nature of the grant made by the material deed of Aug. 1, 1935? Plainly it is not a grant or demise of any land, nor of any *profit à prendre*. It must, therefore, purport to grant either an easement or a licence. If it be a licence, it is admitted that the plaintiffs cannot sue the defendants
- F for any interference. Having regard to the fact that the purpose of the deed is to enable the plaintiffs to take water from well No. 2 through the pipe-line to their mill for the purposes of the business carried on there, I agree with GODDARD, L.J., that the better view is that the deed in question purports to grant an easement for a limited period, for there
- G is a dominant tenement, namely, the mill, and a servient tenement, namely, the common land in which well No. 2 has been sunk, and the pipe-line and other works have been laid and constructed. An easement differs from a *profit à prendre*, although both may be classed under the head of servitudes in that the owner of an easement cannot maintain
- H trespass, the only remedies available to him for disturbance being by abatement or by an action for nuisance. In an action for nuisance the owner of the easement must plead that he is entitled, so that if his title to the easement alleged to be interfered with is put in issue (as in this case), he must establish that title, for he is asserting a right which of necessity excludes the possibility of possession of the servient tenement,

or any part of it: see *Aldred's* case (7), *Higgins v. Betts* (8). To establish the grant of a valid easement under the deed of Aug. 1, 1935, the plaintiffs must prove that the five persons described therein as the proprietors who purported to make the grant, had power to do so. Our attention was called to the existence of two Inclosure Acts of 1770 and 1774, and the award made under the earlier Act; but our attention was not called A to, nor was it suggested that there was conferred on the proprietors of the common rights, either together or acting by any of their number, by those Acts or either of them, any express powers to grant easements in respect of any of the common lands.

It was suggested before us that the fact that G. F. Rowley was the lord B of the manor at the date of the first deed, and that he executed it, would itself be sufficient to validate the grant of the easement claimed. It is a sufficient answer to this argument to say that there is no evidence to prove that G. F. Rowley was then, or has since been, the owner of the soil over which the easement is claimed; and that no claim is in fact made by the C plaintiffs under the first deed. The only claim is under the second deed to which admittedly the then lord of the manor was not a party. I am satisfied that no title to any easement has been established in the plaintiffs in respect of well No. 2, and I am of opinion that GODDARD, L.J., was right in also dismissing the action in respect of well No. 1. Although I D have expressed my opinion in my own words, I respectfully agree with the judgment of GODDARD, L.J., and the reasons he has given for it. I think the plaintiffs' appeal should be dismissed with costs.

The defendants gave notice of a cross-appeal, asking that so much of the order made by GODDARD, L.J., as adjudged that they should pay to E the plaintiffs the costs of the issue whether the pollution of the water alleged in the action was due to the defendants' works, should be varied, and that the plaintiffs should not have these costs, but that they should be ordered to pay to the defendants all their costs in the said action. No leave to appeal was given, but counsel for the defendants urged that F different considerations applied to an application by way of cross-appeal to vary the order of a judge with regard to costs in the court below, and that no leave was necessary in such a case. It is, I think, unnecessary to consider this question, for it is plain that GODDARD, L.J., was entitled to treat the costs with regard to pollution as a separate issue, and to G order those costs to be paid by the defendants. There is no ground on which it can be said that the discretion was wrongly exercised. The cross-appeal must be dismissed with costs. There will be the usual set-off.

Appeal and cross-appeal dismissed with costs. Leave to appeal to the H House of Lords refused.

Solicitors: *Lovell, White & King* (for the appellants); *Crossman, Block & Co.*, agents for *Wade-Gery & Brackenbury*, St. Neots (for the respondents).

WILLIAMS v. WILLIAMS (BY HIS GUARDIAN).

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Finlay, L.J.J.), **July 19, 20, 28, 1939.** *Overruled.* CROWTHER v. CROWTHER. [1951] 1 All E.R. 1131.]

Divorce—Desertion—Insanity—Certification of deserting respondent—Statutory period interrupted—Matrimonial Causes Act, 1937 (c. 57), s. 2.

A The respondent deserted his wife in 1933. In 1934 he was certified as a person of unsound mind, and put under restraint, and from that time remained continuously under restraint. On Jan. 21, 1938, the appellant filed a petition for divorce on the ground of desertion for a period of 3 years immediately preceding the presentation of the petition. It was contended that the supervening insanity interrupted the period of desertion:—

B HELD: (i) the existence of an intention to desert or of an intention to return to cohabitation cannot be disproved without some definite step on the part of the deserting spouse, and in the case of a person of unsound mind there is, generally speaking, no capacity to form the necessary intention to take such a step or to give it the quality of volition required to produce a legal result. The necessary period of desertion could not, in the circumstances of this case, be proved and no decree could be granted.

C (ii) (MACKINNON, L.J., *dubitante*) the court will not draw an inference as to what the conduct of the lunatic would have been if he, or she, had remained of sound mind, as by so doing, the court would be proceeding upon the basis of an assumed fact the existence of which is impossible in law.

D (iii) *per* FINLAY, L.J.: sect. 2 (b) of the Act of 1937 has reference to normal persons and not to lunatics. Lunacy is dealt with in another subsection. *Decision of* LANGTON, J. ([1939] 2 All E.R. 13), *affirmed*.

E [EDITORIAL NOTE. The question here is whether the supervening insanity during the period of the 3 years' desertion required by the 1937 Act prevents the continuance of that desertion. Desertion is a question of intention, and necessitates an exercise of the will, and it is therefore held that, on a person becoming of unsound mind, the continuance of the desertion ceases. MACKINNON, L.J., points out that this may lead to an almost impossible result in the extreme case where, after a long period of desertion, a deserting spouse becomes insane a short time before the presentation of the petition. It would seem that the case of *Herod v. Herod* (7) may be some authority for drawing an inference that the attitude of the deserting spouse towards the deserted spouse remains unaltered.

AS TO DIVORCE ON THE GROUND OF DESERTION, see HALSBURY, Supp., Divorce, para. 971; and FOR CASES, see DIGEST, Vol. 27, p. 319, Nos. 2974-2977.]

G Cases referred to:

- (1) *Pratt v. Pratt*, [1939] 3 All E.R. 437; Digest Supp.; 161 L.T. 49
- (2) *Bowron v. Bowron*, [1925] P. 187; 27 Digest 561, 6168; 94 L.J.P. 33; 132 L.T. 773.
- (3) *Drew v. Drew* (1888), 13 P.D. 97; 27 Digest 319, 2975; 57 L.J.P. 64; 58 L.T. 923.
- H (4) *R. v. Leresche*, [1891] 2 Q.B. 418; 27 Digest 313, 2910; 60 L.J.M.C. 153; 65 L.T. 602.
- (5) *Wynne v. Wynne*, [1898] P. 18; 27 Digest 310, 2879; 67 L.J.P. 5; *subsequent proceedings*, 78 L.T. 796.
- (6) *Bennett v. Bennett*, [1939] 2 All E.R. 387; Digest Supp.
- (7) *Herod v. Herod*, [1939] P. 11; [1938] 3 All E.R. 722; Digest Supp.; 108 L.J.P. 27; 159 L.T. 530.

- (8) *Jones v. Newtown & Llanidloes Guardians*, [1920] 3 K.B. 381 ; 27 Digest 202, 1735 ; 89 L.J.K.B. 1161 ; 124 L.T. 23.
- (9) *Frowd v. Frowd*, [1904] P. 177 ; 27 Digest 556, 6106 ; 73 L.J.P. 60 ; 90 L.T. 175.
- (10) *Townsend v. Townsend* (1873), L.R. 3 P. & D. 129 ; 27 Digest 311, 2892 ; 42 L.J.P. & M. 71 ; 29 L.T. 254.
- (11) *Brookes v. Brookes* (1858), 1 Sw. & Tr. 326 ; 27 Digest 315, 2929 ; 28 A L.J.P. & M. 38 ; 32 L.T.O.S. 228.
- (12) *Parker v. Parker*, [1926] S.C. 574.
- (13) *Thomas v. Thomas*, [1924] P. 194 ; 27 Digest 315, 2925 ; 93 L.J.P. 61 ; 130 L.T. 716.
- (14) *Astrophe v. Astrophe* (1859), 29 L.J.P. & M. 27 ; 27 Digest 319, 2974.
- (15) *Jordan v. Jordan*, [1939] P. 239 ; [1939] 2 All E.R. 29 ; Digest Supp. ; 160 B L.T. 368.

APPEAL by the petitioner from an order of LANGTON, J., dated Mar. 9, 1939, and reported [1939] 2 All E.R. 13, where the facts are fully stated.
J. L. A. Gradwell for the appellant.

J. Roland Adams for the respondent.

Gradwell : The decision in the present case has been followed in *Bennett v. Bennett* (6). The matrimonial offence of desertion is complete as soon as one of the spouses has left the other spouse wilfully and without cause. In *Frowd v. Frowd* (9) it was stated that desertion under the Summary Jurisdiction Acts was the same as desertion under the Matrimonial Causes Acts. The petitioner has discharged the onus resting upon her by proving that the offence has been committed. The husband, by deserting his wife, commits a matrimonial offence. He is given 3 years in which to put the matter right and the onus is upon him to prove that he has done so. *Jones v. Newtown & Llanidloes Guardians* (8) was decided by the King's Bench Divisional Court without any reference to *Drew v. Drew* (3) *Townsend v. Townsend* (10) and *Wynne v. Wynne* (5), which were decided in the Probate and Divorce Division. *Pratt v. Pratt* (1) supports my argument as regards the onus of proof. [Counsel also referred to *Brookes v. Brookes* (11), *Parker v. Parker* (12), *Thomas v. Thomas* (13) and *Astrophe v. Astrophe* (14).]

Adams : The essential difference between the present case and *Drew v. Drew* (3), is stated by LANGTON, J., in his judgment. There is no authority directly in point, as desertion is not defined. It is, therefore, for the court to say whether or not the respondent has been guilty of conduct which entitles the petitioner to relief. If desertion is a continuing offence, it cannot be said that an insane person is responsible, because it is necessary for the petitioner to prove a continuing intention. In the present case, no intention can be imputed to the respondent by reason of his insanity. In *Bennett v. Bennett* (6), BUCKNILL, J., deals with the shifting of the burden of proof. He says that, desertion having once commenced, the onus is upon the respondent to show that the desertion has terminated. In the case of lunatics, however, the onus shifts back to the petitioner. In the present case, the court is entitled to say that desertion for the necessary period was not completed, because

desertion requires the exercise of the will. [Counsel also referred to *Pratt v. Pratt* (1) and *Jones v. Newtown & Llanidloes Guardians* (8).]

A *Gradwell*, in reply : *Drew v. Drew* (3) and *Wynne v. Wynne* (5) can only be justified if they say that desertion happens when a man deserts his wife and does not return. It is for the husband to show why he did not return and if, for some cause, he is unable to do so, it is his misfortune. A lunatic can do neither of the things necessary to end desertion. A prisoner can do one of the things necessary, namely, think of returning. In *Wynne v. Wynne* (5), *Wynne* could not make any offer to return by reason of the allegation of crime against him. An act of bad luck should not be allowed to help a man to the prejudice of an innocent party. I rely upon *Drew v. Drew* (3) and *Wynne v. Wynne* (5). The view I have put forward is consistent with the argument in *Parker v. Parker* (12) and *Pratt v. Pratt* (1). [Counsel also referred to *Jordan v. Jordan* (15).]

C
SIR WILFRID GREENE, M.R. : This appeal raises a novel and difficult question of far-reaching importance. The facts are stated in the judgment of LANGTON, J., and I need not repeat them. The question of law which falls for decision depends upon the true meaning and effect of the Matrimonial Causes Act, 1937, s. 2, and may be thus stated : Where a petition for divorce is based upon alleged desertion without cause for a period of at least three years immediately preceding its presentation, and the respondent, who before the beginning of that period has deserted the petitioner, is during the whole or part of the period of unsound mind and incapable of exercising volition, can the petitioner succeed ?
D
E LANGTON, J., answered this question in the negative ; and, after anxious consideration I have, with hesitation and (I may add) regret, come to the conclusion that his decision is correct.

The decided cases upon the matter of desertion do not present a very illuminating body of jurisprudence. There are, however, some matters which appear reasonably clear. The act of desertion requires two elements on the side of the deserting spouse, namely, the *factum* of separation and the *animus deserendi* ; and on the side of the deserted spouse one element, namely, the absence of consent. The ensuing state of desertion continues until it is terminated. Termination may take place in various ways. It may take place by the *factum* of return, or by a supervening *animus revertendi*, coupled with a *bona fide* approach to the deserted spouse, with a view to the resumption of life together (*Pratt v. Pratt* (1)) ; or by a supervening consensus, for example, under a separation agreement *bona fide* made. It cannot, however, be terminated by a mere *animus revertendi* unaccompanied by some notification to the deserted spouse. It might be argued from this last proposition that as the *animus revertendi* cannot by itself terminate the state of desertion, the continuance of that state cannot depend upon the continued existence of the *animus deserendi*, and that accordingly incapacity to have either

one *animus* or the other is an irrelevant consideration in determining whether the state of desertion exists during a particular period. In my opinion such an argument is fallacious. The statements (a) that the mere formation of an *animus revertendi* does not of itself terminate the state of desertion, and (b) that the presence of an *animus deserendi* is essential for the continuance of that state, may at first sight appear to be logically incompatible. They are, however, not really so, since a deserting spouse who merely forms the intention to return, but takes no step to communicate it or to put it into execution, and so leaves the fact of separation unaffected, cannot be heard to say in any relevant sense that the *animus deserendi* no longer exists. The *de facto* severance of the marital relationship necessarily persists in the absence of some step directed to its restoration. The authorities cited by LANGTON, J., appear to me to establish the necessity for the continuing existence of the *animus deserendi* in the sense already mentioned. In the ordinary case its existence will be inferred, but it cannot be disproved without some definite step on the part of the deserting spouse: see *Pratt v. Pratt* (1), per LORD ROMER [p. 443]. I may add to those authorities a reference to the statement of SCRUTTON, L.J., in *Bowron v. Bowron* (2), at p. 195:

The intention is presumed to continue, unless the husband proves genuine repentance and sincere and reasonable attempts to get his wife back.

In the case of a person of unsound mind, quite apart from the impossibility of taking any such step in fact—a matter which by itself might be disregarded, as it may be in the case of a convict (*Drew v. Drew* (3))—there is, generally speaking, no capacity to have the *animus* necessary to take such a step, or to give to it the quality of volition required to produce a legal result.

During the course of the argument, I thought at one time that the court might be at liberty, upon the facts of a particular case, to draw an inference as to what the conduct of the lunatic would have been, if he or she had remained of sound mind. If it were permissible to draw such an inference, the question whether in any particular case it ought to be drawn would not present any insuperable difficulty. However, I do not think that this is a permissible solution. What must be proved is desertion for the necessary period. If I am right in what I have said as to the necessity for the *animus deserendi*, and the impossibility of its existence in the case of a person who by reason of lunacy is incapable of having it, that proof can never be given. In drawing the suggested inference, the court would be proceeding upon the basis of an assumed fact, the existence of which is *ex hypothesi* impossible in law, namely, that the lunatic is capable of having the *animus deserendi*; for it would be saying that if the lunatic had been capable, he would have acted in a particular way. The result of the conclusion to which I find myself compelled to arrive must in many cases amount to grievous hardship. It will mean, for instance, that lunacy supervening the day before the presentation of the petition, will deprive the deserted spouse of his or

her chance of release under this particular clause. Instances of a similar capricious operation of the clause might be multiplied, but this is a matter which, in my opinion, can only be put right by legislation. The judgment of LANGTON, J., was, in my opinion, perfectly right, and his reasoning unassailable. The appeal must accordingly be dismissed.

A

MACKINNON, L.J.: Having regard to the authorities that were cited to us, and having still more regard to the opinion of my brethren, I am not prepared to dissent from their conclusion that this appeal fails. I confess, however, that my unaided consideration of the principles involved would not lead me to the conclusion that if a respondent is proved to have deserted the petitioner more than three years before the presentation of the petition, and has never returned, or evinced any genuine desire to return, the petitioner's right to a decree under the Matrimonial Causes Act, 1937, s. 2 (b), will be barred if for any part of the three years the respondent has been certified as insane.

C

The verb "desert" is defined by the OXFORD ENGLISH DICTIONARY thus:

(1) To abandon, forsake, relinquish; to depart from. (2) To forsake . . . a person, having moral or legal claims on one.

D

It is not without interest that in the illustrative quotations is a sentence of LOPES, L.J., in *R. v. Leresche* (4), at p. 420:

A husband deserts his wife if he wilfully absents himself from the society of his wife in spite of her wish.

E

There is no doubt that, within these definitions, the husband in this case "deserted" his wife in May, 1933, nearly 5 years before the presentation of her petition in Jan., 1938. At that date he wilfully absented himself from her society in spite of her wish. In fact, he has never rejoined her, or expressed any desire to do so. Sect. 2 (b) of the Act of 1937 says:

F

[if the respondent] has deserted the petitioner without cause for a period of at least three years . . .

The language is natural, but not precise. "To desert," as I have pointed out, means the act of forsaking. "To desert for three years" really means "To commit the act of desertion which causes separation, and to remain in that state of separation for three years." There being no question that the respondent did commit the act of desertion in May, 1933, the only question must be whether he has ever since remained in the state of separation. In fact he has done so, and the question must, therefore, be whether he has done so "without cause."

H

He deserted her nearly 5 years before the petition, and has never returned. It is true that for three years before the petition he was in a lunatic asylum, and, therefore, was physically prevented from returning to the wife. That physical inability to return would appear not to be a cause excusing his absence. If he had been in a prison, instead of a lunatic asylum, he could be held to have been continuing "without

cause" the state created by his previous act of desertion: *Drew v. Drew* (3) and *Wynne v. Wynne* (5).

It is said, however, that the continuance of the state of absence, originally created by his act of desertion, has not been "without cause," by reason of his mental condition. Desertion, it is said, must be wilful, and the continuance of the state of separation created by desertion must also be wilful. However, as the respondent since June, 1934, has been without powers of mind or will, his continued absence, quite apart from the obstacle of his incarceration, cannot be said to be wilful. The principle involved must, I think, be that to establish desertion without cause for 3 years, it must be shown that the respondent was of sane mind for every part of that period. The petitioner presenting her petition in Jan., 1938, would equally have failed if the man remained sane but obdurate until Dec., 1937, and had then been certified for one month or one week. She must equally have failed if, by reason of temporary insanity, he had been in the asylum for a week or a month in Feb., 1935, and had then been discharged cured. Indeed, I see no logical reason why she should not have failed if there were proof that during the three years the man had fractured his skull in an accident, and had lain for some time unconscious in hospital.

Moreover, the same principle must apply however ancient was the original "act" of desertion. In this case, that was nearly 5 years before the petition. However, in *Bennett v. Bennett* (6), decided in the same way by BUCKNILL, J., the act of desertion was 35 years before the date of the petition, and the respondent was only certified 16 months before that date. The "wilfulness" of desertion suggested, if not conclusively proved, by the obstinate persistence of half a century, might be nullified by insanity during the final month of the three years, or by temporary insanity for a month at the beginning of those three years.

I gravely doubt whether a principle leading to such possible results can be correct. It is clear that the continuance in the state of desertion must be wilful. And it must be a question of fact in each case whether the continuance of the state, created by an original act of desertion, has been wilful. The mental condition of the deserter during any part of the material period must doubtless be one of the facts to be considered. I confess that, apart from authority, I should not think there was any reason why the court, taking account of the doings of the party when sane, might not draw an inference therefrom as to what is likely to have been his attitude during the period of his insanity, if it had not occurred. In *Herod v. Herod* (7), the court was held to be entitled to infer from the rest of the conduct of the respondent that, if she had known of the adultery of the petitioner, her attitude towards him would have remained unaltered. That is to infer that a fact would not have altered the respondent's conduct if he had it in mind. I do not think it is a very different thing to make such an inference, not if she had something in mind, but if she had a mind to have it in.

If, as in *Bennett v. Bennett* (6), the respondent had been in a state of obstinate desertion for 35 years it would not, if this principle were applied, be difficult to infer that she would not have repented in the last few months. So also, if the respondent had been insane for a short period at the beginning of the three years, and after recovery had persisted in desertion for the rest of it. In the present case the dates and times are less extreme, and it may be a nice question if any such inference should be drawn. That, however, is not material to the question of principle. The authority containing the clearest statement of the proposition relied on by the respondent is *Jones v. Newtown & Llanidloes Guardians* (8). I agree that the remarks of the EARL OF READING, L.C.J., are very much in point. I may observe, however, that the question in that case was whether an order for maintenance could properly be made against a husband under the Poor Law Amendment Act, 1850, s. 5. In fact, there is nothing whatever in that section about "desertion"; and I do not understand very well how the question of "desertion" arose.

FINLAY, L.J. [read by MACKINNON, L.J.]: I agree with SIR WILFRID GREENE, M.R. In my opinion LANGTON, J., arrived at the right conclusion in this case. By sect. 2 of the Act of 1937, a petition may be presented on the ground that the respondent:

has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition...

It appears that up to 1858, the only remedy for desertion was a suit for restitution of conjugal rights. It is impossible, I think, to imagine that an order for restitution could ever have been made against a lunatic. By the Act of 1857, "desertion without cause for two years and upwards" was made a ground for judicial separation; and, if coupled with adultery, "desertion without reasonable excuse for two years or upwards" was made a ground for divorce. I do not know the reason for the variation of the language, but it does not seem to me to make any difference. My view rests really upon what I conceive to be the real meaning and quality of desertion. It is not a crime, but it is a wrong. The words "matrimonial offence" do not, so far as I have observed, occur in any of the Acts, but they are used with reference to desertion in more than one judgment. There is a moral quality about desertion. It—and in this it resembles a crime—is largely a matter of intent. One man is absent from his wife for 6 months, but he has a "reasonable excuse"; for example, he is working in some place where she cannot well live. That is not desertion. Another man is absent for the same period intending to desert. His intention makes it desertion. It is the mind of the man—judged, of course, as mind must be, by acts and statements—which has to be judged.

By the Summary Jurisdiction Acts, relief may be given by a court of summary jurisdiction to a wife whose husband has deserted her. I cannot conceive that a summons could be issued against a lunatic, but

I do not know why not, if the present respondent has, during the 3 years, been deserting his wife.

I do not think there is any authority really in point. The imprisonment cases—*Drew v. Drew* (3) is the best example—appear at first sight to favour the appellant, but I think they are distinguishable, and exactly on the ground taken by LANGTON, J. The very recent decision of the House of Lords in *Pratt v. Pratt* (1) may perhaps now be considered the leading authority on desertion. In the opinion of LORD MACMILLAN, clear support is to be obtained for the view which I take, particularly where he says ([1939] 3 All E.R. 438):

The deserting spouse must be shown to have persisted in the intention to desert throughout the whole period.

However, I see nothing in the opinion of LORD ROMER inconsistent with my view. It is true that the wife there, having deserted, would no doubt be treated as still in the same state of mind unless she manifested some change of mind. In *Pratt v. Pratt* (1), the wife did manifest a changed mind and thereby, as the House of Lords held, did determine the desertion, although of course physically she remained away from her husband just the same. However, LORD ROMER'S reference to the "active step," seems to me to have no application at all to a lunatic who cannot take any active step, partly no doubt, because he is under physical restraint, but mainly—and this is, I think, the fundamental reason—because, being mindless, he is unable to think any thought, to form any intent, or to take any reasoned action.

My view that the desertion subsection has reference to normal persons, and not to lunatics, is, I think, strengthened by the fact that lunacy is dealt with in another subsection and, as LANGTON, J., points out, the wife may probably, at a not very distant date, be able to take advantage of the appropriate provisions in that behalf. I agree that the judgment of LANGTON, J., was in all respects correct, and should be affirmed.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, agents for *Berkson & Berkson*, Birkenhead (for the appellant): *Lightbounds, Jones & Co.*, agents for *Owen, Dawson & Wynn-Evans*, Liverpool (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

WHITTAKER v. WHITTAKER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P. and Henn Collins, J.), **July 20, 1939.**]

Divorce—Summary jurisdiction—Maintenance order—Allegation of wife's adultery—Previous finding of adultery in county court in action to enforce separation agreement—Res judicata—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 6.

The parties separated under an agreement whereby the appellant covenanted to pay his wife maintenance at a certain rate, so long as she remained chaste. Payments later fell into arrears, and the respondent then took proceedings in the county court for their recovery. The appellant pleaded as a defence that his wife had committed adultery, and the county court judge, finding the adultery proved, gave judgment in his favour. Subsequently the respondent brought proceedings before justices in a court of summary jurisdiction, alleging wilful neglect to maintain. As a defence, the husband relied upon the judgment of the county court judge, but the justices held that they were not bound by this decision, and also that in view of the proviso to the Summary Jurisdiction (Married Women) Act, 1895, s. 6, the issue tried by the justices was not identical with that tried by the county court judge:—

HELD: (i) as there was in this case no question of any condonation, connivance or conduct conducing the issues in both proceedings were the same, namely, whether or not the wife had committed adultery.

(ii) the matter was *res judicata* and the justices were bound by the decision of the county court judge.

[EDITORIAL NOTE.] It would seem that findings of adultery in ordinary civil proceedings are not necessarily binding upon the Divorce Court as matters of *res judicata*, but it is here shown that a finding of adultery by the county court in proceedings to recover arrears of maintenance under a separation agreement is binding upon magistrates when an application is made to them for a maintenance order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1925.

As to *RES JUDICATA* AND DIVORCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 670, 671, paras. 991, 992; and FOR CASES, see DIGEST, Vol. 27, pp. 324-326, Nos. 3026-3061.]

F Cases referred to:

- (1) *Ord v. Ord*, [1923] 2 K.B. 432; 27 Digest 237, 2080; 92 L.J.K.B. 859; 129 L.T. 605.
- (2) *Kingston's (Duchess) Case* (1776), 1 Leach 146; 27 Digest 554, 6080.
- (3) *Harriman v. Harriman*, [1909] P. 123; 27 Digest 321, 2995; 78 L.J.P. 62; 100 L.T. 557.

G

APPEAL from a decision of the justices for the city of Colchester whereby they found that the appellant had wilfully neglected to provide reasonable maintenance for his wife, and ordered him to pay 10s. per week for her maintenance. The facts are fully stated in the judgment of Sir

H BOYD MERRIMAN, P.

P. T. Miller for the appellant.

G. A. Hopper for the respondent.

SIR BOYD MERRIMAN, P.: This appeal raises a curious and not unimportant point. The wife took out a complaint before the Colchester

justices on the ground that her husband had been guilty of wilful neglect to maintain her, and on Apr. 26 last, the Colchester justices held that that complaint was proved.

There is no dispute about the facts. At the material dates the husband was not, in fact, maintaining his wife, but his defence was that he was not bound to do so having regard to the fact that she had committed A adultery. It is necessary, in order to appreciate the points raised by this appeal, to go rather further back in the matrimonial history. Some date before Dec. 2, 1933, the wife had given birth to a child, the paternity of which appears to have been in issue ; at any rate, on Dec. 2, 1933, the wife was party to two agreements in writing, one of them being an B agreement between herself, her mother and a man, whereby the mother undertook the care and control of this child, and the man undertook the financial responsibility for it. On the same date the wife was also party to an agreement of separation between herself and her husband, under which her husband agreed to pay maintenance at a certain rate C so long and only so long as the wife remained chaste. I ought to observe, in passing, that the deed of separation itself remains in force. The provisions whereby the agreement itself was to be terminated admittedly have not come into effect, but the question whether the husband was bound to pay the agreed maintenance depended solely—short of the D agreement coming to an end—on the question of whether the wife remained chaste.

In those circumstances, at the end of 1938 the husband declined to make any further payments. At the time, there was outstanding the sum of £13 4s., and, for this sum, the wife brought proceedings in the E Colchester county court before His Honour JUDGE HILDESLEY. The amount was particularised as an amount, and there is no dispute about the fact that it was unpaid by the due date in accordance with the agreement, but the husband, in answer to this claim, pleaded that his wife was no longer chaste, and he particularised the allegation of adultery F by reference to two incidents in April and July of 1937 respectively. In support of this answer he gave evidence and called a witness. We know nothing about the details of the evidence, save that we have been told that there is evidence and that the witness purported to prove, and prove conclusively and directly, that there was adultery on the G date in question. However, as in the county court and elsewhere, the issue is not whether or not on a particular date adultery is committed. Particulars, are, of course, designed to give the opposite party full notice of what is going to be alleged, in order that he or she may be prepared to make a proper defence, but, finally, in the county court, as else- H where, the issue is whether or not adultery has been committed. In other words, whether it is proved to the satisfaction of the tribunal, that the party charged has committed adultery. As juries have frequently been directed, if all the particulars go by the board, of course the charge itself goes, but neither this court itself, nor a jury sitting in

this court, is asked to find aye or no with regard to each one of several particulars. The issue from first to last is whether it is proved that the spouse charged has committed adultery. The county court judge, having heard evidence on each side, found the wife had committed adultery, and therefore within the terms of the agreement to which

A I have referred, the husband was not liable for the amount claimed, all of which had accrued due after the alleged adultery. That finding was made, and that judgment given on Mar. 15, 1939.

It was in those circumstances that the wife then proceeded before the Colchester justices, to complain that her husband was guilty of wilful
B neglect to maintain. The case came on twice before the justices. On the first occasion the judgment of the county court judge was, so to speak, put before them and the matter was left there. Apparently the clerk to the justices took the view that this was not enough, and the case was adjourned, no doubt to enable the husband to consider how, if
C at all, he would amplify the evidence that he was prepared to put before the court. It is only right to say that I think that on both occasions, certainly on the second occasion, the wife herself gave evidence positively denying that she had committed adultery. When the case came before the Colchester justices on the second occasion, the husband still
D contented himself with relying on the judgment of the county court judge, but he did not merely hand in the judgment: he gave evidence about it. He did not repeat the evidence of fact which he had given before the county court, but he gave evidence proving the county court judgment, and proving the circumstances in which it had been given, and again
E relied upon that judgment as entitling him to resist the wife's complaint that he was wilfully neglecting to maintain her. By a majority the justices made an order for payment of 10s. per week maintenance and costs, the amount of which they fixed. They were asked to give their reasons, which they gave as follows:

F The justices found from the evidence of the wife that the husband had wilfully neglected to provide reasonable maintenance for his wife and infant child Frederick Anthony Russell Whittaker. The justices held they were not bound by the decision of the county court judge as to adultery having been committed, and, in view of the proviso to the Summary Jurisdiction (Married Women) Act, 1895, s. 6, the issue to be tried by the justices was not identical with that tried by the county court judge. The justices further found that commission of adultery was not proved to
G their satisfaction.

I ought to say at once, to get one possible difficulty out of the way, that this case has been fought only on what appears on the face of it to be a maintenance order in favour of the wife. I do not understand that any separate order was made for the wife on behalf of the child,
H which may raise different considerations; we are dealing only with an order which purports to be made in favour of the wife.

It appears from the reasons which I have just read, that the justices had decided as a matter of law that they could not be bound by the decision of the county court judge that the wife had committed adultery, and they therefore decided the matter upon their own view of the

evidence before them, the only direct evidence before them, apart from the production of the county court judge's judgment being, as I have said, the explicit denial on the part of the wife. They have also made it clear that they consider that they are not bound by the judgment of the county court judge because of the wording of the Summary Jurisdiction (Married Women) Act, 1895, s. 6. That section reads : A

No orders shall be made under this Act on the application of a married woman [the allusion, of course, being to orders being made on the various grounds set out in sect. 4, one of which is wilful neglect to provide reasonable maintenance] if it shall be proved that such married woman has committed an act of adultery ; Provided that the husband has not condoned, or connived at, or by his wilful neglect or misconduct conduced to such act of adultery. B

Now it is perfectly true that that proviso marks a difference between the statutory right to obtain maintenance for a wife under the Summary Jurisdiction Act and the common law liability of a husband to maintain his wife. It reduces the conditions upon which the wife may obtain maintenance under the statute, although she might be unable to enforce C the common law right, but, although those words appear in the proviso to the section, it is common ground in this case, and it cannot be disputed, that none of the issues raised by that proviso could possibly have entered into the decision before the county court judge, nor, which is more important, could they have entered into any such decision before the D magistrates. The parties had never seen each other for practical purposes from the date when they parted under the agreement on Dec. 2, 1933, until after the incident in regard to which adultery in 1937 was charged in the county court. Therefore there could not possibly be any question of connivance, nor could there possibly be any question of condonation, E nor could it be alleged, nor was it alleged, that there was any neglect or misconduct which conduced to the adultery. No such issue could possibly be raised or was even hinted at before the justices. To draw the distinction between the finding of the county court judge, and the finding that they were asked to make in this matter on the ground of F the section which contains this proviso, is really beside the mark. It is really now very faintly disputed, if it is disputed at all, that the issue before the justices and the issue before the county court judge were absolutely identical, namely, whether the wife had committed adultery since the execution of the agreement. That issue, and nothing else, G was the issue in both cases. When once that has been ascertained, the question remains whether the justices were right in saying that they were not bound by the findings of the county court judge. I have rejected the reason that they gave for holding that they were not bound, but that is not conclusive of the matter, because counsel for the res- H pondent has argued that it is essential that it shall be before it is proved that the woman has committed adultery. He says that you do not prove a thing of that sort by putting in a judgment of a county court judge to that effect. "Proof" means that it must be proved by oral evidence given before, and accepted as conclusive by, the justices

themselves. I agree that it is necessary that facts should be proved before the justices, but the question is whether it is not proved and proved conclusively by the production of a judgment of a court of competent jurisdiction deciding that very matter between the same parties. In my opinion the justices were wrong in holding that they were

A not bound by the county court judge's decision. I am not going to attempt to elaborate the view of the law of estoppel *per res judicata*, I am content to refer to the very useful view of this branch of the law by LUSH, J., in *Ord v. Ord* (1), where, quoting from the notes of the *Duchess of Kingston's* case (2) in SMITH'S LEADING CASES, he said,

B at p. 439 :

As is said in the notes to the *Duchess of Kingston's* case (2), if the truth has been ascertained, the party against whom it has been ascertained, is taken as admitting it. This is what the learned author says : "An estoppel, therefore, is an admission ; or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature—so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it."

C Then he continues, at p. 440 :

The litigant must admit that which has been judicially declared to be the truth with regard to the dispute that he raised. In order to see what the fact is that he must admit the truth of one has always to see what is the precise question, the precise fact that has been disputed and decided. This has constantly been stated

D to be the law.

Then, on the same page, he quotes from STEPHEN'S DIGEST OF THE LAW OF EVIDENCE, 10th Edn., this passage :

Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based.

E I am not going to multiply opinions. In my opinion every word of that passage applies to this particular case and to the section on which counsel for the respondent has relied. The judgment was between the same parties ; the fact of adultery was directly in issue before the county

F court judge. It was actually decided by him, and quite clearly appeared to be the ground for the decision, for it was the only ground on which the judgment could be based. That being so, the moment that judgment was produced and proved to be in full force and effect, and proved to be given by a court of competent jurisdiction on these issues, in my opinion

G there was an end of the matter so far as the justices were concerned. That judgment was itself not merely proof, but conclusive proof, so far as the justices were concerned, that the wife had committed adultery. I say so far as the justices are concerned, because that is all that we have to deal with. It will, however, be apparent, that the situation

H thus raised might be an extremely unfortunate one if this were a conclusive estoppel in all circumstances. Whereas I am satisfied that it is conclusive between these parties in a court of summary jurisdiction, let me make plain at once, as has been conceded in the course of the argument, that it would not be conclusive if the matter were litigated in this division in a matrimonial suit between these parties. It is

important to bear that fact in mind. Curiously enough, the very same word "proved" on which counsel for the respondent has laid so much stress, appears not merely in the Matrimonial Causes Act, 1857, but it also occurs in the revised version of the Judicature Act, 1925, s. 176, which is re-enacted with modifications, by the Matrimonial Causes Act, 1937. With regard to proof in this court, I need do no more than refer, A without reading it, to the well-known passage in the judgment of FLETCHER MOULTON, L.J., in the full Court of Appeal in *Harriman v. Harriman* (3). However binding the estoppel may be elsewhere, it is not binding on this court when this court has to satisfy itself that the facts are proved. In other words, a court of summary jurisdiction is B bound by the decision of an inferior court of record, but this court is bound by the decision neither of a county court judge, nor of a court of summary jurisdiction, great as the evidential value, as FLETCHER MOULTON, L.J., said [p. 142], may be of a decision of either of those tribunals. Of course, it is precisely that aspect of the matter which is C reflected in the Matrimonial Causes Act, 1937, s. 6 (2), dealing with decisions of courts of summary jurisdiction. Therefore, in fact, the parties need not be left finally in the unfortunate situation that one court finds that adultery has been committed and another court says that it is not satisfied that the adultery has been committed. The wife could D put the matter to proof by asking the county court judge to rehear and re-determine the matter on new material. A county court judge, unlike other tribunals, has that jurisdiction by statute. She could also get leave to appeal out of time from the county court judge's decision, if the Court of Appeal were minded to give such leave, or the matter could E be tested in this court afresh on some appropriate proceeding taken by the wife to enforce her conjugal rights, whatever they might be. However, as the matter stands before us now, sitting as a divisional court of this Division on appeal from the decision of the Colchester justices that they were not bound by this decision of the county court judge, we are bound F to hold that they were so bound, and that they ought to have given effect to it. I only want to add one other word. In their first reason they found that the husband had wilfully neglected to provide reasonable maintenance. That he had not provided it is, as I have said, common ground, but wilful neglect means more than that, it means that there G has been some wrongful default. Now this matter has not been argued out to the full. Suffice it to say that there is authority that a reasonable belief in the wife's adultery may afford a defence to a charge of wilful neglect. Here on the face of it, and again without going into the matter because it was not gone into before the justices, the refusal to H maintain her was based on an existing judgment of a court of competent jurisdiction. In those circumstances it might, in any view, be a little difficult to establish that a refusal so based was wilful, or amounted to a wilful neglect, but that aspect of the matter, as counsel for the appellant frankly admits, does not appear to have been presented to the justices,

and was not dealt with by them. I only mention it to show that in any view of the matter it has not been overlooked.

For these reasons this appeal must be allowed.

HENN COLLINS, J. : I agree, and I have nothing to add.

A *Appeal allowed.*

Solicitors : *Iliffe, Sweet & Co.*, agents for *Ellison & Co.*, Dovercourt (for the appellant) ; *Speechly, Mumford & Craig*, agents for *Jones & Son*, Colchester (for the respondent).

[Reported by J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

B

URBAN HOUSING CO., LTD. v. THE MAYOR, ALDERMEN
AND CITIZENS OF THE CITY OF OXFORD AND CHARLES
C RICHARD FOX.

[CHANCERY DIVISION (Bennett, J.), July 20, 21, 24, 25, 1939.]

Public Health—Streets—Strips between two streets running in same direction not made up—Sewers—Buildings over sewers—Walls—When removable by local authority—Public Health Act, 1875 (c. 55), s. 26.

D

By a conveyance dated July 27, 1933, the plaintiffs bought from the defendant council part of a farm, of an area of 20½ acres. The conveyance provided for a right of way to the plaintiffs over the strip of land lying between the land conveyed and the main road, but reserved no right of way to the defendant over the plaintiffs' land to the main road. It also provided for full and free rights of road way, sewerage and drainage to and for the plaintiffs over and along and in and under the whole length and breadth of two proposed new roads marked on the plan. The purchasers were obliged to level, curb, pave, metal, sewer, drain, flag, channel and light all the roads to be constructed within the area as well as certain streets. Buildings were to conform to a building line and no building or erection of any kind except a fence or other enclosure and a gate or gates were to be erected on the sites of the proposed roads. (Covenant 7). No building was to be erected on the land other than a private dwelling house with suitable offices and outbuildings and with or without garage accommodation and sixteen garages. (Covenant 9.) The plaintiffs were also prevented from gaining any easement of light over the land retained by the defendants and bordering on the land which they sold to the plaintiffs. The plaintiffs could not make any addition to or alteration in the character of any building on the land without the approval of the defendant council or their estates surveyor or erect thereon any hut, shed or other outbuilding without their previous consent in writing. The estate plan was submitted and approved on July 31, 1933, and plans for the construction of new roads were approved. In Sept., 1934, the plaintiffs notified the defendant council that they were going to retain the roads as private roads and enclose the whole estate in a ring fence by building a wall across two of the roads, and towards the end of 1934 the plaintiffs erected two walls, 7 ft. high and 9 ins. thick, and strengthened at intervals by buttresses on the roads, and barring entrance to the plaintiff's housing estate. On Jan. 20, 1936, the defendant council sought to obtain confirmation from the Minister of Transport for a compulsory purchase order affecting the walls and land on which the walls were built, but after an inquiry the Minister declined to confirm the order,

E

F

G

H

having regard to the offer by the plaintiffs of land for a footway. On Sept. 20, 1937, the defendant council called upon the plaintiffs to remove the walls and make good the surface of the roads within 21 days pursuant to the Public Health Act, 1875, s. 26, which provides for the removal of buildings built over sewers. The defendant council, however, took no steps to enforce the rights they claimed under that Act. On Feb. 7, 1938, the defendant council adopted the Private Street Works Act, 1892, and later they declared the roads in question to be highways repairable by the inhabitants at large. On June 7, 1938, in accordance with a resolution of the defendant council, some officers of the council went to the *locus in quo*, and, with the assistance of some police and a steam roller, pulled down the two walls :—

HELD : (i) the two strips of land on which the walls stood were not “streets” and therefore the walls were not illegal obstructions.

(ii) the walls were not “buildings” within the meaning of the Public Health Act, 1875, s. 26, but in any case to which the section applies the council’s power must be exercised judicially and after giving the party affected an opportunity to be heard. The walls, being in no way injurious to the sewers beneath them, could not be removed under that section.

(iii) the walls were “fences” within the meaning of covenant 7, but not “buildings” within the meaning of covenant 9, and there had, therefore, been no infringement of the restrictive covenants in the conveyance.

[EDITORIAL NOTE.] The principal point of interest in this case is the question of the buildings upon land under which public sewers have been laid. Such buildings in order to be removable under the Public Health Acts must be injurious, by reason of their weight or otherwise, to the sewers. The question of what is a street will be of interest to builders, who wish to separate one locality from what is in their view a less desirable one.

AS TO BUILDINGS OVER SEWERS, see HALSBURY, *Hailsham Edn.*, Vol. 30, p. 27, paras. 48, 49; and FOR CASES, see DIGEST, Vol. 38, pp. 184-187, Nos. 242-259.]

Cases referred to :

- (1) *Hopkins v. Smethwick Local Board of Health* (1890), 24 Q.B.D. 712; 26 Digest 564, 2584; 59 L.J.Q.B. 250; 62 L.T. 783.
- (2) *Cooper v. Wandsworth Board of Works* (1863), 14 C.B.N.S. 180; 26 Digest 518, 2202; 32 L.J.C.P. 185; 8 L.T. 278.

ACTION for an injunction against both defendants to restrain them from interfering with and/or preventing the plaintiffs, their servants and agents from re-erecting certain walls, the property of the plaintiffs erected by the plaintiffs in Dec., 1934, upon land belonging to the plaintiffs adjoining Wentworth Road and Carlton Road in the city of Oxford, which walls the plaintiffs alleged were illegally demolished by the first named defendants on June 7, 1938, and against the first named defendants for a declaration that the plaintiffs were entitled to erect and maintain the walls and an injunction to restrain the first named defendants from demolishing or otherwise interfering with the walls when so re-erected and damages for trespass. The first defendants alleged in their defence that the walls were illegally erected to block certain public highways. They further alleged breaches of the bye-laws and the obligations of the plaintiffs in a conveyance of Sept. 19, 1933, made

between the plaintiffs and the first defendants. The facts are fully set out in the judgment.

Erskine Simes and C. E. Scholefield for the plaintiffs.

Hon. Sir Stafford Cripps, K.C., and Wilfrid M. Hunt for the defendants.

A BENNETT, J.: The events out of which this action arises began at the end of the year 1925, when the defendant council purchased a farm on the outskirts of Oxford, known, I think, as Summertown Farm, which lies on the east side of the highroad leading from Oxford to Banbury. On July 27, 1933, the plaintiffs entered into a contract to buy from the defendant council a part of this farm, the area of which part was 20½ acres, for £6,867 10s. The contract provided for the purchase to be completed on Sept. 16, 1933. It was completed three days later by a conveyance dated Sept. 19, 1933. The transaction was completed by the deed, the whole of which is necessary to be considered. It is made between the mayor, aldermen and citizens of Oxford, called the "vendors," of the one part and Urban Housing Co., Ltd., called the "purchasers," of the other part. It recites that the vendors were seised in fee simple in possession free from incumbrances of the land thereafter described and intended to be thereby conveyed and had agreed to sell the same to the purchasers for the sum of £6,867 10s., subject to the covenants, stipulations and restrictions thereafter contained. The deed proceeds as follows :

Now this deed witnesseth that in pursuance of the said agreement and in consideration of the sum of £6,867 10s. to the vendors paid by the purchasers on or before the execution of these presents (the receipt whereof the vendors hereby acknowledge) and of the covenants by the purchasers hereinafter contained the vendors as beneficial owners do hereby convey unto the purchasers all that piece of land being part of certain land conveyed to the vendors by a conveyance dated Dec. 3, 1925, and made between John Edmund Sawyer of the first part Elizabeth Isabel Sawyer and Frank Cecil Jones of the second part and the vendors of the third part which piece of land hereby conveyed contains an area of 20½ acres or thereabouts situate east of Banbury Road in the city of Oxford formerly in the parish of Water Eaton (detached) in the county of Oxford shewn on the plan annexed hereto and thereon coloured pink and surrounded by a red line together with full and free rights of road way, sewerage and drainage to and for the purchasers and the persons deriving title under them (in common with the vendors and the persons deriving title under them) over and along and in and under the whole length and breadth of the two proposed new roads lying between the points A to B and C to D and coloured yellow on the said plan To hold the same unto the purchasers their successors and assigns The purchasers hereby covenant with the vendors and the persons deriving title under them that they the purchasers and the persons deriving title under them will henceforth at all times hereafter observe and perform all and singular the restrictions and stipulations contained in the schedule hereto provided that the purchasers and the persons deriving title under them shall as regards any of the aforesaid restrictions and stipulations which are restrictive of the user of the same be liable only in respect of breaches which occur while they shall respectively be owner or owners of the premises or the part thereof in respect of which any breach occurs provided also that the purchasers and the persons deriving title under them shall not be or become entitled to any right of access of light or air to buildings to be erected on the land hereby conveyed which will or in any way may prejudicially affect the free and unrestricted user by the vendors and the persons deriving title under them of any adjoining or neighbouring property belonging to the vendors for building or other purposes Provided further that if and whenever the vendors or the persons deriving title under them shall sell a plot of land (being other part of the said land then remaining vested in them) the right to enforce the covenants hereinbefore contained in respect of the plot of land so sold shall not pass to the

purchaser thereof unless it shall be expressly assigned or declared in the conveyance that it is intended to pass thereby and nothing herein contained shall operate to prevent the vendors and the persons deriving title under them selling or leasing any such plot of land either subject to such covenants restrictions and stipulations as the vendors and the persons deriving title under them may in their absolute discretion think fit or free from any restrictions or stipulations whatsoever. The vendors hereby covenant with the purchasers and the persons deriving title under them as follows: (1) To lay out or cause to be laid out the two roads coloured yellow on the said plan from the points A to B and C to D marked thereon within twelve calendar months from the date of the execution of this conveyance and without expense to the purchasers (2) To erect good and sufficient fences of close boarded deal with oak posts and rails six ft. six ins. in height on the north and west boundaries of the land hereby conveyed and upon such fences being erected the vendors shall for ever thereafter at their own expense maintain and keep in repair the same except the portion of the fence on the west boundary of the land hereby conveyed between the points marked X and Y on the said plan which shall for ever hereafter be maintained and kept in repair by the purchasers or the persons deriving title under them at their own expense and the vendors shall pay to the purchasers a sum of £50 in respect of such portion of the fence and the vendors hereby acknowledge the right of the purchasers to production of the said conveyance dated Dec. 31, 1925, the possession of which is retained by the vendors and to delivery of copies thereof and hereby undertakes for the safe custody thereof.

The schedule above referred to, which contains covenants by the purchasers with the vendors, is as follows:

(1) The purchasers on demand shall pay to the vendors one-half of the cost (with a maximum of £190) of the erection of the said close boarded deal fence with oak posts and rails six ft. six ins. in height on the north and west boundaries of the land hereby conveyed (2) The height of all fences next to any road shall be measured to the level of the footway to such road taken to the nearest point (3) The purchasers shall not be entitled to require the vendors to erect any fences or enclosures except the fences on the north and west boundaries of the land hereby conveyed (4) The purchasers shall forthwith lay out and on being required by the vendors shall level curb pave metal sewer drain flag channel and light all the roads to be constructed within the area of the land hereby conveyed and coloured pink on the said plan the two continuation streets of the width of 40 ft. in respect of the continuation of the said two streets coloured yellow on the said plan the street parallel with but nearer to Banbury Road of the width of 36 ft. the street parallel with but further from the Banbury Road and the circular street at the southerly end of the estate of the width of 30 ft. and the four small island sites of the width of 26 ft. to be constructed on the said land in a manner and to the satisfaction in all respects of the vendors as the local authority and in accordance with the building byelaws as to new streets and the provisions of Local and Public Acts and will pay the whole cost of same (5) The purchasers shall only erect on the land hereby conveyed detached or semi-detached houses and two blocks of eight garages each for the use only of owners or occupiers of houses erected on the said land in accordance with the estate plan hereinafter referred to with a density of not more than twelve to the acre including the acreage of any roads to be constructed thereon within the area coloured pink on the said plan and not more than 246 houses shall be erected on the whole of the said land (6) No house or other building shall be erected so that its principal front shall face otherwise than towards the said roads (7) The front or flank walls of any house or building to be erected on any part of the land hereby conveyed shall range or be in line with the building line or lines to be shown on the estate plan of the purchasers hereinafter referred to and to be approved by the vendors' estates surveyor and no building or erection of any kind except a fence or other enclosure and a gate or gates shall be erected on any part of the said piece or plot of land which lies between the said building lines and the road or on the sites of the proposed roads marked on the said estate plan (8) The erection shall not be commenced of any house or other buildings on any part of the land hereby conveyed until and then only in accordance with an estate plan showing the proposed lay out and also plans and drawings of such house or other building showing the intended elevations and sections and specifications thereof have been submitted to and approved by the vendors or their surveyor for the time being the purchasers submitting the said estate plan and plans elevations sections and specifications as often as called upon by the vendors' estates' surveyor so to do until the same shall be finally approved and signed by the vendors' estates surveyor and if required leaving with him for reference copies of such approved estate plan plans elevations sections and specifications and a copy of

such drawings has been deposited by the purchasers with the vendors in respect of each house or building (9) No building shall be erected on the said piece of land or on any plot forming part thereof other than a private dwelling-house with suitable offices and outbuildings and with or without garage accommodation and the said sixteen garages (10) The dwelling-house to be erected on each plot of land forming part of the land hereby conveyed shall be of the value of at least £650 and the said value shall be taken to be the net first cost of the dwelling-house in materials and labour of construction only calculated at the rate of one shilling per foot cubic contents measured from the top of the footings to half way up to the roof or two ft. above any flat roof and exclusive of the cost of fences and land and any detached outbuilding or motor garage (11) Except with the consent in writing of the vendors first obtained no ale beer porter or spirituous liquors shall be sold in or upon the land or any house or building to be erected thereon nor shall any licence for the sale thereof be applied for in respect thereof (12) No portion of the land shall be used as a road or way or as part of a road or way from or to any land adjoining or adjacent to the said land other than the roads shown on the said plan without the consent in writing of the vendors first obtained (13) The purchasers shall not make any addition to or alteration in the character of any building on the land hereby conveyed which may be erected hereunder without the approval of the vendors or their estates surveyor or erect thereon any hut shed or other outbuilding without the previous consent in writing of the vendors (14) The purchasers shall not get or work gravel or clay in or on the land hereby conveyed or carry on or permit to be carried on any trade manufacture or business of any description nor expose or permit to be exposed any advertisement (other than a notice to let or sell) or sign board on the land hereby conveyed or on any part thereof or on any buildings thereon nor use such buildings nor permit the same to be used otherwise than as a private dwelling-house (15) The purchasers shall not place or permit to be placed goods for exhibition or sale in front of or on the land hereby conveyed (16) The vendors may from time to time alter the plotting of any land which for the time being remains unsold and may vary the position of any intended roads leading from the roads to be constructed on the said land in accordance with the estate plan of the purchasers and approved by the vendors (17) If any dispute as to the site or measurements shall arise between the vendors and the purchasers or between one purchaser and another purchaser it shall be settled by the vendors' city estate surveyor and the purchasers' surveyor and if they shall be unable to agree by a surveyor appointed by the President for the time being of the Surveyors Institute and his decision shall be final and conclusive and may be made a rule of His Majesty's High Court of Justice (18) The scheme of roads building lines and other matters as shown on the said estate plan and the building and other restrictions imposed upon purchasers shall not be binding upon the vendors who shall be at liberty to vary or alter the same from time to time as regards any other portions of the vendors' adjoining land without reference to the owners or occupiers of any plot or plots which may have been previously sold or otherwise disposed of (19) In this schedule where the context so admits (1) the expression "the purchasers" includes their successors in title (2) the expression "the vendors" includes their successors in title owners for the time being of the unsold portion of the said estate and any person to whom the benefit of the covenants by the purchasers in these presents shall be expressly assigned.

The plan annexed to the conveyance shows the area of land conveyed coloured pink and surrounded with a red line. Between it and the Banbury Road is shown a strip of land some 200 ft. in width extending along the whole of the western boundary of the land conveyed and over that strip there are the sites of two roads shown coloured yellow. The plan of the land conveyed shows those two roads continuing in an easterly direction, running parallel with one another, across the land conveyed and connecting with two roads upon the land (on the eastern side of that conveyed) retained by the defendant council and described on the plan as the Cutteslowe housing estate. The plan also shows on the land conveyed two roads, running from north to south across the land conveyed, parallel with one another, and some island sites, which are referred to in the conveyance, at the southerly end of it.

Before the conveyance was executed, the estate plan referred to in condition 8 had been submitted by the plaintiffs' surveyor or by the plaintiffs to the city council and had been approved by them on July 31, 1933. An extract from the minutes of the defendant council shows that on that day they adopted a recommendation of their highways, sewers and lighting committee, as follows :

(a) That plans submitted by Mr. W. H. Smith on behalf of the Urban Housing Co. for the construction of five new roads on the Summertown farm estate be approved, subject to the materials, construction and workmanship being to the satisfaction of the city engineer. Two of the roads will run eastwards from Banbury Road and connect with the roads on the Cuttleslowe No. 2 housing estate ; there are two other intersecting roads and a crescent at the south end of the estate. (b) That the city engineer be authorised to construct the roads and sewers on the above estate for the Urban Housing Co. and also the two entrance roads to the Banbury Road for the estates sub-committee on the basis of payment of actual cost plus $7\frac{1}{2}$ per cent.

After that recommendation had been adopted by the council and, as I understand it, before the conveyance had actually been executed, the plaintiffs took possession and the construction of the roads began. Matters went on without a hitch until some time in the autumn of 1933 when the question of the naming of the roads arose. As I understand it, the roads running from east to west, beginning at the Banbury Road, were made in sections and work was done on part of the land on the east, retained by the city council, at the same time as work was going on on the land purchased by the plaintiffs. When the trouble arose about the naming of the roads, the defendant council apparently wished that the name to be given to the more southerly of the two cross roads should be Aldrich Road, and the name to be given to the more northerly of the two should be Wolsey Road. The plaintiffs seem to have desired that, so far as the roads in course of construction on their property were concerned, the southerly one should be given the name of Wentworth Road, and the northerly one the name of Carlton Road.

The correspondence in regard to that matter becomes a little acrimonious with a letter written on Dec. 4, 1933, by the city engineer to the plaintiffs, in which the city engineer says :

With further reference to your letter of the 10th ultimo I beg to inform you that the question of the names to be given to the roads of the above estate now being developed by you were considered by the street names sub-committee and afterwards confirmed by the highways committee at meetings held on Friday last. It has been decided to recommend to council that the roads be named as follows :— Road No. 1 [that is the most southerly of the two cross roads] Aldrich Road ; Road No. 2 Southdale Road ; Road No. 3, Cavendish Road ; Road No. 4 [the most northerly of the cross roads] Wolsey Road ; Road No. 5, Salisbury Crescent. As explained to you over the telephone, the names for Roads Nos. 1 and 4 were adopted by reason of the fact that these roads form a continuation of those already constructed and in course of construction on the corporation housing estate adjoining.

The answer to that letter was made on Dec. 6, 1933, and is written by Mr. Clive Saxton, a director of the plaintiffs. He acknowledges receipt of the letter and says :

As previously mentioned to you, we always understood that we had the right to name the streets, subject, of course, to the council's byelaw which gives them

power to alter the name of a street at any time. In the ordinary course my directors would have agreed to almost any suitable name for the roads, but they cannot see any reason whatever why this particular estate should be linked up with the corporation housing scheme, and the names suggested for Roads Nos. 1 and 4 will most certainly prove extremely detrimental to us.

A There are other matters in the letter dealing with the roads which it is not necessary for me to read. The correspondence ends, so far as the defendant council is concerned, with a letter of Jan. 19, written by the city engineer to the plaintiffs, in which he says :

B that at a meeting of the highways committee held this morning the following extract from the report of the street names sub-committee was adopted : " That the continuation of Wolsey Road on the Summertown farm estate, constructed by the Urban Housing Co., Ltd., be named Cardinal Road, and the extension of Aldrich Road on the same estate be named Sawyer Road." I think you will agree that the highways committee have met the point raised by you and, as soon as these names have been confirmed by the city council, I will arrange for the necessary name plates to be ordered and erected as part of the works now being carried out by the council on your behalf.

C That proposal did not meet with the approval of the plaintiffs, who themselves named Cardinal Road, " Carlton Road," and Sawyer Road, " Wentworth Road," and there the matter of the names rested.

Friction next broke out in Sept., 1934, and on Sept. 22, the plaintiffs wrote to the town clerk of the first defendants a letter in these terms :

D Dear Sir, Summertown Farm Estate. In response to extreme pressure brought to bear upon us by our tenants, we feel that we ought to retain the roads on the above estate as private roads and not to open them to the public, and to enclose the whole estate in a ring-fence by building a wall across the roads numbered 1 and 4 where they meet those of the city No. 2 Cuttleslowe housing scheme. [Those two roads numbered 1 and 4 are Cardinal Road and Sawyer Road as named by the defendants, or Carlton Road and Wentworth Road as named by the plaintiffs.]
 E We realise that it may be necessary to make private arrangements or to enter into a contract with your council for the cleaning and lighting of the streets, and we shall be glad if the council will consider this and arrange to open negotiations. The whole of the difficulty seems to lie in the fact that slum clearance tenants have been introduced into the district, yet when we negotiated for the purchase of the land from your council we were definitely informed that all the houses were being built under the 1924 Housing Act and none under the 1930 Housing Act.

F and then the writer goes on to deal with that matter. The town clerk replied to this letter on Oct. 29, as follows :

G . . . the city council have considered your letter of the 22nd ultimo and a petition from residents on the Cuttleslowe housing estate of the corporation protesting against the retention by your company of the barriers erected across two new streets named by the council " Cardinal Road " and " Sawyer Road " at the Summertown farm estate. I am instructed by the council to require your company to open the east ends of the said new streets from the ground upwards to the full width of such streets in accordance with the provisions of the byelaws with respect of new streets and buildings. I shall be glad to hear that this will be done.

H Correspondence followed and, so far from the obstructions across the eastern end of Cardinal Road (otherwise Carlton Road) and Sawyer Road (otherwise Wentworth Road) being removed by the end of the year the plaintiffs erected upon land bought by them from the defendant council, two walls, some 7 ft. high, 9 ins. thick, and strengthened at intervals by buttresses. Those two walls completely blocked up the eastern ends of the two roads and effectively barred any entrance from

the Cutteslowe housing estate on to the plaintiffs' property from the eastern side of the plaintiffs' property. For some time there seems to have been nothing but talk. The walls stood until Jan., 1936.

On Jan. 20, 1936, the defendant council, at a meeting held on that date, adopted a recommendation of the general purposes committee in these terms :

(1) That a compulsory purchase order be made under the Public Works Facilities Act, 1930, s. 2, for the acquisition of (a) that part of Cardinal Road (called by the Urban Housing Co., Ltd., "Carlton Road") and the land forming the site and subsoil thereof and the road works therein, situated on the estate of the said company at Summertown, in the city of Oxford, as lies between the easterly end of such part of Cardinal Road (near Wolsey Road on the adjoining housing estate of the Oxford city council) and its junction at its westerly end with the remaining part of Cardinal Road ; (b) the wall and the land forming the site and subsoil thereof situated at the easterly end of Cardinal Road ; (c) that part of Sawyer Road (called by the said company "Wentworth Road") and the land forming the site and subsoil thereof and the road works therein, situated on the estate of the said company at Summertown in the city of Oxford, as lies between the easterly end of such part of Sawyer Road (near Aldrich Road on the adjoining housing estate of the city council) and its junction at its westerly end with the remaining part of Sawyer Road ; (d) the wall and the land forming the site and subsoil thereof situated at the easterly end of Sawyer Road. (2) That the seal of the corporation be affixed to the order. (3) That the order be advertised and submitted to the Minister of Transport for confirmation. (4) That the necessary proceedings be taken and notices served to give effect to the order. (5) That the said roads and land when purchased be dedicated as public highways.

The order made by the council required confirmation by the Minister of Transport, who caused an inquiry to be held, and, as a result of it, on Nov. 18, 1936, the following communication was addressed by the Ministry of Transport to the town clerk of the defendant council :

Sir, Public Works Facilities Act, 1930. The Cardinal Road and Sawyer Road (Compulsory Purchase) Order, 1936. I am directed by the Minister of Transport to refer to the public local inquiry held on July 9 in connection with the above named order and to state that, after giving careful consideration to the objections to this order, the representations made at the inquiry and the report of the inspector holding that inquiry, the Minister has decided not to confirm the order. I am to add that the Minister is of the opinion that the provision of a footway between Aldrich Road and Islip Road would overcome many of the difficulties referred to at the inquiry by witnesses on behalf of the corporation, and in this connection he has noted the offer made by the Urban Housing Co. of land for the provision of such a footway.

There the matter rested for a time.

On Sept. 20, 1937, very nearly a year later, the town clerk of the defendant council wrote to the plaintiffs in these terms :

Dear Sirs, Cutteslowe Estate. Notwithstanding previous requests to you to remove the buildings you have erected and which constitute a barrier across the eastern end of Cardinal Road and Sawyer Road on the Summertown farm estate the same are still subsisting. The city council considered the question at their meeting to-day, when an opinion of counsel obtained on their behalf was put forward for their consideration. The council has been advised that your acts constitute a breach of the covenants contained in the conveyance to you of Sept. 19, 1933, and also of the council's byelaws with respect to new streets and buildings. The council are further advised that your acts constitute a breach of the provisions of the Public Health Act, 1875, s. 26. Under these circumstances the council have instructed me to call upon you to remove the buildings you have erected and to make good the surface of the roads upon which the same were erected within 21 days from the date hereof, failing which the council have authorised me to take all necessary steps to secure their removal and such reinstatement at the earliest possible moment. I enclose herewith a notice pursuant to the provisions of the Public Health Act, 1875, s. 26.

The notice enclosed was addressed to the plaintiffs and was as follows :

Take notice that the buildings erected by you across the eastern end of Cardinal Road and Sawyer Road on the Summertown farm estate in the city of Oxford constitute a breach of the provisions of the Public Health Act, 1875, s. 26, and that from henceforth until their removal you are liable to the daily penalties payable under the said section.

A The notice was dated Sept. 20, 1937, and to it the common seal of the defendant council was affixed in the presence of the mayor and the town clerk.

The plaintiffs did nothing as a result of that notice ; neither did the defendant council ; they took no steps to enforce the rights that they claimed that they had under the Public Health Act, 1875, s. 26, and the matter rested as it was until the beginning of 1938.

B On Feb. 7, 1938, the defendant council adopted the Private Street Works Act and, by the terms of the resolution adopting it, it was provided that the resolution should come into operation on Mar. 31, 1938.

C On May 16, 1938, the defendant council passed this resolution :

Resolved " That whereas the undermentioned streets within the city of Oxford are streets within the meaning of the Private Street Works Act, 1892, and have been sewered, levelled, paved, metalled, flagged, channelled and made good and provided with proper means of lighting to the satisfaction of the council of the said city. And whereas we the council of the said city being the sanitary authority for the said city are of opinion that the said streets ought to become highways repairable by the inhabitants at large Therefore under and by virtue of the powers conferred upon us by the said Act we do hereby in the case of each of the said streets declare the whole street to be a highway repairable by the inhabitants at large from the date of the notice in relation to such street hereinafter mentioned and that the city engineer and surveyor be and is hereby instructed and authorised to sign and affix in the case of each of such streets all necessary notices in accordance with the provisions of the said Act to give effect to this resolution." Names of streets above referred to : Cardinal Road (also known as Carlton Road) from its junction with Banbury Road to its junction with Wolsey Road ; Sawyer Road (also known as Wentworth Road) from its junction with Banbury Road to its junction with Aldrich Road ; Cavendish Road, Southdale Road ; Salisbury Crescent.

Before that resolution was passed there had been a meeting of the parliamentary committee of the council held on May 9, 1938. The minute of the meeting held on that day is in these terms :

Cutteslowe Walls. The chairman informed the committee of a consultation with Sir Stafford Cripps, K.C., and Mr. W. Hunt, junior counsel, on the 3rd instant. Resolved : (a) That this committee be informed of the advice given by counsel on the 3rd instant. The chairman then informed the committee of such advice and the procedure to be followed thereon. (b) That the council be not recommended to confer further powers on the committee as per the following draft recommendation read by the chairman : " That the council confer on the parliamentary committee full powers to take any action advised by counsel in the matter of the Cutteslowe walls." (c) That a special meeting of this committee be held on Tuesday June 7 next at 5 p.m. to take action on counsel's advice and that the mayor be specially invited to attend. (d) That the committee ask the council at the ordinary meeting of the council to be held on June 20 next, to ratify any action taken by or instructions given by the committee at its meeting on June 7 next and that meanwhile any risk involved be accepted.

H Then there is this minute of the meeting of the same committee on June 7 :

The following draft resolutions were considered : (1) That, in accordance with the opinion of counsel, the city engineer be and he is hereby instructed to remove

forthwith the walls erected by the Urban Housing Co., Ltd., across Cardinal Road (also known as Carlton Road) and across Sawyer Road (also known as Wentworth Road). (2) That the chief constable be and he is hereby requested to provide such police assistance as may be necessary to enable the city engineer to remove the walls without interference and to prevent the re-erection of the walls. (3) That the council be recommended to ratify the above instructions and action taken by the committee against the officers and workmen of the corporation against all actions, proceedings, claims, damages, costs and expenses arising out of the removal of the walls. Resolved: That the draft resolutions be adopted with the exception of No. 2 [the one referring to the request to the chief constable to provide police assistance] which was not considered necessary. A

Having passed that resolution, some officers of the defendant council went on June 7, 1938, to the *locus in quo* and, with the assistance of a steam roller belonging to the defendant council, pulled down the two walls. B

On the next day, the defendant council met, and passed the following resolution affecting the roads on their Cutteslowe estate which as originally constructed had been connected with the roads passing over the plaintiffs' land and leading to the Banbury Road: C

Resolved: "That whereas the undermentioned streets within the city of Oxford are streets within the meaning of the Private Street Works Act, 1892, and have been sewered, levelled, paved, metalled, flagged, channelled and made good and provided with proper means of lighting . . ."

The resolution then proceeds to the effect that the roads ought to be highways repairable by the inhabitants at large, the roads in question being: D

Wolsey Road from its junction with Cardinal Road (also known as Carlton Road) to its junction with Wren Road; Aldrich Road from its junction with Sawyer Road (also known as Wentworth Road) to its junction with Wren Road.

That is all that it is necessary to read of that resolution. E

I think that I have now stated all the material facts for the purpose of considering the legal rights of the parties, except these: first, on the evidence, in my judgment, there always was a break on the surfacing of the two roads in question at the points where Sawyer Road (or Wentworth Road) and Cardinal Road (or Carlton Road) respectively joined up with Aldrich Road and Wolsey Road. At all material times while the roads were being constructed there had been across the eastern end of those roads, where they were on the plaintiffs' land, a barrier which had prevented the steam roller, used for rolling in the surface material, passing from the plaintiffs' land on to the defendants' housing estate, and so rolling the surface material in, and the surface material which had been put down at those points had been rammed in by hand and not rolled in, with the consequence that there was not a continuous surface. That, in my judgment, is the outcome of the evidence, though I do not think that it is of the least importance. The second matter of fact is that the defendants have called no evidence, that the walls or either of them were or was dangerous to the sewer underneath it, or that the walls or either of them interfered with access being had to the sewer. The last point of fact is that the cost of re-erecting the walls, will, in my judgment, be £180. F G H

- The defendant council has taken three grounds of defence. The first ground was that, as a result of the adoption by the council of the Private Street Works Act, and of the two resolutions passed, the one on May 16, 1938, and the other on June 8, 1938, the whole of the two roads, Cardinal Road and Wolsey Road on the north, Sawyer Road and Aldrich Road on the south, leading from the Banbury Road across the plaintiffs' land to the defendant council's housing estate, became highways repairable by the inhabitants at large, and that to erect the walls upon those highways, the whole surface of which would be vested in them under the Public Health Act, would be an illegal obstruction.
- The second ground of defence was based upon the Public Health Act, 1875, s. 26, which provides that any person who, in any urban district, without the written consent of the urban authority, causes any building to be newly erected over any sewer of the urban authority, shall forfeit to the urban authority the sum of £5 and a further sum of 40s. for every day during which the offence is continued after written notice in this behalf from the urban authority, and the urban authority may cause any building erected or constructed in contravention of this section to be pulled down or otherwise dealt with as they may think fit, and may recover in a summary manner any expenses incurred by them in so doing from the offender. The point taken was that, under the two roads in question, there were sewers vested in the city council as the urban authority, and that the walls were, within the section, buildings newly erected without their consent and so violated the provisions of the section. The third ground of defence taken was that what the plaintiffs had done was in breach of the restrictive covenants into which they had entered by the conveyance of Sept. 19, 1933.

Dealing with the three points in their order, the first depends, in my judgment, upon whether it is possible to maintain the view that, on May 16, 1938, those parts of Cardinal Road and Sawyer Road upon which the two walls were erected were or could be regarded as streets. It is only possible, in my judgment, for the resolution of May 16, to have affected the two strips covered by the walls, if it could be said of them that they were streets. You cannot by misdescribing something make it a street and, in my judgment, it is impossible either to describe or define the two strips of land upon which these walls stood on May 16, 1938, as streets. They were not, and, therefore, in my judgment, neither the resolution of May 16, nor the resolution of June 8, extended to or affected the soil upon which on June 7 the two walls were standing. On that ground I reject the first line of defence set up by the defendant council.

The second ground of defence, as I have said, is based on the Public Health Act, 1875, s. 26. There is no question but that the two walls were newly erected, within the meaning of the section, over the sewers of the urban authority. There are sewers vested in the urban authority lying under the strips of ground upon which the two walls were built.

The question is, in my judgment, whether, upon a proper construction of the section, the walls were buildings within the meaning of it. They may be. I do not think that anybody has doubted that they may be. On the other hand, it is equally clear that they need not necessarily be. The question is whether they are within the mischief aimed at by the section which, in my judgment, is this: a building to be within the section must be one which, by reason of its weight or otherwise, may cause an injury to the sewer over which it has been built, or one which, by reason of its size or otherwise, prevents access being gained to the sewer. The defendants have called no evidence to show that these walls either affected or are likely to affect the sewers which lie beneath them, or that they render access to the sewers difficult, and, although there is no evidence of it, I cannot bring myself to think that these walls in any degree affect or are likely to injure the two sewers—there may be more sewers which go under the walls—or prevent access to them.

I will further add this: sect. 26 confers a power upon the local authority which is to be exercised judicially. The power of removing a building which somebody else has erected, so it has been held, ought not to be exercised without giving the person who has erected the building an opportunity of being heard. Dealing with the Public Health Act, 1875, s. 158, which confers upon the local authority like powers, *WILLS, J.*, with regard to the notice which ought to be given by a local authority before it exercises such powers as are conferred upon it by sect. 26, said, in giving judgment in the case of *Hopkins v. Smethwick Local Board of Health* (1), at pp. 714, 715:

The only material question is, whether the principle of *Cooper v. Wandsworth District Board of Works* (2) applies to the Public Health Act, 1875, as well as to the Metropolis Management Act; if so, the principle there laid down has not been satisfied. In condemning a man to have his house pulled down, a judicial act is as much implied as in fining him £5; and as the local board is the only tribunal that can make such an order its act must be a judicial act, and the party to be affected should have a notice given him; and there is no notice, unless notice is given of time when, and place at which the party may appear and show cause.

In this case, in the notice which was sent by the defendant council to the plaintiffs on Sept. 20, 1937, neither a time when, nor place where the plaintiffs could show cause, was fixed. I think that that is all that it is necessary for me to say, to reject the argument on behalf of the defendant council based on the Public Health Act, 1875, s. 26.

There remains what seems to me to be the more difficult question, based upon the restrictive covenants entered into by the plaintiffs with the defendant council in the conveyance of Sept. 19, 1933. Before considering the terms of the covenants there are perhaps three matters which ought to be noticed with regard to the conveyance. The first is that it grants an express right of way to the plaintiffs over the strip of land which lay between the land conveyed to them by the defendant council and the road leading from Oxford to Banbury. The second is that it contains no reservation whatever in favour of the defendant council of any right of way, from their land on the east side of the land

which they conveyed to the plaintiffs, over that land to the Banbury Road. The last point is that the conveyance contains a provision for the purpose of preventing the plaintiffs from gaining any easement of light over the land retained by the defendants and bordering that which they sold to the plaintiffs.

- A The first ground taken by the defendant council was that, if one looks at the covenants as a whole, and also the plan annexed to the conveyance, and sees from that plan proposed roads leading from the Banbury Road over the land conveyed to the plaintiffs and connecting that land on the east side of that conveyed to the plaintiffs and retained
- B by the defendant council, as a matter of implication it ought to be held that the roads so shown were through roads. The short answer to that, in my judgment, is that it is not necessary to imply any such right. If they had wanted it, the defendant council, in my judgment, should have stipulated for it and not have left it as a matter to be implied
- C from the general terms of the document and the plan annexed to it.

- The second ground was that the plaintiffs had expressly covenanted not to build across the roads in question. That depends upon the true meaning and interpretation of, I think, three covenants, or possibly four; and there is one which may assist the argument of the defendant
- D council. The four covenants which may be relevant are the fifth, the seventh, the eighth and the ninth. In my judgment the fifth covenant is really nothing to do with the matter. In my view, its object was to limit the number of houses and buildings to be erected on an acre of land, and nothing else. The seventh covenant in terms enables the
- E plaintiffs to erect a fence or other enclosure between the building lines shown on the plan and the road, or on the sites of the proposed roads marked on the plan.

- The first question, I think, is whether a wall made of brick can properly be said to be "a fence" within the meaning of that covenant. I see no
- F reason why I should not hold a wall to be a fence. If one looks at the definition of "a fence" which is to be found in the OXFORD DICTIONARY, a wall is one of the things which the authors of that dictionary include amongst the meanings of the word "fence." Then the second question is whether, although it is a fence, it is a building which by covenant
- G No. 9 the plaintiffs have bound themselves not to erect. The ninth covenant is:

No building shall be erected on the said piece of land or on any plot forming part thereof other than a private dwelling-house with suitable offices and outbuildings and with or without garage accommodation and the said sixteen garages.

- H If the wall be "a fence" within the meaning of covenant No. 7, in my judgment it cannot be a "building" within the meaning of covenant No. 9.

The conclusion that I have come to upon what I regard as the real point of the case is that the defendant council have failed to establish that the restrictive covenants into which the plaintiffs entered with

them in the deed of Sept. 19, 1933, have been or will be infringed by the erection by the plaintiffs across the eastern end of the two roads in question of the walls which were standing there on June 7, 1938. Therefore, in my judgment, all the grounds of defence taken on behalf of the defendant council fail.

Judgment for plaintiffs against first defendants with costs. Liberty to apply. Action dismissed without costs against second defendant. A

Solicitors: *Hancock & Scott* (for the plaintiffs); *Sharpe, Pritchard & Co.*, agents for *Arthur Holt*, Town Clerk, Oxford (for the defendants).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.] B

Re WOLSON, WOLSON v. JACKSON AND OTHERS.

[CHANCERY DIVISION (Crossman, J.), June 21, 22, 23, 1939.]

Wills—Lapse—Gift contingent on attaining age of twenty-five—Death of legatee in lifetime of testator under twenty-five—Legatee would have attained twenty-five had she died immediately after the testator—Wills Act, 1837 (c. 26), s. 33. C

The testator, by a will declared (*inter alia*) that one-quarter of his residuary estate should be divided between his three children as and when they respectively attained the age of twenty-five years. A daughter died in the lifetime of the testator aged twenty-four. The testator died over a year later, by which time the deceased daughter would have attained the age of twenty-five. The daughter had issue one child. It was contended that the gift was not one determinable on the death of the daughter, and that by virtue of the Wills Act, 1837, s. 33, the daughter must be deemed to have died immediately after the testator, and that, as she would then have attained twenty-five years, the gift to her did not fail:— D

HELD: (i) this was a gift bequeathed for an interest determinable on the death of the daughter. E

(ii) the only purpose of the section was to provide against the effect of the death of a child in the lifetime of the testator, and not against the effect of death without attaining an age the attainment of which is a condition of the bequest. F

(iii) the gift therefore failed and there was an intestacy with regard to the share in question.

[EDITORIAL NOTE.] The statutory exception from lapse in the Wills Act, 1837, s. 33, only applies to gifts for any estate or interest not determinable at or before the death of the beneficiary. The gift here was contingent on the attainment of a certain age, and the beneficiary had died under the age. The section, however, says that the gift shall take effect as if the beneficiary had died immediately after the testator, and, at that time, in the circumstances of this case, the beneficiary would have attained the stated age. It is, however, held that these circumstances are not enough, upon the proper construction of the section, to save the gift. G

AS TO STATUTORY EXCEPTIONS FROM LAPSE, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 610-612, paras. 1195-1198; and FOR CASES, see DIGEST, Vol. 44, pp. 502-507, Nos. 3218-3256.] H

ORIGINATING SUMMONS to determine (*inter alia*) whether, upon a true construction of the will of Solomon Wolson dated Sept. 21, 1928, and in the events which have happened, Ethel Preiss's one-third interest in

reversion of the remaining one-quarter of the residuary estate of the testator had taken effect in manner provided by the Wills Act, 1837, s. 33, or whether there was an intestacy in respect of such interest, or how such interest devolved.

G. C. Dunbar for the plaintiff.

A *J. Neville Gray, K.C.*, for the defendant *Lena Mary Jackson*.

Hon. Denys Buckley for the defendant *Dina Scorman*.

A. L. Ungood-Thomas for the defendants *George O. Preiss* and *Chloe Tamara Preiss*.

E. Ronald Haylor for the defendant *Joseph Gregory Wolson*.

B *Quentin B. Hurst* for the defendant *Hilda Martine*.

CROSSMAN, J. : By his will, as I have construed it, dated Sept. 21, 1928, the testator, Solomon Wolson, declared that on the death or remarriage of his wife, one-quarter of his residuary estate should be divided between his three children as and when they respectively attained the age of twenty-five years. The testator died on Apr. 1, 1933. His daughter Ethel married the defendant G. O. Preiss on Nov. 10, 1930, and had issue one child, C. T. Preiss, born in Sept., 1931. Ethel Preiss died on Nov. 1, 1931, aged 24. I have already made a declaration which involves the conclusion that the bequest to Ethel Preiss was contingent on her attaining twenty-five years. Counsel on behalf of G. O. Preiss and C. T. Preiss has argued that the Wills Act, 1837, s. 33, applies to a contingent interest and that, although Ethel Preiss died under the age of twenty-five, the bequest to her of the share in question has taken effect in the manner provided by that section. The section provides as follows :

E And be it further enacted, that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

It was argued that the share was bequeathed to Ethel Preiss for an interest not determinable at or before her death. It was argued that it was necessary, under the section, to assume that her death had happened immediately after the testator's death, and, if she had died then, she would have attained twenty-five, and the bequest must therefore take effect in the manner provided by the section. Counsel for the parties interested in opposing this conclusion contended that sect. 33 does not apply to save a contingent interest which had already failed. In my judgment that contention is right. This is entirely a question of the construction of the section. In the first place I think the bequest to Ethel Preiss which was contingent on her attaining 25, was a bequest to her for an interest determinable at her death within the meaning of the section. Consequently, in my view, the section does not apply to the interest at all. In the second place I think the use in the section

of the words "shall not lapse" shows that the purpose of the section was to provide against the effect of the death of a child in the lifetime of the testator, and not against the effect of death without attaining the age, the attainment of which was a condition of the bequest. There is, therefore, an intestacy in regard to the share in question.

Declaration accordingly.

Solicitors: *Crump, Sprott & Co.* (for the plaintiff); *W. A. G. Davidson & Co.* (for the defendants *Lena Mary Jackson, Dina Scorman, George O. Preiss and Chloe Tamara Preiss*); *Wm. Easton & Sons* (for the defendant *Joseph Gregory Wolson*); *Greenwood & Knocker* (for the defendant *Hilda Martine*).

[Reported by CHARLES SHELLEY, Esq., Barrister-at-Law.]

LATHALL v. A. JOYCE & SON AND OTHERS.

[KING'S BENCH DIVISION (Oliver, J.), July 21, 1939.]

Animals—Liability of owner—Negligence—Ordinary consequences of negligence—Scienter—Bullock being unloaded from lorry escaping on to highway—Deliberate attack on human being.

A bullock, having been transported in the lorry of the first defendants, was being delivered at the premises of H., a butcher. The intention was to drive the bullock out of the lorry into a dark passageway leading to a yard at the back of the premises. The lorry could not be brought right up to the entrance of the passageway, and to prevent the bullock from escaping into the street there were two wing gates on the lorry. These, however, did not nearly reach the mouth of the passage, and in the gap on one side H. placed himself and in the gap on the other side an employee of H. was placed in order to prevent the escape of the bullock into the street. The animal, however, broke past the employee and dashed down the street and ran straight at the plaintiff, knocking him off the bicycle which he was riding and injuring him. There was no proof of *scienter*.—

HELD: the facts did not establish such negligence on the part of the defendants as would render them liable in damages, apart from proof of *scienter*.

[EDITORIAL NOTE.] The owner of a domestic animal is only liable for injury caused by reason of his negligence where the injury is one which may be reasonably expected to result from that negligence. A deliberate attack upon a human being is not to be reasonably expected in the case of a domestic animal, unless it can be shown that the animal had previously exhibited such a tendency—that is, unless there is proof of *scienter*.

AS TO NEGLIGENCE IN RELATION TO DOMESTIC ANIMALS, see HALSBURY, Hailsham Edn., Vol. 1, p. 542, para. 932; and FOR CASES, see DIGEST, Vol. 2, pp. 229-233, Nos. 201-220.]

Cases referred to:

- (1) *Haynes v. Harwood*, [1935] 1 K.B. 146; Digest Supp.; 104 L.J.K.B. 63; 152 L.T. 121.
- (2) *Deen v. Davies*, [1935] 2 K.B. 282; Digest Supp.; 104 L.J.K.B. 540; 153 L.T. 90.
- (3) *Turner v. Coates*, [1917] 1 K.B. 670; 2 Digest 235, 230; 86 L.J.K.B. 321; 115 L.T. 766.

(4) *Manton v. Brocklebank*, [1923] 2 K.B. 212; Digest Supp.; 92 L.J.K.B. 624; 129 L.T. 135.

ACTION for damages for injuries sustained through being knocked down and injured by a bullock, which had escaped owing to the alleged negligence of the defendants. The facts are fully set out in the judgment.

A *R. C. Vaughan* for the plaintiff.

S. H. Granville-Smith for the defendants A. Joyce & Son.

M. D. Van Oss for the executors of T. G. Harris deceased.

OLIVER, J.: In this case the plaintiff sued A. Joyce & Son, a firm of transport contractors, and also the executors of one T. G. Harris deceased. He claimed damages on the ground that on Apr. 4, 1938, while riding his bicycle along St. John's St., Newport Pagnell, he was knocked down and injured by a bullock which had escaped owing to the alleged negligence of the defendants or their agents. I am using the word "defendants" to cover the representatives of T. G. Harris who would have been a defendant had he lived. Damages, if liability was established, were agreed at £325. The first-named defendants were on the date in question engaged in delivering a bullock (which they had collected and transported in their lorry) at the premises of the late T. G. Harris, who had a butcher's business in High Street, Newport Pagnell. The lorry arrived outside these premises at about 8 a.m. The premises are in the middle of a busy street, though at that time in the morning there were not very many people about. The lorry was driven by one Joyce, a servant of the first-named defendants. There was no evidence to suggest that the animal in question was other than an ordinary quiet beast, and it had given no trouble on being loaded into the lorry. On arrival at the deceased's premises, L. T. Harris, the deceased's son and agent, and a servant of the deceased, named Clark, were in attendance for the purpose of taking delivery of the animal on behalf of the deceased. The process of delivering involved the lowering of a landing board from the back of the lorry, and the driving of the bullock into a long, narrow and dark passageway leading to a yard at the back of the premises. For the guidance of the animal into the passage, 9-in. guide boards and two wing gates were provided on the lorry. There was evidence that the owner of the lorry had been to the place on previous occasions and knew it well. The wing gates did not nearly reach to the mouth of the passage, but left a space on either side of the entrance through which the bullock, if so minded, could escape into the street. For the purpose of preventing such escape, on the morning in question Clark stood on one side of the opening and L. T. Harris on the other side. I find accordingly that the business of unloading the animal was the joint adventure of the first defendants and the deceased. Upon the van being backed into position opposite the entry, there was evidence that from sounds within the lorry the bullock was in a very restless condition. According to two witnesses it could be heard jumping about, and

according to the evidence of a third it was in "a rummish condition" when it appeared. When the gate at the back of the lorry was opened, the creature rushed down the landing board, broke past Clark, and made good its escape. Upon the evidence, I am clear that there was negligence on the part of all the defendants. The entry itself was described by witnesses as a singular place, a difficult place into which to persuade A a restive animal to enter. There was further evidence, which I accept, that a solitary beast in a lorry is more likely to be restive than when more than one are carried together, and that the instinct of such an animal is to make for the light and to avoid such a thing as a dark entrance. I further find that the beast was in fact restless, and I find that the B short wing gates were quite inadequate for safety. They should have been supplemented (as they have been since) by auxiliary wings from the entry itself, making one continuous passageway. The standard of duty in such cases must be fixed having regard to all the circumstances of C the case, and particularly to the fact that the operation was taking place in the middle of a populous place. The authority for that proposition is to be found in *Haynes v. Harwood* (1), at p. 146, and in *Deen v. Davies* (2), at p. 282.

I proceed next to consider the evidence of what happened after the bullock escaped, for the purpose of determining whether in the circum- D stances the plaintiff can succeed. As I have indicated, the evidence negatives *scienter*; and the defendants can only be responsible in law for the results which naturally flow from their breach of duty. A bullock is in the ordinary sense a tame animal, and not prone to attack mankind. There was in the present case a body of evidence from E witnesses of great experience to the effect that they had never before known of a case of such an animal attacking human beings. On the other hand, it is obvious that a frightened bullock may blunder about and run into people and injure them without any *mens rea*, if such a phrase can aptly be applied to such a creature. As I understand the F law, the defendants would be liable in the latter state of facts, but not liable in the former. As to what happened on the bullock leaving the lorry, the following facts were proved to my satisfaction. In the first instance, the beast charged past Clark, who was guarding the gap. This might, I think, be fairly set down to fright and to the desire to G escape. After it had passed Clark, a witness named Brown, a bystander, tried to stop it. The bullock charged at Brown who sought safety in flight. I think even this might be treated as being part of the ordinary effort to escape. It next turned into the London Road, and some H 200 yds. distant met the plaintiff on his bicycle. Police Sergeant Hulls, who was cycling behind the plaintiff, going in the same direction, described what happened in these words :

The plaintiff was attacked by a bullock who ran across the road straight at him, and knocked him off his bicycle.

He then proceeded to describe how the animal stood over the plaintiff

with its forefeet on a low brick wall. The police sergeant got off his bicycle and went to the plaintiff's assistance. The bullock thereupon took its feet off the wall, put its head down and came for me.

The police sergeant, whose equipment and training did not qualify him as a toreador, beat a hasty but excusable retreat. The bullock was eventually rounded up and destroyed. I accept unhesitatingly the evidence of this officer, and, indeed, there was nothing to displace it, and conclude that the attack on the plaintiff was deliberate. In this connection it is interesting to observe that the expression used in para. 2 of the statement of claim is :

A bullock charged the plaintiff.

I am forced to the conclusion that on this occasion this particular animal showed a viciousness which was quite out of keeping with the nature of its kind, and, as I have already said, the evidence negatives *scienter*. The case is quite different from *Turner v. Coates* (3), where a young unbroken colt loose on the highway in the dark, being frightened by the light of the plaintiff's bicycle, ran across the road and knocked him down. If in that case the colt had deliberately attacked the plaintiff with its teeth, the defendant would not have been liable. On the view which I have formed of the facts, to hold the defendants liable would be, to quote the words of ATKIN, L.J., in *Manton v. Brocklebank* (4), at p. 230 :

[to] impose the same liability upon the owner of a tiger and of a cow. . . .

Although I have the utmost sympathy for the plaintiff, in the circumstances, I am forced to hold that he has not made out his case, and, therefore, there must be judgment for the defendants.

Judgment for the defendants with costs.

Solicitors : *Dennis, Faulkner & Alsop* (for the plaintiff) ; *Sharman & Trethewey* (for the defendants A. Joyce & Son) ; *Ernest Marchant* (for the executors of T. G. Harris decd.).

[Reported by CHARLES NEWTON, Esq., Barrister-at-Law.]

LONDON & PROVINCIAL LEATHER PROCESSES, LTD. v. HUDSON.

[KING'S BENCH DIVISION (Goddard, L.J., sitting as additional judge),
July 25, 1939.]

Insurance—Property insurance—All-risk policy—Goods sent to Germany for treatment—Insolvency of German firm—Goods irrecoverable from administrator of insolvent firm—Accident or fortuitous casualty.

Following their usual course of business, the plaintiffs sent a large quantity of undressed skins to P. & Co., in Berlin, to be processed, and insured them under a Lloyd's all-risk policy during carriage, and while in Germany, against "all and every risk whatsoever." P. & Co. became insolvent, and their affairs were taken over by an administrator according to German law. Part of the consignment was in the hands

of M. & D., another German firm which was under a subcontract with P. & Co. M. & D. set up a claim of general lien on the plaintiff's goods in respect of debts due to them from P. & Co., to which they were not entitled by German law, and with regard to the rest of the skins no effective satisfaction could be got from the administrator by either the plaintiffs or the insurers' solicitors. The plaintiffs made a claim under the policy for the value of the goods detained :—

HELD : the plaintiffs were entitled to recover the loss as it was of an accidental or fortuitous character. A

[EDITORIAL NOTE. Property may be insured against loss or damage generally and then the precise nature of the casualty causing the loss is immaterial. To constitute a loss, the property need not have been actually destroyed : there may be a loss though the property still exists if the assured has been deprived of it as the result of some casualty. The decision in this case is as to the precise meaning of the term "casualty" in such cases. B

AS TO INSURANCE OF PROPERTY AGAINST GENERAL LOSS OR DAMAGE, see HALSBURY, Hailsham Edn., Vol. 18, pp. 516, 517, paras. 811, 812; and FOR CASES, see DIGEST, Vol. 29, pp. 420, 421, Nos. 3280-3282.]

Case referred to : C

- (1) *British & Foreign Marine Insurance Co. v. Gaunt*, [1921] 2 A.C. 41; 29 Digest 95, 527; 90 L.J.K.B. 801; 125 L.T. 491.

ACTION on a Lloyd's all-risk policy on goods sent to Germany for treatment. The material words of the policy were as follow : D

At and from any port or ports, place or places in Germany and while there for not exceeding 3 months for processing and thence to any port or ports, place or places in the United Kingdom. This insurance is against all and every risk whatsoever however arising. Including War risks and Strike risks. Subject to the Institute cargo clauses (Nos. 8 and 9 deleted) as far as applicable including confiscation, or prohibition of re-export other than loss arising out of War or process. E

Evidence of German law was called to show that even if a successful action had been brought in that country for damages, the goods having been sold by the administrator, any damages awarded would have been paid only in "blocked" marks. The effect, it was claimed, was that the goods, or their value, were lost. The facts and arguments are fully stated in the judgment. F

R. F. Levy, K.C., and *Harold Simmons* for the plaintiffs.

A. T. Miller, K.C., and *C. N. Shawcross* for the defendant.

GODDARD, L.J. : This is a claim against Lloyd's underwriters under an all-risk policy. The policy is dated Mar. 25, 1938. It was taken out by the plaintiffs, the London & Provincial Leather Processes, Ltd., a firm of leather merchants and manufacturers in England, who are in the habit of importing skins from North Africa and of having them sent direct for dressing to Germany. When the process of dressing the skins has been completed, the goods are sent by the people in Germany who treat the skins to people in the United Kingdom. The policy is on goods "at and from any port or ports, place or places in Germany and whilst there for not exceeding three months (or held covered at a premium to be arranged) for processing and thence to any port or ports, place or places in the United Kingdom." It is the widest possible policy, G
H

so far as risks are concerned, because it is upon skins valued at £4,000 against all and every risk whatsoever, however arising.

What happened was this. The firm which the plaintiffs employed to dress these lamb skins was Alfred Popper Lederfabrik of Berlin. It seems that they sub-contracted part of the work which they had to do
A for the plaintiffs to another firm called Moebis & Dieter. It so happened that in April the managing director of the plaintiffs, Mr. Larholt, was in Germany, and he saw all the skins which form the subject of this action, some of them actually in the hands of Popper, and some of them actually in the hands of Moebis & Dieter. He had no objection to Moebis
B & Dieter being employed as sub-contractors, but there is no pretence for saying, and it has not been contended, that there was any contractual relationship between Moebis & Dieter and the plaintiffs. The contractual relationship with regard to these skins was between the plaintiffs and Popper, and if the latter chose to have some of the work
C done by sub-contractors that, of course, would not establish any relationship between the sub-contractors and the plaintiffs. Unfortunately, though the plaintiffs did not know it, the firm of Popper was in difficulties, and on May 6, 1938, information reached the plaintiffs from Popper that Moebis & Dieter were claiming a lien on these skins
D belonging to the plaintiffs, because they did not obtain payment from Popper. The next thing that happened was that the plaintiffs wrote to Moebis & Dieter protesting against their withholding their goods, and on May 10, Moebis & Dieter wrote to the plaintiffs as follows :

E We have received your letter of the 6th inst. and would inform you in the first place that we have no knowledge of any goods of the firm of Alfred Popper stored here belonging to you. We will freely release the goods immediately the invoices are met and our charges paid. It may well be that your relationship with Alfred Popper is such that you can pay us direct. We presume that you will communicate with the firm Alfred Popper, and we will then release your goods.

So far as those goods are concerned, which were of the value of
F £615 15s. 1d., Moebis & Dieter later enlarged their claim. Not only did they claim that they had a lien on these particular goods for the work which was done on them, but they also claimed something in the nature of a general lien against Popper, because they said that they proposed to hold all the goods which Popper had sent to them. Apparently he
G had sent them goods of his own as well as those of the plaintiffs, and they were claiming to hold the whole of the goods until they were paid their account. Both by German law and English law that would be an inadmissible claim. Of course, it is German law which governs this matter, and I am satisfied from the evidence of Dr. Cohn that German
H law and English law on this point are identical—that is, that a sub-contractor who is owed money by the principal contractor has no right to hold the goods of a third person which have been entrusted to the contractor, because the contractor may owe the sub-contractor money. There is no pretence for saying that there was any contractual relationship, or any implied authority in Popper to entrust the goods to Moebis

& Dieter. It is one thing to give authority ; it is another thing not to take objection when you find he is a sub-contractor. Moebis & Dieter had no right whatever to assert a lien on these goods against the plaintiffs.

Popper became bankrupt, and the administrator, who is substantially the equivalent of the trustee in bankruptcy in English law, took possession of the goods which he found at Popper's place of business, including skins belonging to the plaintiffs to the amount of £942 15s. 2d. Though it is no part of my duty to criticise the performances of an officer of a foreign court, it does not seem to me that he behaved in a way which is calculated to be very satisfactory to a person who had entrusted goods to Popper, because what happened was this. He sent a notice to the plaintiffs announcing the bankruptcy, and his appointment as administrator, and claiming payment of some moneys which he alleged the plaintiffs owed to Popper. We have not been into it, and I do not think it is very material, but it does not seem to me to be denied that there was some money due from the plaintiffs to Popper. Popper had all the plaintiffs' goods. The plaintiffs at once wrote back and told the administrator what the state of affairs was. They wrote him on June 13 and set it out fully. They set out exactly the goods which were theirs, they specified them and gave reference members, and so forth. They did in fact trade under other names as well as the London & Provincial Leather Processes, Ltd., for well understood purposes. They also called themselves the Yeovil Leather Co. and the Hermes Leather Co. There were some goods there in the names of those two companies. They set out all those and, having sent that to the administrator in Berlin, the administrator did nothing and he did not answer their letters. In spite of everything they could do, they got no satisfaction from him until a very late stage in this case, on Nov. 19, when the administrator wrote to the solicitors whom the plaintiffs had instructed saying :

I beg to inform you that I am not in a position to release the lamb skins sent by them to Messrs. Alfred Popper Lederfabrik Berlin as per the following working instructions.

He then sets out the working instructions which shows that he knew exactly what goods they were, and also that they were for working on. He also adds :

With reference to the raw skins contained in your working instructions . . . Messrs. Moebis & Dieter as before still refuse to release these goods and I am not in a position to lift this prohibition to return and export your goods.

Whether he was not in a position at that time to release and export the goods because they were already sold I do not know. There is no evidence before the court as to when the lamb skins were sold. That they have been sold by the administrator is proved by one of the affidavits, though the deponent does not say when, nor do I think it very much matters. I ought to say this, that at a very early stage of the case, as soon as the plaintiffs had information about the attitude that Moebis & Dieter were taking up, they communicated with the underwriters

and gave them information about it. Then the underwriters instructed their solicitors. Their solicitors proceeded to make their investigations and get information from Germany. It is abundantly clear that the underwriters could get no satisfaction. They could not get the goods. It appears that they got a report sent over and they could not get them.

- A On June 18 they got a letter from a Dr. Pernutz, solicitor to Moebis & Dieter, which shows perfectly clearly that Moebis & Dieter were holding these goods and would not give them up. The underwriters made no attempt to take proceedings in Germany any more than the plaintiffs did, and now the underwriters say there has been no loss to
- B the plaintiffs under the policy.

I am of opinion that there has been a loss under the policy. The policy insures against all and every risk whatsoever, however arising. Counsel for the underwriter has argued that, before a claim can attach on a policy of insurance, there must be a loss of an accidental or fortuitous character, there must be in some form or another a casualty.

- C There is no doubt that that is a general statement of the law. The difficulty at times is to find out in these cases what interpretation one has to put upon the words so often used—"accident or fortuitous casualty." It is quite clear that the word has a wider meaning than

- D something in the nature of an accidental fire or a destruction of the goods by the forces of nature, such as a flood or a hurricane; because it cannot be denied that theft of the goods would be a loss coming within the policy, and that theft is a conscious and wilful act of another person. There is nothing fortuitous and nothing accidental about that. It is

- E accidental and fortuitous in the sense that the assured is deprived by some unexpected acts of his property in the goods or of his possession of the goods. The same is true with regard to embezzlement by an agent. I think one gets considerable assistance as to what the true interpretation of the words "accident or casualty," or the meaning of what is a risk

- F in an all-risk policy, by referring to the opinion of LORD SUMNER in *British and Foreign Marine Insurance Co. v. Gaunt* (1). The passages to which I am going to refer to are on pp. 57, 58. The case is an exceedingly well-known one in insurance law, and one from which I think great assistance can be obtained. The question in that case was that

- G some wool, having arrived in this country, and being covered by an all-risk policy, had suffered damage on the way. ROWLATT, J., had held that the circumstances were consistent with natural forces acting on the wool, which would not have been a risk within the policy because there would be nothing there accidental or fortuitous—no extraordinary

- H force of nature but the ordinary force of nature acting on the goods, atmospheric conditions or weather, causing some deterioration. It was necessary for the shipper to negative that and to prove some definite cause within the policy. What was meant by a casualty I think is to be found in the opinion of LORD SUMNER, at p. 57 :

There are, of course, limits to "all risks." They are risks and risks insured

against. Accordingly the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something, which happens to the subject-matter from without, not the natural behaviour of that subject-matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself.

The underwriter is not insuring against the shipper destroying his own goods. I need not read the next passage, but I go on to the next page, A
p. 58, where he says :

When he [the assured who is seeking to recover] avers loss by some risk coming within "all risks," as used in this policy, he need only give evidence reasonably showing that the loss was due to a casualty, not to a certainty or to inherent vice or to wear and tear. B

I do not think that LORD SUMNER, in using those words, was using them in an exhaustive sense in saying that anything which could be shown to be not a certainty or not to be inherent vice must necessarily be one of the things not coming within the policy. He had already mentioned British capture and also instances caused by the assured's C
own acts. I think it shows quite clearly the nature of the happening which the court must bear in mind or have regard to when it is construing what is a risk upon an all-risk policy. Here we have the fact that the plaintiffs have been deprived of their goods. They have suffered a loss in the sense that they cannot get their goods. With regard to D
the Moebis & Dieter goods, it seems clear that Moebis & Dieter converted these goods. They committed the wrong or tort which, in English law, we should call conversion, because, having a demand made upon them to deliver up the goods, they refused to do so, and have asserted a right to retain the goods which was bad in law, a right which they had no right E
to enforce against the goods. Therefore that was a conversion. For my part I am unable to see why, if goods which are insured against all risks are converted so that the true owner, the assured, is deprived of the possession of the goods, he is any the less entitled to recover under the policy than he would be if the goods were stolen. He is deprived F
of the possession in one case by theft; he is deprived under circumstances which would render the spoliator liable to the criminal law. It is a matter of the state of mind, whether there was a felonious mind. In the case of conversion he is equally deprived of his goods and equally wrongfully deprived, but wrongfully only in the sense that a civil tort is committed G
and not a criminal wrong. It seems to me, therefore, that with regard to the goods which came into Moebis & Dieter's hands which amount to £615 15s. 1d. there cannot be any doubt that the plaintiffs are entitled to recover. The most that can be said is: "Well, if you had gone out to Germany and contested this matter in the German courts you would H
have got your goods back." I do not think that is the right way to look at the case at all. The underwriters having paid and subrogated could go and get the goods back if they could, or they could have got the goods back, if they could, when notice was given to them; but they could not get them back. I do not think it lies in the underwriter's

mouth to say, when a loss has happened : " The goods still remain intact and if you like to go out and take your risk of going to the German courts you may be able to get the goods back." The plain fact of the matter is that, when Moebis & Dieter refused to hand over those goods, the plaintiffs lost the possession of those goods. Since they lost that

A possession by a wrongful claim set up by Moebis & Dieter, I think they are clearly entitled to recover. The other goods were still in the hands of the administrator, and the matter there is not quite so plain, but I think the same principles apply. The administrator made a claim on the plaintiffs for money. They supplied him with evidence that these

B goods were their goods. They sent him out their working instructions so that he could turn up the documents in the office and find out the facts. That he must have done so I think seems clear from the letter in Nov., 1938, to which I referred, because he sets them all out and quotes the goods and the numbers. I have listened to Dr. Cohn's evidence,

C and I think that here the administrator has had evidence supplied to him, and having refused to deal with these goods in any way recognising the plaintiffs' title in the goods, there was also a conversion of these goods. He seems to have acted in a manner which seems to English ideas unsatisfactory. He simply took no notice when the claim was

D made upon him ; he retained the goods and at some time he sold them. The administrator sold them at some time, and the act of selling would relate back to the time when he seized the goods which were not the debtor's goods and which ought not to have formed part of the debtor's estate. I think the same considerations apply to the act of the administrator here. Undoubtedly the goods were lost to the plaintiffs by a

E happening not analogous to theft, but just as much unexpected, if that be a test to apply, as a theft. I think the circumstances show that the loss fairly falls within the expressions " a fortuitous occurrence," " accidental loss " or " casualty " in the sense, as I have explained

F earlier in this judgment, in which they have been used in so many insurance cases. The result is that in my judgment the plaintiffs are entitled to judgment for the amount claimed with costs.

Judgment for the plaintiffs with costs.

Solicitors : *Leader, Plunkett & Leader* (for the plaintiffs) ; *William G Charles Crocker* (for the defendant).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

[RAILWAY AND CANAL COMMISSION (Wrottesley, J., Sir Francis Taylor, K.C., and Sir Francis Dunnell), **July 20, 1939.**]

Mines and Mining—Jurisdiction of tribunal—Coal mines—Restrictions on working—Rights of pre-emption—Coal under and extending for 100 yards back from turnpike road—Inclosure Act, 1845 (c. 118)—Mines (Working Facilities and Support) Act, 1923 (c. 20), ss. 1, 4—Mining Industry Act, 1926 (c. 28), s. 13.

The applicants desired to mine certain coal lying under land belonging to their lessor. The coal lay under or near a former turnpike road, which traversed a common, enclosed in 1876. The lessor's predecessor was party to an agreement incorporated in an award made under the Inclosure Act, 1845, by virtue of which (i) he was restrained from working coal under the turnpike road, and (ii) certain allotment owners were given a right of pre-emption in respect of coal extending for 100 yds. back from the turnpike road. The coal in question amounted to about 570,000 tons, and the applicants were the only company that could work it. They therefore applied to the tribunal for the right to work the coal free from the restrictions and rights of pre-emption binding on their lessor :—

HELD : (i) the case was clearly within the Mines (Working Facilities and Support) Act, 1923, s. 1, as there was a danger of the minerals being left unworked owing to the restriction upon the land.

(ii) the case was also within sect. 4 (1) (c) of the 1923 Act, as the applicants' lessor had not the necessary powers of disposition.

(iii) the case was also within the Mining Industry Act, 1926, s. 13 (2), in view of the limitations imposed by the award made under the Inclosure Act, 1845.

(iv) the case was also within sect. 4 (1) (a), (b) of the 1923 Act, owing to the numerous interests having rights of pre-emption and the difficulty which existed of ascertaining who were the interested persons.

(v) the tribunal had therefore power to grant the rights sought, and being satisfied by the evidence that it would be in the national interest so to do, made the order required.

[EDITORIAL NOTE.] The argument in this case was that the inclosure award gave statutory effect to the agreement to leave the coal unworked, and that the Commission had no jurisdiction to remove those statutory restrictions. In support of this argument it was contended that the statute giving the Commission its jurisdiction would not be construed as repealing the earlier statute unless such repeal was expressly provided for. It is held, however, that the Commission has jurisdiction.

AS TO JURISDICTION OF RAILWAY AND CANAL COMMISSION, see HALSBURY, Hailsham Edn., Vol. 22, pp. 692-694, paras. 1473-1479; and FOR CASES see DIGEST, Vol. 34, pp. 635, 636, Nos. 321-327.]

Cases referred to :

- (1) *Re Tilmanstone (Kent) Collieries, Ltd.*, [1928] 1 K.B. 599; Digest Supp.; 97 L.J.K.B. 169; 138 L.T. 452; 19 Ry. & Can. Tr. Cas. 26.
- (2) *Blackpool Corpn. v. Starr Estate Co.*, [1922] 1 A.C. 27; 42 Digest 770, 1974; 91 L.J.K.B. 202; 126 L.T. 258.
- (3) *Cato v. Thompson* (1882), 9 Q.B.D. 616; 40 Digest 138, 1090; 47 L.T. 491.

APPLICATION for the right to work certain coal, ironstone, and iron ore freed from certain restrictions and rights of pre-emption. The facts of the case are fully set out in the judgments.

H. V. Rabagliati, K.C., and *P. G. Roberts* for the applicants.

P. Gordon Bamber for the objector, the Earl of Bradford.

WROTTESELEY, J. : This is an application by the Walsall Wood Colliery Co., Ltd., for the right to work coal, ironstone and iron ore, freed from certain restrictions and rights of pre-emption which are binding on the applicants and on their lessor, the Earl of Bradford. They ask us to confer these powers upon them under the Mines (Working Facilities and Support) Act, 1923, s. 1, or else to grant them such powers under the Mining Industry Act, 1926, s. 13.

The coal in question lies either under or near a former turnpike road which traverses a common which was inclosed in 1876, and was then part of the Manor of Walsall Wood. The applicants had the right to work all the coal around the coal in question, having obtained that, for the most part, I think, by a lease from the Earl of Bradford, but he cannot grant the company the right to work the coal the subject of the application because, although he is the owner of it, he, or rather his predecessors, were party to an agreement, subsequently incorporated in a provisional order promoted and confirmed under the Inclosure Act, 1845, and an Inclosure award made under that order. By virtue of those provisions the then Earl of Bradford derived various advantages with regard to his minerals, including a right to work, subject to the restrictions specified in those provisions, and those restrictions firstly, forbade him to work or let to be worked, the coal under the turnpike road and, secondly, provided that owners of allotments made under the award or already existing there, should have a right of pre-emption in respect of coal extending for 100 yds. back from the turnpike road. It appears that the company, in 1881, gave the notices which had to precede the working of this coal, which I call the pre-emption coal. They must, in doing so, have acted, of course, on behalf of the Earl of Bradford, but since *omnia praesumuntur rite esse acta*, and since we are told that the coal in two seams was worked out under the highway, including the pre-emption coal, the allotment holders, apparently, were unwilling, at that date, to exercise their right of pre-emption. Now, nearly 60 years later, the company is anxious to work four seams of this coal. If they leave them unworked, about 570,000 tons of coal will be lost to the only company which can work it, and so to the country. The coal in the pillar left supporting the road is alone about 142,000 tons. The difficulties involved in the stoppage of the faces and in heading through the pillar, assuming that were possible, would increase the loss of coal by amounts which cannot be calculated at the present moment, but, at any rate, productive work in this part of the mine would be stopped entirely for six months while heading takes place, and partially, for another six months, while the necessary opening out takes place at the far end of the headings. In terms of wasted capital this is estimated to be a clear loss of about £10,000. Moreover, if the restrictions placed by the award upon working through the pillar are to be observed, then the headings will be of dimensions which we are told modern coal mining legislation, and regulations made under that legislation, make not only undesirable, but probably unlawful. At any rate,

it will make it impossible to carry out certain operations which are to be carried out nowadays in the driving of such headings in order to ensure the safety of those engaged in winning and getting coal. Therefore, it is difficult to imagine a case which should fall more clearly within the mischief which sect. 1 of the Act of 1923, and, later, sect. 13 of the Act of 1926, was directed to remedy. It is not only that we have coal which is in danger of being left permanently unworked, but we have coal the working of which, whether economically and efficiently or at all, is impeded by restrictions contained in a mining lease and, apart from that lease, by restrictions binding upon the applicants by reason of the terms contained in the provisional order and the award. Moreover, the matters to which I have alluded, make it clear that it is in the national interest that the Commission should, if they have the power, grant the right to the applicants to work the coal. A B

As regards the pillar provided for the support of the highway, it is clear to-day, as it was not, apparently, in 1866 or 1876, that the leaving of a pillar of 60 ft. is not so much a provision which is of no use, but one which is positively disastrous. I am satisfied that the special provisions which have been agreed with the highway authorities, which are submitted for our approval, are far more beneficial to the public than were the provisions of the provisional order and the award. I think that the Commission has power to make the order under sect. 1 of the Act of 1923. There is a danger here of the minerals being left permanently unworked, by reason of the minerals being comprised in or lying under land which is subject to an exception or restriction, and so not capable of being worked without the concurrence of two or more persons. For this purpose, it appears to me that the highway authority, who succeeded the turnpike trustees, are persons whose concurrence would be necessary in order that the coal might be worked. In addition, I think the case falls quite clearly within the provisions of sect. 4 (1) (c) of the same Act, it being a case where the persons from whom the right must be obtained have not the necessary powers of disposition, whether by reason of defect in title, or otherwise. For this purpose, I think it can be said that the Earl of Bradford has a defect in his title. The Commission, sitting as a court, construing Acts of Parliament under which its acts, is not, as I understand it, to be astute to try to minimise the powers which are conferred upon it by the various Acts of Parliament which have clothed it with its powers. This is a beneficial Act of Parliament and to be construed, of course, like other Acts of Parliament, as a whole. In addition, I think the case falls within sect. 13 (2) of the Act of 1926, especially having regard to the limitations imposed by the award on the size of the headings which would, without our order, have to be driven through the road pillar, unless, indeed, the coal south of the road were to be abandoned, at any rate, for the present, and possibly for ever. As regards the right of pre-emption, this again seems to fall precisely under sect. 1 of the Act of 1923. It is coal under land subject to an exception or reservation and, on that C D E F G H

account, is not capable of being worked without the concurrence of at least two persons. For this purpose, I think that the somewhat shadowy persons in whom there may reside to-day a right of pre-emption, are persons whose concurrence would be necessary. The case appears to me to fall also under sect. 4 (1) (a), seeing that there are, as I say, on the plan submitted, 30 or 40 interests, all of which would have to be gone into in order that the rights of pre-emption might be either exercised or declined. It seems to me also to fall within the provisions of sect. 4 (1) (b), there being, I gather, at least a difficulty in ascertaining to-day who the persons interested are. As regards the owner, the Earl of Bradford, it seems to me also to fall within the terms of sect. 4 (1) (c), taking the view, as I do, that he is a person who has not the necessary power of disposition, either by reason of a defect in title or otherwise. I am applying the words "or otherwise" there to a defect which appears to me to be *ejusdem generis*. It also appears to me to be a case to which the more general words of sect. 13 (2) of the Act of 1926 apply, for it appears to me that not only the lease but also the award are at present binding on the applicants. Here again, as in the case of the pillar necessary to support the road, as it was thought in former days, the order, if given effect to, will result not only in the winning of a vast amount of coal which otherwise will not be won at all, but it will also mean far less damage to the premises on the surface than would be occasioned if the coal, the subject of the application, were left unworked and if, therefore, the working stopped at the point at which it would otherwise be stopped.

It is for these reasons that I think, in the peculiar circumstances of this case, the compensation provisions to be applied should be not those commonly applied in this court in ordinary cases, but the same provisions as are provided in the award and provisional order.

SIR FRANCIS TAYLOR, K.C. : I agree with WROTTESELEY, J., on the question of national interest, on the grounds which he has stated. If this order is not made, over half a million tons of coal will be sterilised ; also the roads, as has been stated in evidence, are impracticable for haulage and ventilation, and the use of modern machinery will be impeded, and it is in the national interest that that coal shall be got and that modern machinery shall be used.

With regard to the rest of the case, on the point of law and the jurisdiction of this court, I should like to add this. The inclosure award of 1876 incorporated, and gave statutory effect to, an agreement which, speaking generally, gave the Earl of Bradford's predecessor in title the right to work all the minerals under the inclosed land except in the prohibited area. That deals with the minerals under the Lichfield Road, and it seems to me that that is a case which does come within the provisions of the Mining Facilities Act, 1923, s. 1 (a), which gave power to this court to grant a right to work coal under copyhold land and under lands subject to an exception or reservation. In my opinion, this agreed statutory

prohibition is an exception or reservation within the meaning of the language of that section and the subsection. That power, which the court was given with regard to that category of coal, was extended by the Mining Industry Act, 1926, s. 13, which empowered the court to give the right to any person to work any coal subject to the conditions imposed by the Act of 1923 and, of course, subject to the question of national interest. It is an extension and enlargement of the area of the coal specified in the Act of 1923 to "any coal." When the two Acts are combined, the general effect, in my opinion, enables the rights now applied for to be granted, even though the exception as to a prohibited area is statutory, and, provided that we do not go outside the conditions of the Act, we are, in the somewhat figurative language of the lords justices in *Re Tilmanstone (Kent) Collieries, Ltd.* (1), exercising, in effect, Parliamentary powers delegated to the court by the legislature. Something was said by counsel for the Earl of Bradford about the case of the *Blackpool Corpn. v. Starr Estate Co.* (2). That was a case in which there was a bargain between two corporations, on the basis of which Parliament passed an Act in 1917. VISCOUNT HALDANE lays down this principle, that where such is the basis of a preceding Act of Parliament, that is to say, where, in an earlier Act, Parliament directs its attention to an individual case and provides for it unambiguously, the presumption is that a subsequent general Act is not intended to rip up what the legislature provided for an individual. That is really a rule or canon of construction to guide courts of law in reconciling conflicting sections or provisions of Acts, but it appears to me to have no relevance to the orders of this court which are, as I have said, exercised extensively under enlarged powers to give a right to any person to work any coal.

With regard to the question of whether we are brought within the powers and conditions of the Act, in my opinion, sect. 4 (1) (c) of the Act of 1923 has been complied with because, in my opinion, the statutory prohibition constitutes a defect in title. That seems to be the result of the decisions of courts of equity in such cases as *Cato v. Thompson* (3), to which counsel for the applicants referred, and also the statement in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 29, p. 259, para. 344.

With reference to the minerals over which there is a right of pre-emption, I think that that right of pre-emption comes within the language of sect. 13 (2) of the Act of 1926, where the working of any coal is impeded by restrictions, terms or conditions contained in the mining lease, or otherwise binding on the persons entitled to work the coal. It seems to me that, under those provisions of the two Acts, we are authorised to grant this application. As I have said, I am satisfied that it is in the national interest and I am also satisfied with regard to the terms of compensation.

I agree entirely with what WROTTESELEY, J., has said.

SIR FRANCIS DUNNELL: I am in entire agreement with the judgments delivered by WROTTESELEY, J., and SIR FRANCIS TAYLOR. The evidence

has satisfied me that it is in the national interest that this coal shall be worked. I am also satisfied (in fact, there is no dispute on the point) that the working is impeded at the present time. The only point that has been raised at all is the point which counsel for the Earl of Bradford has discussed, as to whether this court has jurisdiction to make the order.

A SIR FRANCIS TAYLOR, in the concluding part of his judgment, has really said what I was going to say, with regard to sect. 13 (2) of the Act of 1926, which states :

B Where the working of any coal, or the working of any coal in the most efficient and economical manner, is impeded by any restrictions terms or conditions contained in a mining lease, or otherwise binding on the person entitled to work the coal, a right to work the coal freed wholly or partially from such restrictions or conditions, or to work the coal on other terms and conditions, may, on an application for the purpose being made and referred to the Railway and Canal Commission under the principal Act, be granted by the Commission in any case where the Commission consider that it is expedient in the national interest that the right applied for should be granted to the applicant.

C This is a case in which, as I have already stated, it is in the national interest that that shall be done.

I am quite satisfied. in my own mind, that this order should be made.

Solicitors : Ward, Bowie & Co., agents for Nicklin & Cotterell, Walsall (for the applicants) ; Meaby & Co., agents for E. G. Potter, Walsall (for the objector).

D [Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

HUGHES AND FALCONER v. NEWTON.

E [KING'S BENCH DIVISION (Charles, J.), July 21, 24, 1939.]

Bankruptcy—Deed of arrangement—Composition with creditors—Receipt stating terms of oral agreement—Whether receipt should have been registered—Deeds of Arrangement Act, 1914 (c. 47), s. 1.

F On June 26, 1937, the plaintiffs obtained judgment against the defendant for £7,448 with £7 7s. 6d. costs. At the time of the issue of the writ in the present action £1,863 16s. 10d. had been paid under an oral agreement made between the plaintiffs, four other creditors of the defendant, and the defendant, whereby the plaintiffs and the other creditors agreed to accept a composition of 5s. in the £ on the amount of their respective debts in full satisfaction thereof. At the instance of a third party, who in fact provided the money paid under the composition agreement, the plaintiffs gave the defendant a receipt for the £1,863 16s. 10d. stating that the same was a payment of 5s. in the £ on the amount of their claim and that they accepted it in full satisfaction and discharge of that claim in consideration of all the defendant's other creditors accepting a similar composition upon the amounts respectively due to them. The plaintiffs now sued for the balance of their claim with interest and costs, alleging that the receipt was a document which under the Deeds of Arrangement Act, 1914, s. 1, should have been filed and that in default thereof the composition agreement was void :—

H HELD : (i) the receipt was not an instrument which ought to have been registered under the Act because, although it reproduced the terms of the oral agreement, it was not intended to be a legal record of that agreement and only came into being at the request of a third party.

(ii) the plaintiffs were entitled to interest on the judgment debt at 4 per cent., as this item was not covered by the composition agreement.

[EDITORIAL NOTE.] The only question arising here is whether a receipt stating the terms of a composition agreement is a deed of arrangement within the Act and requires registration. This is held not to be so; but it is to be noted that a prior oral agreement is found to have been concluded.

AS TO WHAT IS A DEED OF ARRANGEMENT, see HALSBURY, Hailsham Edn., Vol. 2, pp. 432, 433, para. 588; and FOR CASES, see DIGEST, Vol. 5, pp. 1072, 1073, Nos. 8773-8782.]

ACTION for the recovery (i) of £5,591 10s. 8d. being the amount outstanding on a judgment debt of £7,448 with £7 7s. 6d. costs after the payment of a sum of £1,863 16s. 10d. (ii) of interest on the judgment debt at rate of 4 per cent. per annum. The facts are fully stated in the judgment.

Eric Sachs, K.C., and Hon. Quintin M. Hogg for the plaintiffs.

G. D. Roberts, K.C., and Maurice Lyell for the defendant.

CHARLES, J. : The defendant says, and testimony has been called to substantiate it, that on Nov. 9 four letters were written to the four principal creditors of Colonel Newton inviting them to come to a creditors' meeting. A petition in bankruptcy had been lodged against Colonel Newton. Sir Louis Newton, his father, was very desirous that that petition should be withdrawn, but obviously it could not be withdrawn unless some composition acceptable to the creditors was put forward and accepted. Sir Louis Newton had indicated to the solicitor acting for Colonel Newton and not for Sir Louis Newton, that he would find enough money to pay 5s. in the £. At one time he envisaged £4,000 as the limit of the amount payable, but finding that was not enough—the amount of the debts at that moment were a little difficult to decide upon, inasmuch as the debts due to the banks, Barclays Bank and Lloyds Bank, were partly covered by securities—he said ultimately, when the exact amount was ascertained, that he would advance to his son, Colonel Newton, for the creditors sufficient to pay 5s. in the £. On Nov. 16, 1937, in response to the letter of Nov. 9 to which I have referred, there was a meeting of these creditors. For the plaintiffs there was Mr. Nordon and his client, and there were present Mr. Poore for Messrs. Jay, representatives of Lloyds Bank and Barclays Bank, and the defendant's solicitor. "There and then at that meeting," the defendant's solicitor said: "I made an offer to pay 5s. in the £ on the judgment debt." The money was coming from Sir Louis Newton, but he was no party to any agreement from first to last in these proceedings, and so I find. I heard from Mr. Nordon that at that meeting they were all perfectly well aware that Colonel Newton had not got 6d., and it must have been a complete surprise that they were going to get a quarter of their judgment debt. Barclays Bank and Jays accepted straight away, and on Nov. 30 the plaintiffs agreed to accept, and through Mr. Nordon they asked that the money should be paid as soon as possible, and said that, if that was paid, or if they were satisfied that they would be paid, they would withdraw the petition. They acted upon that agreement and trusted to that

agreement, and the petition was withdrawn. It was a term that all the four creditors should come in. There were some smaller creditors but they were to be satisfied by another member of the family. On Dec. 23, the last of the four came in ; that was Lloyds Bank. Therefore, by that date they had all accepted, and only one thing then remained and that was to pay the money over. On Jan. 26 the money was paid over ; it was accepted in accordance with the agreement which I find was made orally on Nov. 30.

The point then was taken that the receipt which was signed was in fact a record of the agreement, and because of that the document had to be registered under the Deeds of Arrangement Act, 1914, s. 1. That section reads as follows :

A deed of arrangement to which this Act applies shall include any instrument of the classes herein-after mentioned whether under seal or not . . . (b) made by, for or in respect of the affairs of a debtor who was insolvent at the date of the execution of the instrument for the benefit of any three or more of his creditors.

Counsel for the plaintiffs tells me that although there are a great many cases analogous to this to be found under the Bills of Sale Act, this particular point in relation to a transaction of this sort has not yet been the subject of a decision. The point is put in this way. It is said that the receipt was to be worded so as to show that there was a full discharge, and a letter written by the defendant's solicitor is quoted which says that Sir Louis would not take any assignment of the debt but would only pay a composition, and the receipt was to be worded to show that the composition was paid in full discharge. I have found that there was an oral agreement, which could have been sued upon, and I have to find whether or not the receipt, upon which so much turns, is a receipt such as it was necessary to register under the Deeds of Arrangement Act. The receipt was in this form :

Received of Mr. Edgar Henry Newton the sum of one thousand eight hundred and sixty-three pounds sixteen shillings and tenpence being five shillings in the £ on the amount of our claim against him amounting to seven thousand four hundred and fifty-five pounds seven shillings and sixpence which we agree to accept in full satisfaction and discharge of that claim in consideration of all of his other creditors agreeing to accept a similar composition upon the amounts respectively due to them.

It is said that that receipt is a record of an oral agreement, and if it is a record of the oral agreement, then it ought to have been registered under the Deeds of Arrangement Act. It is pointed out, however, that, in the letter I have already read and in some of the other letters, it is not the defendant who for one moment requires the receipt to be given either in any particular form or at all. The agreement had been made orally.

The money has been found, the money has been paid over, and the money has been accepted in accordance with the oral agreement to take 5s. in the £ on the judgment debt. It was only because Sir Louis, who was not party to the action, was putting up the money, advancing it to his son, that he said to his son : " I want a receipt in that form." The son passed that on and said specifically : " That is what Sir Louis requires.

Will you sign it ? I am afraid if you do not sign it Sir Louis may make a fuss about paying the money." They said : " Very well, then we will sign it " and they did sign it. It correctly and accurately reproduces at the request of Sir Louis, the terms of the oral agreement which was made as far back as Nov. 30, but it is not a legal record of that agreement. The creditors got these very substantial sums when they expected nothing. I am quite unable to find that this is a document which ought to have been registered. It is a totally unnecessary document. It was not intended to be a record of the oral agreement so far as the plaintiffs and the defendant were concerned. It was a document which came into being at the request of somebody who was not a party to the action, and if it had not been signed, satisfaction would have been complete, the money would have been paid, the oral agreement would have been implemented, and there would have been an end of the matter. I cannot see that in these circumstances it is open to the plaintiffs to reopen the whole of this matter or to treat the receipt as a record of a transaction which required a record. The parties accepted 5s. in the £, they acted on that oral agreement, they have taken the 5s. in the £, and they have implemented their part of the agreement and withdrawn the petition in bankruptcy. Therefore, I find that the plaintiffs fail on the first limb of their claim. A
B
C
D

They also claim sums for interest. It is quite plain that although there was that oral agreement, which I have found to be a true and binding agreement, there were discussions afterwards as to costs and interest. Mr. Nordon quite rightly tried to do the best for his clients, but the defendant could not get any more money from Sir Louis or anybody else to pay the interest and they had to look to him. The 5s. in the £ was simply and solely on the judgment debt. There is by statute a right to interest at 4 per cent., and there must be judgment for the plaintiffs against the defendant Newton for £160 19s. 1d. E

Judgment for the plaintiffs for £160 19s. 1d. : defendant to have the costs of the action except those occasioned by the claim for £160 19s. 1d. F

Solicitors : Nordon & Co. (for the plaintiffs) ; Nash, Field & Co. (for the defendant).

[Reported by CHARLES SHELLEY, Esq., Barrister-at-Law.] G

ATKINS v. ATKINS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), July 12, 1939.] H

Divorce—Ancillary relief—Settlement of wife's property for benefit of children—Children wards of court in custody and care of mother—Jurisdiction.

On Nov. 15, 1929, the husband made a settlement on his two daughters, producing about £90 per annum. In 1934, an order was made in the Chancery Division of the High Court that the children should reside with and be under the care of the mother and that the father should pay

£3 per week towards their education and maintenance and their proper medical and dental expenses. On May 2, 1938, the husband obtained a decree of divorce on the ground of his wife's desertion, which decree had been made absolute. The income of the father was about £750 per annum subject to a deduction of £240 per annum payable in monthly instalments in respect of a judgment debt due to the wife of £1,800. The wife had an income of £364 per annum. The father asked that the mother be ordered to settle £100 per annum on the children :—

HELD : the circumstances were not such as to require the court to make an order for the settlement of any part of the mother's property upon the children.

[EDITORIAL NOTE. The Chancery Court would have no jurisdiction to order any part of the mother's income to be applied for the maintenance of the child, but it is agreed in this case that the Divorce Court has that power, but that the circumstances are not those in which that court will exercise the jurisdiction.

AS TO SETTLEMENT OF WIFE'S PROPERTY, see HALSBURY, Hailsham Edn., Vol. 10, p. 797, para. 1265 ; and FOR CASES, see DIGEST, Vol. 27, pp. 514-517, Nos. 5541-5575.]

APPLICATION by the husband for a settlement of the property of the respondent wife for the benefit of the children. The facts are fully stated in the judgment.

Noel Middleton, K.C., and J. Roland Adams for the petitioner.

W. A. Fearnley-Whittingstall for the respondent.

HODSON, J. : This is an application made against a wife respondent for settlement of her property under the Judicature Act, 1925, s. 191 (1), as amended by the Matrimonial Causes Act, 1937, s. 10 (3). The parties were married in 1912, and there are two children, both girls, aged 14 and 11 respectively. The application is made by the husband, who has asked for a settlement not on himself, but only on the children. On Nov. 15, 1929, a settlement was made by the husband on the children. This settlement produces an annual income of approximately £90.

On Nov. 10, 1933, proceedings having been brought by the wife against the husband on the ground of his alleged cruelty, the petition was dismissed by BATESON, J. Proceedings were instituted by the wife in the Chancery Division, and on June 6, 1934, CLAUSON, J., ordered that the children should reside with and be under the care of the wife until further order, and that the husband should pay to the wife £3 per week, to be applied towards the education and maintenance of the children, except during such periods as they might be under his care, and that he should pay their proper medical and dental expenses. This order is still subsisting. The husband states that the medical and dental expenses incurred during the three years ending May 9, 1939, when he swore his last affidavit, have averaged over £100 per year. The last order made against him in the Chancery Division in respect of medical expenses was dated Dec. 19, 1938, when he was ordered to pay £43 12s. 6d. I have seen the master's report, which shows that on that occasion he complained to the master that over a period of four years he had to pay about £150 in all for dentists and doctors. This appears to be incon-

sistent with the figure put forward in his affidavit sworn in these proceedings. Meanwhile, on May 2, 1938, the husband obtained a decree of divorce from the wife on the ground of desertion, but no order was made on this petition affecting the care and control of the children, who are still with the wife under the order of the Chancery Court. This decree has been made absolute. A

The position being as I have stated, it was somewhat startling that an application should be made by the husband against the wife that she should be ordered to make a settlement on the children, who are, and have been for some time past, under her care and control. It was, however, sought to justify the application on the following grounds. B
The income of the husband was said to be £750 per annum, derived from his occupation as a property dealer, but to be subject to a deduction of £20 per month by reason of an order made by FARWELL, J., in December, 1937, which directed him to satisfy a judgment obtained by the wife against him to a total amount, including costs, of over £1,800. It was C
not contended that this payment would increase the income of the wife, except in so far as it restored her capital. The payment of £3 per week to which I have already referred is also a deduction from the husband's income. The wife, on the other hand, has an income from trustees of £364 per annum gross, and is in receipt, for the purpose of D
the maintenance of the children, of £90 per annum from the settlement.

It was urged on behalf of the husband, in view of the provision he had already made, and of the fact that the wife had broken up the home, and that she had investments, whereas he had none, that the wife should make a settlement upon the children of £100 per annum, or less, for the E
period of their minority or until each of them should marry, at least, and it was further asked that the capital should be settled for the benefit of each of the children for their lives, with resulting trusts for their issue.

The husband by his counsel stated that the children now having arrived at boarding-school age, he intended to make application to the F
Chancery Division with a view to the children being sent to a boarding-school, and also for an abatement of the order by which he was directed to pay £3 per week. It was argued that under the Guardianship of Infants Act, 1925, there is power to make an order against a father for maintenance, but no corresponding power to make an order against G
a mother; therefore, the children would be unlikely, having regard to the means of the husband, to be sent to a boarding-school by the chancery judge unless recourse be had to the wife's money. I am unable to accept this contention. It is quite true that the Chancery Court cannot, under the power conferred by the Guardianship of Infants Act, H
order a mother to make a payment.

It seems to me plain that the court will be in a position, if and when an application is made for any purpose in connection with the maintenance and education of these children, to take into account not only the settlement from which the £90 is derived, and the additional contribution

which the husband is able to make, but also the means of the wife. It seems to me that this application is in the nature of a tactical move in order to strengthen the hands of the husband in his proposed application to the Chancery Court. Notwithstanding this, if I thought it was right in the interests of these children that I should direct the wife to settle some of her property, I should be ready to accede to the application, but I am not so satisfied. There is no evidence that the wife is making away with her capital, or is likely to do so, to the detriment of the children, who are under her care, and I see no reason to interfere with the registrar's report, which I therefore confirm.

Solicitors : *Kenneth Brown, Baker, Baker* (for the petitioner) ; *J. & P. J. F. Chapman-Walker* (for the respondent).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

C *Re PAYNE, POPLETT & ANOTHER v. ATTORNEY-GENERAL.*

[CHANCERY DIVISION (Simonds, J.), **June 14, July 3, 6, 7, 26, 1939.**]

Estate Duty—Gift inter vivos—Gift by way of settlement—Value of settled fund increased before death of deceased—Customs and Inland Revenue Act, 1881 (c. 12), s. 38—Customs and Inland Revenue Act, 1889 (c. 7), s. 11—Finance Act, 1894 (c. 30), ss. 2 (1) (c), 5, 7—Finance (1909-10) Act, 1910 (c. 8), s. 59—Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), s. 3.

Estate Duty—Aggregation—Gift inter vivos—Finance Act, 1894 (c. 30), s. 2 (1) (c).

In Jan., 1936, the settlor, by a declaration of trust, settled £10,000 and an option to acquire shares in a company in which he was interested, upon trust to hold the same for the benefit of certain members of his family. The option was exercised by the trustees of the fund and certain investments were made by them in the exercise of the powers conferred upon them, with the result that, at the time of the settlor's death, which occurred within three years from the date of the declaration of trust, the value of the fund had greatly appreciated. The question then arose whether the "property" assessable for the payment of estate duty was the sum of £10,000 and the option, i.e., the property as it had existed at the time of the establishment of the fund, or whether it was the property as it existed at the time of the settlor's death, i.e., after the exercise of the option and the acquisition of, and the increase in value of, the investments. The second question was whether the *corpus* of the settled property was aggregable with the free estate of the settlor so as to form one estate for the purpose of determining the rate of duty :—

HELD : (i) the property assessable for estate duty was the fund in the form in which it existed at the time of the testator's death, and not as it had existed at the time of its inception, and consequently, estate duty was payable on the increased value of the fund at the time of the deceased's death.

(ii) the *corpus* of the settled property was aggregable with the free estate of the settlor so as to form one estate for the purpose of determining the rate of duty.

[EDITORIAL NOTE. The question here decided for the first time is one that has been the subject of discussion for some years. A gift *inter vivos* attracts estate duty if the donor dies within three years of the date of the gift, and the principal

question arising upon that is whether the property, the subject-matter of the gift, is to be valued at the date of the gift or at the date of the death. The matter is, perhaps, carried a step further here since there had been a change in the investment of a settled fund, and the question may be asked in this rather different form : is duty payable on the property as it existed at the date of the settlement—here the gift was by way of a voluntary settlement—or as it existed at the date of the death ? The question is answered that the material date is the date of the death, and, further, that such property must be aggregated with the free estate. A

AS TO ESTATE DUTY ON GIFTS *inter vivos*, see HALSBURY, Hailsham Edn., Vol. 13, pp. 269-273, paras. 272-280 ; and FOR CASES, see DIGEST, Vol. 21, pp. 24, 25, Nos. 133-137.]

Cases referred to :

- (1) *Strathcona, Lord, v. Inland Revenue Comrs.*, [1929] S.C. 800 ; Digest Supp. B
- (2) *Re Hodson's Settlement, Brooks v. A.-G.*, [1939] Ch. 343 ; [1939] 1 All E.R. 196 ; Digest Supp. ; 108 L.J.Ch. 200 ; 160 L.T. 193.

ORIGINATING SUMMONS taken out by trustees of a voluntary settlement under the Administration of Justice (Miscellaneous Provisions) Act, 1933, to determine whether estate duty was payable on the property as it existed at the time of the establishment of the settlement or as it existed at the time of the settlor's death. The same question arose with regard to a second summons, the facts being, *mutatis mutandis*, identical. The second question was whether the subject-matter of the voluntary settlement was aggregable with the free estate of the settlor so as to form one estate for the purpose of determining the rate of duty. The facts and arguments are fully set out in the judgment. C

Cyril King, K.C., and *Frederick Grant* for the plaintiffs the trustees of the settlement. D

J. H. Stamp for the defendant the Attorney-General. E

SIMONDS, J. : In Jan., 1936, Matt Payne was the sole registered proprietor of a number of patents and was the joint registered proprietor with his brother, William A. Payne, of other patents. He was at the same time a director of the British Thermostat Co., Ltd., in which he had a large interest. In the same month, an agreement was made between that company and Matt Payne and his brother for the purchase of all the patents for £13,883 in cash, with an option to acquire 8,000 £1 ordinary shares in the company at 35s. per share. On Jan. 29, 1936, Matt Payne, to whom I will refer as the settlor, executed a declaration of trust by which, after reciting the position in regard to the patents, and that, as part of a family arrangement for making some provision for his parents, his wife and issue and other members of his family, he was desirous of settling his interest in the patents and the proceeds of sale thereof, he declared that he and the trustees of that declaration, to be appointed as thereafter provided, would hold the same upon trust to permit the same to remain as invested or to sell and convert the same into money and invest the proceeds in the names of the settlor and his brother as therein mentioned. He then directed that the trustees should stand possessed of the trust fund upon certain beneficial F

trusts therein set out. It is unnecessary to refer to them in detail. On the same day, in part fulfilment of the agreement already made, the settlor in consideration of £10,000 then paid to him by the British Thermostat Co., Ltd., which I will call the company, assigned to the company the patents, or (as the case might be) his share and interest

A in the patents, referred to in the schedules to the assignment. It appears that the sum of £10,000 was in fact paid by the company to the settlor by a cheque drawn in his favour which he then paid into an account opened with the Westminster Bank in the names of himself and his brother as trustees. Also on Jan. 29, 1936, by a further assignment,

B to which the settlor, his brother, W. A. Payne, and the company were parties, after recitals whereby it appeared that the settlor desired to give to his brother the benefit of the patents mentioned in the first schedule thereto and the interest of the settlor in the patents mentioned in the second schedule thereto, and that his brother had agreed to sell

C the same to the company for £3,883, the settlor in consideration of £3,883, paid by the company to his brother, assigned to the company the patents, or (as the case might be) the interest of the settlor in the patents, mentioned in the first and second schedules thereto. The sum of £3,883 was duly paid to W. A. Payne. In neither assignment was

D anything said about the option to take shares in the company, but I assume that this option was in fact part of the consideration for the transfer of patents or patent rights, and that it became exercisable by the trustees and W. A. Payne in the proportion which £10,000 bore to £3,883. On Jan. 30, 1936, the trustees exercised the option so far as

E they had funds available, paying £10,000 to the company and becoming entitled to 5,714 and 10/35ths £1 shares, and on the same day W. A. Payne paid £3,883 to the company and acknowledged himself indebted to the company in the further sum of £117 by way of subscription for 2,285 and 25/35ths £1 shares and requested the company to issue 2,000

F of such shares to him and the remaining 285 and 25/35ths shares to the settlor and him as trustees of the declaration of trust. This was duly done, so that the trustees had allotted to them 6,000 ordinary shares of £1 each of which 285 and 25/35ths shares were in effect settled by W. A. Payne, the remaining 5,714 and 10/35ths being the investment

G of the sum of £10,000 settled by the settlor.

On Feb. 6, 1937, the settlor died and on May 6, 1937, W. A. Payne died. In each case less than three years elapsed between the date of settlement and death, so that claims arose for estate duty under the Finance Act, 1894, s. 2 (1) (c), as varied by the Finance (1909-10) Act,

H 1910. Certain further facts must be stated before the nature of these claims and the questions that arise on them are examined. The financial arrangements of the company are not very clearly stated in the evidence, but it appears that the capital prior to Jan. 18, 1936, was £50,000, divided into 25,000 preference shares of £1 each and 25,000 ordinary shares of £1 each, and that on that day it was increased to £150,000

by the creation of 100,000 further ordinary shares of £1 each. It further appears, though somewhat obscurely, that, at or about the same time that an option was given to the settlor and his brother to take up 8,000 shares at 35s. each, the directors of the company were authorised to issue 10,000 ordinary shares at the price of 30s. per share to existing shareholders and had placed at their disposal a further 1,385 similar shares to issue at the same price as they might consider in the best interests of the company. I mention this fact because some importance was attached to it by the plaintiffs, but there is no evidence that any shares were in fact issued for 30s. Further alterations were from time to time made in the capital structure of the company. In April, 1936, bonus shares at the rate of one share for every share held were issued to the ordinary shareholders. In May, 1936, the preference shares were converted into ordinary shares and each share was divided into four shares of 5s. each, and at the same time 48,000 shares resulting from the subdivision of certain shares were called "founders' shares" and given certain special rights, 16,000 of these shares being given to the trustees. At the same time the company was converted into a public company and adopted new articles of association. It was exceedingly prosperous, with the result that the ordinary shares of 5s. each were quoted at a high figure on the Stock Exchange. Of this fact the trustees took some advantage, realising some of the ordinary shares before the settlor's death, at which date the trust funds consisted of 15,000 ordinary 5s. shares and 16,000 founders' 5s. shares of the company, £911 8s. advanced on mortgage, 500 £1 shares in De Havilland Aircraft Co., Ltd., 65 £5 shares in Legal & General Assurance Co., Ltd., £100 of stock in the British Electric Traction Co., Ltd., 500 shares of £1 each in the Assurance & Finance Trust, Ltd., £3,500 2½ per cent. Funding Loan and £740 5s. 11d. in cash. No distinction has been or can be made between the shares settled by W. A. Payne and those purchased by the trustees with the £10,000 settled by the settlor, and it has been assumed throughout that I may treat 20 twenty-first parts of the fund as originating with the settlement made by the settlor and the remaining twenty-first part as provided by W. A. Payne. It is on this basis that the Attorney-General claims that estate duty is exigible on the death of the settlor upon 20 twenty-first parts of the value as at the death of the settlor of the trust funds as they existed at that date. It is this claim which is in the first place challenged by the plaintiffs who are the present trustees of the declaration of trust.

The claim to estate duty arises under the Finance Act, 1894, s. 2 (1), which provides that

Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (c) Property which would be required on the death of the deceased to be included in an account under section 38 of the Customs & Inland Revenue Act, 1881, as amended by section 11 of the Customs & Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom . . .

The Customs and Inland Revenue Act, 1881, s. 38, as so amended and re-enacted so far as is material for the present purpose reads as follows :

The personal property to be included in an account shall be property of the following descriptions, namely, (a) any property taken as a *donatio mortis causa* made by any person dying after Feb. 1, 1894, or taken under a disposition made by any person so dying purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made twelve months [now three years] before the death of the deceased.

I need not set out para. (b). Para. (c) provides as follows :

Any property passing under any past or future voluntary settlement made by any person dying on or after such day . . . whereby an interest in such property . . . is reserved . . . to the settlor.

The claim in this case arises under para. (a) ; I set out para. (c) only because counsel for the plaintiffs rely on the distinction between property taken under para. (a) and property passing under para. (c).

What then for the purpose of estate duty under the Finance Act, 1894, s. 2 (1) (c), is this "property taken" under the declaration of trust of Jan. 26, 1936, and how and as at what date is the value of such property to be ascertained ? It is at least clear what the settlor settled.

He had before executing the declaration of trust agreed to sell the patents and patent rights, the subject of that declaration ; and upon the footing that the agreement was carried out, as in fact it was, he could and did settle nothing more than the sale price which the company had agreed to pay him, that is to say, the sum of £10,000 with an option to acquire ordinary shares of the company at 35s. per share. That is clear, and this also is clear, that the only relevant date for the purpose of valuing property which passes on the death of the deceased is the date of his death : see Finance Act, 1894, s. 7 (5), and see *Strathcona, Lord*, v. *Inland Revenue Comrs.* (1). The question of difficulty upon which the

parties are at issue is what is the property of which the value has to be ascertained at the death of the deceased. The contention of the Attorney-General has already been stated : the property which passed on the death was the trust fund as it then existed. The plaintiffs on the other hand say that it is essential to see what was on Jan. 26, 1936, taken under this disposition made on that date ; it was the sum of £10,000 and an option, and it is that property so taken which must be valued at the death. Each side points to the hardships and anomalies which the other view involves. A gift of little value enormously appreciates by the date of death by reason of the skill and exertion of the donee.

Is he to pay duty upon a value largely created by himself ? A gift of great value becomes worthless by the date of death through no fault of the donee : is he to pay duty upon a value which would not in any case have existed at the death of the donor ? The dull subject of duties has been agreeably illustrated by examples taken from the racecourse, such as the colt optimistically regarded as a Derby winner by donor

and donee which proved to be the merest plater. This and other examples from animal life enliven the judgments given in the Court of Session in *Strathcona's* case (1); but I think that that case does not afford any authority for determining the point which I have to decide. It does decide that the date of valuation is the date of death, but, though I find much in the judgments to support any view as to the subject-matter of valuation, A upon this point I cannot find any majority in favour of one view or another. I must form my own opinion without the assistance that I should have welcomed from the Court of Session.

The real problem is to reconcile the two elements: (a) property taken under a disposition made in (say) 1936, and (b) a valuation to be made B in (say) 1939. Where, as under the Act of 1881, only an interval of three months between gift and death was in question, probably there was little difficulty; it is the enlargement of this interval to twelve months, and then to three years, that makes the problem so serious. It is surprising that the matter has not come up for judicial consideration, C for since my early days at the Bar I have frequently heard it discussed; presumably a compromise between the Estate Duty Office and the subject has been reached whenever the question has been raised.

It is to be observed that the disposition may be by way of gift outright or by way of settlement. It is the latter class of case with which D I have to deal, and I think it is the easier class of case. Where there is a settlement which persists to the date of death, it is not, I think, difficult to regard the trust property, in whatever state it may be at the death, as the same property as that which was taken under the disposition. The claim was thus formulated on behalf of the Attorney-General, E namely, that the subject-matter of the gift is in each case the settled fund, that is, in this case the property originally made subject to the declaration of trust, subject to and with the benefit of the duties and powers vested in the trustees by the trust, including the power of investing money and varying investments, and that the settled fund F as it actually existed at the death of the settlor is therefore the property deemed to be included in the property passing on death, and the valuation as at the date of death should relate to the investments and moneys representing the *corpus* of the trust fund at that date. In support of this contention, counsel for the Crown referred to other provisions of the G Finance Acts in which a continuing identity is attached to the property from time to time subject to a settlement through all its changes of investment. In particular he relied on the Finance Act, 1894, s. 4 (1), which dealt with the exemption of settled property which had borne duty from future estate duty where it passed to some person not competent to H dispose of it. He pointed out that this exemption had always been interpreted as applying equally to cases where the settled property remained unchanged through the period of settlement, and to those in which it had been sold and the re-invested proceeds became subject to the settlement. It is indeed clear that if this interpretation is not

right and the exemption is given only where the same property bears duty and then passes a second time, the obvious intention of the section would be largely defeated. Again, under the very section which I have to consider, it might well be, if the plaintiffs are right, that duty would be leviable both under para. (a) upon the actual property which was the subject
A of the trust disposition, and under para. (c) upon the settled property actually in existence at the death, for the Finance Act, 1894, s. 7 (10), which provides that estate duty in respect of property passing on any death shall not be levied more than once on the same death can have no operation except in respect of the same property.

B These are in my judgment cogent considerations in favour of the claim made by the Attorney-General. They reconcile, in a way which appears to be consistent with the general policy of the Act in dealing with settled property, the discordant elements to which I have referred. I am conscious that in isolating gifts by way of settlement from other forms of gift
C I am not solving all the difficulties which the section provides; nor should I be justified in thus isolating them if it was clear that, in the case of outright gifts, that which had to be valued at the death was the actual subject-matter of the gift regarded as in a hypothetical state of preservation in the condition in which it was given; for then it might well
D be said that the same principle must be applied to all kinds of disposition. However, in view of the difficulties—well nigh insoluble as I humbly think—that may arise in the case of outright gifts, it is permissible I think to adopt in regard to gifts by way of settlement a construction which is consistent with the policy of the Act, and does not appear to create
E any hardship to the subject or to cause any administrative inconvenience.

A further question has been raised, whether the *corpus* of the settled property in respect of which, as I hold, duty is payable under the Finance Act, 1894, s. 2 (1) (c), is aggregable with other property of the settlor passing on his death so as to form one estate for the purpose of determining the rate of duty. It has been urged on behalf of the plaintiffs
F that it is saved from aggregation by the proviso to sect. 4 of the Act upon the ground that the settlor never had an interest in the actual property which was in existence at the date of his death. In a sense this proposition is true, but I cannot give effect to it consistently with
G the decision of the Court of Appeal in *Re Hodson's Settlement, Brookes v. A.-G.* (2). In that case the question related to the aggregation of an accumulations fund which, as it was held, passed under sect. 1 of the Act, but every word of the judgment of the court on pp. 369 to 371 ([1939] 1 All E.R., pp. 209-211) is equally applicable to property the
H subject of a trust disposition which passes under sect. 2 (1) (c). I must, therefore, hold that the settled fund is aggregable with the settlor's free estate.

The same question is raised by another summons in regard to the estate duty payable upon the death of W. A. Payne upon the shares settled by him, that is to say, one twenty-first part of the property

originally settled. The same answer must be given. The settled fund as at the death of the settlor Matt Payne must be regarded as divided in the ratio of 20 to 1. From the 20 parts settled by him the estate duty and any other payments chargeable against such parts must be deducted ; the remaining part in the condition in which it was at the death of W. A. Payne must be valued at that date, and estate duty paid upon it at a rate determined by the aggregation of that one twenty-first part with his other estate. A

Declarations accordingly. Plaintiffs to pay costs of the Attorney-General.

Solicitors : *Wilkinson, Howlett & Moorhouse* (for the plaintiffs) ;
Solicitor of Inland Revenue (for the defendant the Attorney-General). B

[Reported by T. A. DILLON, Esq., and F. HONIG, Esq., Barristers-at-Law.]

PROVENDER MILLERS (WINCHESTER), LTD. v. SOUTHAMPTON COUNTY COUNCIL. C

[CHANCERY DIVISION (Farwell, J.), July 4, 5, 6, 7, 11, 12, 13, 14, 17,
18, 1939.]

Public Authorities—Exercise of statutory powers—Damage to riparian owner—Possibility of alternative method—Onus of proof. D

Waters and Watercourses—Riparian owners—Interference with flow of water by works executed under statutory powers—Reasonable steps to avoid interference—Onus of proof.

The plaintiff company and their predecessors in business had for many years carried on the business of millers at a mill which was situated on a river and which derived its water power from that river. The defendant council was responsible for the upkeep of a bridge carrying the highway over a stream which ran parallel with the river, and for the protection of the bridge and acting under statutory powers, the defendant council rebuilt an existing culvert so as to give greater support to the road and to provide a means of outlet for flood water. It was stated in evidence that no skilled person would have expected that the work carried out would have affected the working of the plaintiffs' mill, but the result of these works was to increase the flow of water in the stream and correspondingly and permanently to decrease the flow of water in the river so that the plaintiffs could not obtain a sufficient head of water to work their mill :— E

HELD : the onus was on the defendant council to show that there was no reasonably possible way of doing this other than the way which they in fact employed, and this onus they had failed to discharge. F

[EDITORIAL NOTE.] Public authorities in the exercise of their statutory duties are bound to have regard to the rights of other parties unless the statute prescribes the method in which the duty is to be performed or expressly exempts them from the results of the interference with such rights. The point in the present case was that no one would have expected the works carried out by the defendant council to affect the plaintiffs' mill, but the execution of the works having had that effect, the defendant council are liable to the plaintiffs. G

AS TO LIABILITY OF PUBLIC AUTHORITIES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 261-263, paras. 574, 575 ; and FOR CASES, see DIGEST, Vol. 38, pp. 38-50, Nos. 225-291.] H

Cases referred to :

- (1) *Manchester Corpn. v. Farnworth*, [1930] A.C. 171 ; Digest Supp. ; 99 L.J.K.B. 83 ; 142 L.T. 145.
- (2) *East Fremantle Corpn. v. Annois*, [1902] A.C. 213 ; 38 Digest 28, 158 ; 71 L.J.P.C. 39 ; 85 L.T. 732.
- (3) *British Cast Plate Manufacturers (Governor & Co.) v. Meredith* (1792), 4 Term Rep. 794 ; 38 Digest 10, 43.
- (4) *Boulton v. Crowther* (1824), 2 B. & C. 703 ; 38 Digest 28, 157 ; 2 L.J.O.S.K.B. 139.
- (5) *Sutton v. Clarke* (1815), 6 Taunt. 29 ; 38 Digest 22, 122.
- (6) *Galloway v. London Corpn.* (1864), 2 De G.J. & Sm. 213 ; 42 Digest 722, 1415 ; 10 L.T. 439 ; on appeal (1866), L.R. 1 H.L. 34.
- (7) *Southwark & Vauxhall Water Co. v. Wandsworth District Board of Works* (1898), 62 J.P. 519 ; 38 Digest 32, 178 ; *reversd. on other grounds*, [1898] 2 Ch. 603.

ACTION for an injunction restraining the defendants, their officers, workmen and agents, from doing any act which would in any way reduce the flow of water down the River Itchen to the plaintiffs' mill ; for a mandatory order forthwith to construct all necessary works and to take all necessary steps to restore the flow of water down the river to what it was before 1937, and for damages.

The plaintiffs were at all material times the owners in fee simple in possession and occupiers of Wharf Mill, Winchester, and their premises were situated by the main stream of the River Itchen, and comprised a mill which for over 100 years had been worked by water power derived from the River Itchen. This power had been adequate until the execution of the works by the defendant council of which the plaintiffs complained.

These works were undertaken by reason of the fact that the disrepair of a culvert was a danger to the highway, and in times of flood there was an escape of flood water into the highroad. The defendant council, therefore, rebuilt the culvert and made slight alterations, including the easing of a bend, in that part of the stream immediately adjacent to the culvert. There was evidence that skilled professional men would not have expected these works, which were carried out in a stream running parallel with the River Itchen, would have affected the flow of water in that river. In fact, the flow in that river was appreciably diminished and was, after the completion of the works, insufficient for the purposes of the plaintiffs' mill. It was proved that, during the time the old culvert was in use, there was not a free flow of water through it, and, in consequence, there was a holding up of the water at that point, which had the effect of increasing the flow in that part of the river passing the plaintiffs' mill.

C. E. Harman, K.C., and Wilfrid M. Hunt for the plaintiffs.

J. M. Gover, K.C., Roger W. Turnbull and G. T. Hesketh for the defendants.

FARWELL, J. : The plaintiffs have suffered from a diminution in the flow of the River Itchen as a result of works which have been done by

the defendant council, and the problem which I have to solve is whether or not the plaintiffs have suffered any actionable wrong, and, if so, whether they can make the defendant council liable for that wrong. The rights of a riparian owner are not seriously in dispute. A riparian owner is entitled to have all the water coming down a natural watercourse so far as it has not been appropriated under some right by other riparian owners, whether above or below. There are certain purposes for which riparian owners are entitled to use the natural water in the river, and persons may acquire prescriptive rights to use the water, but, subject to any such rights as those, riparian owners are entitled to have the natural flow of a river down its natural watercourse, and the whole of it, without any interruption at all. Moreover, in my judgment, if that natural flow is interfered with by any person so as to affect the riparian owner, that riparian owner is entitled to have resort to the courts, and is entitled, if he can prove his case, to relief by way of an injunction, even though he may prove no damage. As was said in one of the cases, if he does not take any steps in the matter, and allows another to abstract water from the river, at the end of the necessary period that other person will have acquired a prescriptive right, and the first riparian owner will have no remedy at all. Therefore, the proof of actual damage is not a necessary ingredient in obtaining relief in such an action. Once the riparian owner can show that his rights have been prejudiced by something which another person has done, then he is entitled to relief by way of injunction. Of course, the extent to which he is affected must be appreciable. The mere abstraction of a very small quantity of water might not well be sufficient to entitle him to relief, on the principle of *de minimis*. However, if there is a sensible alteration in the natural flow of the water by reason of the acts of some third party, then the plaintiff is entitled to relief. If that be so, assuming that I am right in saying that the defendant council have, by the work they have done, affected the flow in the River Itchen to the prejudice of the plaintiff company, then the defendants are liable for the consequences of what they have done, unless they can satisfy the court that they are protected by some Act of Parliament which has justified them in doing that which they have done notwithstanding that there has been damage to third parties. If the defendants had been private people, there could be no question but that the plaintiffs, on the facts as I have found them, would be entitled to relief.

The defendant council have imposed upon them by Acts of Parliament duties of maintaining and keeping up the roads in this particular district, and in that connection they are bound to see that any supports of the road are kept sufficiently in a state of repair to prevent the road from subsiding or from otherwise becoming unsafe. The way in which they carry out that duty is wholly a matter for them, and is not to be found prescribed in any Act of Parliament. They must execute that duty in a proper way, and are bound to protect, so far as is possible, the rights

of third parties. That is to say, their statutory obligations do not entitle them to invade other persons' rights unless there is no way by which those statutory duties can be performed except a way which necessarily involves damage to other parties. There is a vast amount of authority on this matter. I think that the effect of all the authorities
A may be found stated by VISCOUNT DUNEDIN in *Manchester Corpn. v. Farnworth* (1). I refer to that authority only for the purpose of citing from it a passage in the opinion of VISCOUNT DUNEDIN, at p. 183 :

B That brings me to say a word or two on what I conceive to be the well settled law on such matters. The cases are numerous ; . . . I mention these [authorities] to show that I have carefully considered the question but I think it would be of no real service to analyse exactly what was decided in each actual case.

If I may, with the very greatest respect, I will adopt what VISCOUNT
C DUNEDIN there says. The fact that I have not mentioned the cases in terms does not mean that I have not carefully considered them, but I do not think that any useful end would be served by my going through them. Then VISCOUNT DUNEDIN continued, at p. 183 :

D I believe their whole effect may be expressed in a very few sentences. When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorised. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.

E As I understand what is said there it is that, when Parliament imposes upon a body of persons duties which have to be carried out, it does not give them *prima facie* any right to invade other persons' rights. It may be that there are cases where Parliament does authorise a particular thing to be done, and to be done in a way which will lead to invasion of other parties' rights. In such cases as that, it is usual, though not
F universal, to provide for some compensation to the persons whose rights are so invaded. If, however, Parliament imposes duties on such people as the defendants in this case, but does not impose upon them the way or the time in which, or the method by which, those duties are to be performed, then in the performance of those duties the council have no
G right to invade other people's rights, and such an invasion may render the council liable in damages, or liable to an injunction, unless they can show that the work which was done was reasonably necessary, that it was properly done in all respects, and that, if it results in damage, there was no way of doing the work which would not have so resulted. As
H VISCOUNT DUNEDIN points out, a council in the position of the defendants here may have a defence if the only thing which can be shown is some fantastic method of doing some particular thing which is really quite unsuited to the object which is in view, although it may to some extent perform the duty which is required. The inevitableness of the damage must be considered in the light of scientific

knowledge at the time, and what is practically feasible. Subject to those matters, however, as VISCOUNT DUNEDIN points out, there is no right in a council in the position of the defendants to shelter themselves behind their statutory powers, and to damage other persons, unless they can show, not only that what they did was done in pursuance of the powers, and properly done in all respects, but also that they could not, in any reasonable use of the word, have achieved that end without doing the damage which has in fact been done. That passage, in my judgment, does sum up the effect of the earlier cases, and especially what LORD BLACKBURN said in more than one of the earlier cases. However, the difficulty, if there be a difficulty, which has been raised in my mind with regard to that passage in the speech is a judgment of LORD MACNAGHTEN in *East Fremantle Corpn. v. Annois* (2). Any decision or any *dictum* of LORD MACNAGHTEN is one which we all of us accept, and from which we should venture to differ with the utmost hesitation. LORD MACNAGHTEN was not in the habit of making statements which were not carefully considered, and were not founded upon what he believed to be the legal position. Therefore, when I find in a judgment of his a statement of the law as he understood it which does not perhaps entirely accord with the statement made by VISCOUNT DUNEDIN which I have just read, I naturally pause to consider how the two passages should be reconciled. LORD MACNAGHTEN said in the *East Fremantle* case (2); at pp. 217, 218 :

The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorised by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute. That was distinctly laid down by LORD KENYON, C.J., and BULLER, J. [in *British Cast Plate Manufacturers (Governor & Co.) v. Meredith* (3)], and their view was approved by ABBOTT, C.J., and the Court of King's Bench [in *Boulton v. Crowther* (4)]. At the same time ABBOTT, C.J., observed that if in doing the act authorised the trustees acted arbitrarily, carelessly, or oppressively, the law in his opinion had provided a remedy. Those words, "arbitrarily, carelessly, or oppressively," were taken from the judgment of GIBBS, C.J., in *Sutton v. Clarke* (5), decided in 1815. As applied to the circumstances of a particular case, they probably create no difficulty. When they are used generally and at large, it is not perhaps very easy to form a conception of their precise scope and exact meaning. In simpler language TURNER, L.J., observed in a somewhat similar case [*Galloway v. London Corpn.* (6), at p. 229] that "such powers are at all times to be exercised *bona fide* and with judgment and discretion." And in a recent case [*Southwark & Vauxhall Water Co. v. Wandsworth District Board of Works* (7)], where persons acting in the execution of a public trust were sued in respect of an injury likely to result from their act . . . COLLINS, L.J., observed [at p. 613] that "the only obligation on the defendants was to use reasonable care to do no unnecessary damage to the plaintiffs." In a word, the only question is, Has the power been exceeded? Abuse is only one form of excess.

It is to be noticed that in that case LORD MACNAGHTEN does not use any sort of expression about the onus of proving that there was no other way or anything of that sort which is to be found in the passage in the opinion of VISCOUNT DUNEDIN which I have read. I think, however, that that opinion of LORD MACNAGHTEN must be read, of course, as all judgments must be read—namely, in the light of the particular facts

- in that case—and I think that, when one looks at the facts there, it is quite obvious that the legislature had authorised the doing of the actual thing which was done, and that, that being so, unless the work was done improperly, or in some way which was not accepted and proper, the corporation could not be made liable for damage which the plaintiff in
- A that case had suffered. He was not, I think, taking into consideration cases such as this, where the power given by statute to the defendant council is a general power of obligation to do certain things, without any sort of limitation to be found in the Act itself upon the method in which they are to do those things. In my judgment, it was not necessary
- B for LORD MACNAGHTEN to state the law with any greater precision than he did state it for the purpose of that case, and I do not think that he intended to be wholly exhaustive. So far as a more exhaustive statement of the law is concerned, I think that it is to be found in the passage in the opinion of VISCOUNT DUNEDIN which I have just read. There are
- C cases in which it has been said that a corporation or council of this sort cannot be liable for damage to other people if it can be shown that they have done the work properly and in a reasonable way, and not negligently. WICKENS, V.-C., many years ago now pointed out that the word “negligent” or “negligently” was not a very happy word to use in
- D this connection, and so it seems to me, because negligence is not really what is meant in this sort of expression which one finds in many of the cases. For this purpose, negligence as used in those cases means adopting a method which does in fact result in damage to a third person, except in a case where there is no way of performing the statutory duty other
- E than the way so adopted. It is in fact negligent to carry out work which results in damage unless it can be shown that that way, and that way only, was the way in which it could be performed. That, in my judgment, is the way in which the word “negligence” is used in many of these cases.
- F In the present case, if one takes that as the law, can it be said that the defendant council have done this work in a way which renders them liable to the plaintiffs for what they have done, or, rather, for the damage which they have caused them? That the work was necessary I have no doubt whatever. The evidence on behalf of the defendants has satis-
- G fied me that the highway over the bridge was in such a state that an early rebuilding of the culvert was necessary. Further, I am satisfied that it was necessary to provide a means whereby flood water could be carried off, and thus avoid the risk of flooding the highway. To that extent, I am completely satisfied. Moreover, I am completely satisfied that,
- H from a purely engineering point of view, the work was done in a proper manner, and, apart from any injury which may have been done to other people, it was done in a proper way having regard to the small space in which the workmen had to work and the other circumstances of the case. However, I have still to be satisfied, if my view as to the law is correct, that there was no other way of doing it, and in that regard the

onus is on the defendants. If the law be that the onus is on the defendants to show that there was no other way in which this work could be done, then, in my judgment, they have failed to discharge that onus. No attempt really has been made to prove—and it may be that no attempt could be made to prove—that there was no reasonably possible way of doing this, other than that which they adopted. I should point out that the way which they adopted was unnecessary to the extent that to prevent flooding, which was one of the things the defendants desired to achieve, it was unnecessary to widen or increase the space in the culvert itself, so long as they made some provision to carry off the extra water in times of flood. To that extent, the actual work which they did was unnecessary. However that may be, the position, in my judgment, is this. The plaintiffs have shown that their rights have been affected by the diminution of the flow of water which reaches their mill—that is, by an appreciable diminution of the amount of water—and that, therefore, they are entitled to relief in this court. They are entitled to relief because their rights as riparian owners have been invaded. That state of affairs has been brought about, in my judgment, by the action of the defendant council. That act was done in pursuance of a statutory duty laid upon the defendant council, and no doubt they did their best to carry out their duty in a proper way. However, the fact that they have been unable to show the court that they could not have performed their duty in any other way prevents them from sheltering behind the Act of Parliament as a protection against the plaintiffs' claim in this case.

I should add that I desire to impress upon the defendant council and other persons in that position the desirability, from their point of view, as well as from other people's point of view, of—even in comparatively small matters like this—giving notice by advertisement or otherwise of what they are proposing to do, and, if possible, having plans available, so that, if people are going to object, or think that they are going to be damaged, they will have notice. If they think that they can properly intervene, they may be able to intervene before expense has been incurred in carrying out the work in question. That, of course, is not part of my business, except as a suggestion to the defendant council, and other councils in the same position, in order to avoid, if possible, the sort of action which we have all had to consider during these last ten days.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Bell, Pope, Bridgwater & Hughes*, Southampton (for the plaintiffs); *Robbins, Olivey & Lake*, agents for *F. V. Barber*, Winchester (for the defendants).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.]

EGERTON v. JONES.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Finlay, L.JJ.), July 25, 1939.]

Landlord and Tenant—Forfeiture—Relief—Lease mortgaged—Relief of mortgagees—Conditions of relief—Full indemnity to landlord in respect of all costs in proceedings for breach of covenant and relief from forfeiture—Law of Property Act, 1925 (c. 20), s. 146 (4).

A
B
C
A lessee committed a breach of covenant and the landlords thereupon brought an action for possession and obtained an order for possession and costs on Mar. 20, 1939. The lessee then applied for relief under the Law of Property Act, 1925, s. 146, which was refused. The lessee appealed against such refusal to the Court of Appeal and the appeal was dismissed with costs on May 15, 1939. All these costs were said to be irrecoverable. The mortgagees of the lease on Apr. 4, 1939, applied for relief under the above section and the master granted relief upon the terms that the mortgagees paid all the landlords' costs in the above proceedings. The judge in chambers struck out that part of the order which imposed the term of paying the landlords' costs. On appeal to the Court of Appeal, it was contended that the plaintiffs ought either to have made the mortgagees parties to the action or to have given them notice that there had been a breach of covenant, and also, that the lessors should have given notice to the mortgagees that the lessee was applying for relief:—

D
HELD: (i) the action was properly constituted without making the mortgagees parties to it. In an action by lessors to recover possession, there is no obligation to join mortgagees by sub-demise as defendants.

E
(ii) the plaintiffs were under no obligation to give notice to the mortgagees of the proceedings brought by the lessee for relief against forfeiture, and the mortgagees ought only to have relief on the terms of indemnifying the plaintiffs against all the costs, as between solicitor and client, which they had incurred, subject to the plaintiffs transferring to the mortgagees, if the latter so required, the benefit of the judgment for costs.

(iii) it should be a term of the grant of the relief to the mortgagees that they should pay the costs of this appeal to the Court of Appeal, as between solicitor and client.

Rogers v. Rice (1) followed.

F
G
[EDITORIAL NOTE. Relief against forfeiture is only given upon the terms that the lessor receives a full indemnity against costs. The indemnity extends to solicitor and client costs in all proceedings to which the lessor has been a party, both those for recovery of possession and those for relief against the forfeiture and all appeals in both proceedings. The mortgagee or underlessee obtaining such relief is entitled to the benefit of a judgment for costs obtained by the lessor against the lessee, but in many cases this will be valueless. The matter is one of considerable importance to mortgagees, particularly building societies, granting mortgages of leasehold property.]

AS TO RELIEF OF UNDERLESSEES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 263, 264, para. 296; and FOR CASES, see DIGEST, Vol. 31, pp. 495, 496, Nos. 6419-6426.]

H Cases referred to:

- (1) *Rogers v. Rice*, [1892] 2 Ch. 170; 31 Digest 489, 6362; 61 L.J.Ch. 573; 66 L.T. 640.
- (2) *Cholmeley School, Highgate (Wardens, Etc.) v. Sewell*, [1894] 2 Q.B. 906; 31 Digest 495, 6420; 63 L.J.Q.B. 820; 71 L.T. 88.
- (3) *Howard v. Fanshawe*, [1895] 2 Ch. 581; 31 Digest 482, 6311; 64 L.J.Ch. 666; 73 L.T. 77.

(4) *Hyman v. Rose*, [1912] A.C. 623 ; 31 Digest 488, 6356 ; 81 L.J.K.B. 1062 ; 106 L.T. 907.

(5) *Evans v. Bartlam*, [1937] A.C. 473 ; [1937] 2 All E.R. 646 ; Digest Supp. ; 106 L.J.K.B. 568 ; 157 L.T. 311.

APPEAL of the plaintiffs from an order of HILBERY, J., dated June 30, 1939, varying an order made by MASTER HORRIDGE on the application A of the respondents for relief against forfeiture. The facts are fully stated in the judgment of SIR WILFRID GREENE, M.R.

G. P. Slade, K.C., and *Sir Shirley Worthington-Evans*, for the appellants.

A. T. Denning, K.C., and *M. R. C. Overton* for the respondents. B

Slade, K.C. : The effect of the Law of Property Act, 1925, s. 146 (4), is to repose in the court a wide discretion. The discretion, however, is to be exercised upon clearly settled principles. The landlord is seeking a legal right and anyone who wishes to deprive him of it under the terms of sect. 146 (4) is seeking an indulgence. If the indulgence is granted, C the landlord should be placed, so far as possible, in the position in which he would have been had his right not been infringed. The statute should not be read as putting the landlord in a worse position than he would have been in if the matter had been dealt with in a court of equity. *Cholmeley's School v. Sewell* (2) seems to be the only case on this sub- D section in which the question of costs was substantially argued. [Counsel also referred to *Howard v. Fanshawe* (3).]

Denning, K.C. : The lessors had full knowledge of the existence of this mortgage as express notice was given to them. The discretion given to the court in any particular case should not be fettered by general rules : E *Hyman v. Rose* (4). The position between master and judge with regard to discretion is dealt with in *Evans v. Bartlam* (5). In the present case, the landlord gave no notice of the proceedings to the mortgagees and if he had obtained possession before the mortgagees learned of the proceedings, the landlord would have been able to keep the premises F beneficially free from the lease and the mortgage. The landlord should, therefore, not be allowed the costs as against the mortgagees. Moreover, if the mortgagees could have obtained possession at once under the terms of the mortgage deed, the right to apply under subsect. (4) would have come to an end. Unless the mortgagees had been joined as parties G before the landlord actually entered, they would have been excluded, and that is a matter to be taken into consideration. The exercise of the judge's discretion should not be overruled because the absence of any rule requiring notice would mean, in effect, that a landlord could squeeze out a mortgagee. [Counsel also referred to *Croft v. London and County H Banking Co.* (6).]

Slade, K.C., in reply.

The Law of Property Act, 1925, s. 146 (4), provides as follows :

Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, or for non-

payment of rent, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as underlessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case may think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sublease.

A

SIR WILFRID GREENE, M.R. : The application out of which this appeal arises was an application by mortgagees by sub-demise for relief under the Law of Property Act, 1925, s. 146 (4). The mortgagees applied *ex parte* for leave to appear in the action ; and then applied in the action for relief. The master made an order granting relief to the mortgagees upon certain terms. Some of those are common form, and need not be dealt with here. The objection to the terms imposed by the master's order related to that part of it which imposed upon the mortgagees, as a condition of obtaining relief, liability in respect of certain costs. Those costs were the costs of the action by the plaintiffs against the lessee, who, of course, was the mortgagor, and the costs incurred by the plaintiffs in relation to certain applications in the action by that lessee for relief for herself.

D

The order for possession was made on Mar. 20, 1939. At that time the lessee was the only defendant to the action. She applied for relief against forfeiture. She carried that application, unsuccessfully at each stage, as far as this court, which dismissed her appeal in relation to it on May 15, 1939. In the meanwhile, while those applications were pending, the mortgagees were informed by the lessee on Mar. 31, what had happened and what was happening. On Apr. 4, 1939, they applied for leave to appear. It seems that the costs which the lessee was ordered to pay in the ejectment action and the costs of her unsuccessful attempts to obtain relief against forfeiture, are in all probability irrecoverable against her personally. Upon that basis, which is really not disputed, the master by his order imposed, as a term of granting relief to the mortgagees, the obligation to pay to the plaintiffs, the lessors, the amount of the costs to which they had been put in those proceedings. There is a point as to the costs being between solicitor and client, to which I will refer later. HILBERY, J., on appeal, struck out from the master's order that part which imposed the term of paying to the plaintiffs those costs. From that order the present appeal is brought.

G

It has been contended that this is a case where the judge has exercised his discretion ; and that this court should not interfere with that exercise except according to well-known principles, which, it is said, do not operate in the present case. It is quite certain, on the one hand, that the discretion of the court is not to be fettered by rules. The discretion is given by statute, and must be exercised according to the circumstances of each particular case. On the other hand, it is equally true that, when a matter

H

involving discretion comes before a judge, there must be in every case a number of considerations which he ought to have in mind for the purpose of enabling him to exercise his discretion. If it appears that he has taken into consideration something which he ought not to have taken into consideration, or has omitted to take into consideration something which he ought to have taken into consideration, or if on all the facts this court is satisfied and convinced that the discretion has been wrongly exercised, it is the duty of this court to interfere. A

In the present case the judge, I think, cannot have had in mind, when he made the order he did, the fact that, without apparent justification, he was by his order not putting the plaintiffs back into the position that they would have been in if the forfeiture had not occurred, a position in which, I think it is not putting it too strongly to say, they are *prima facie* entitled to be ; nor do I think that he can have had in mind that the mortgagees, as sub-lessees, would have been by his order put into a better position than the actual lessee herself could ever have been in. In addition, it is said by counsel for the respondents that he must have had in mind—I am not sure whether the point was referred to by him at all when the matter was before him—the circumstance that the plaintiffs, in taking these proceedings against the lessee, were really doing nothing more than endeavouring to shield themselves from criminal consequences under the Criminal Law Amendment Acts. We have listened to the argument upon that point ; and it is sufficient to say with regard to that that if the judge had drawn any such inference, and had based an exercise of discretion upon it, he would, in my opinion, have been quite wrong in doing so. B C D E

This is not a case where the plaintiffs, the lessors, are seeking to enforce the special rights given by the Criminal Law Amendment Act in the case of brothels. They are merely, as lessors, enforcing the covenant in their lease, and the condition of forfeiture which they are directly entitled to do. The fact that by doing so effectively they may avoid the possibility of criminal liability, is in my opinion absolutely irrelevant to the question of the terms on which relief from forfeiture should be granted. Therefore, if, as it is suggested he did, the judge did take that matter into account, it would be sufficient, in my judgment, to allow the whole matter to be reviewed in this court. F G

The substantial point upon which counsel for the respondents said that the terms which the judge fixed were the right ones, was based upon the fact that when the plaintiffs began these proceedings, and during their continuance, they gave no notice to the mortgagees. Counsel said, and said truly, that if the ejectment action against the defendant had been carried to its conclusion, and the plaintiffs had re-entered, the mortgagees, as under-lessees, would have lost all right to apply for relief. That was settled as long ago as 1892, by a decision of this court, in *Rogers v. Rice* (1). Notwithstanding that decision, the legislature did not think fit in 1925 to alter the law as there laid down. Accordingly, in the case of a mort- H

gatee by sub-demise, that mortgagee is always at the risk of the lessor obtaining re-entry for breach of covenant without the mortgagee knowing anything about it ; in which case the mortgagee is completely shut out. Every mortgagee, therefore, knows that that is the risk he runs. If after taking a covenant from his mortgagor to observe the covenants in the lease, he takes no steps whatsoever to satisfy himself from time to time that no breach of covenant is taking place, he is always exposed to the risk that, behind his back and without his knowledge, the lessor will succeed in re-entering, and so determining the lease ; with the result that all possibility of relief from forfeiture is lost to the mortgagee. That is one of the risks of the game.

It is said by counsel for the respondents that, notwithstanding that circumstance, the plaintiffs in the present case ought either to have made the mortgagees parties in the first instance, or ought to have given notice to them of the fact that there had been a breach of covenant. With regard to the first of those suggestions, in my opinion, it is misconceived. The action was perfectly properly constituted without the presence of the mortgagees as defendants. The judgment obtained in it was in no way defective through lack of parties ; and it could have been enforced according to its terms. To say that there is some obligation upon the plaintiffs in such a case to join the mortgagees by sub-demise as defendants to an action to recover possession is quite wrong. There is no justification for it in practice or in principle. It is said here, however, that the fact that they did not join the mortgagees as defendants, ought to be made a ground for relieving the mortgagees of some of the terms which *prima facie* ought to be imposed upon them. I am quite unable to see how that can be so. The plaintiffs were doing what they were perfectly entitled to do ; and the mortgagees must run the risk. They were fortunate enough in this case to discover what was happening before re-entry. Even assuming that the plaintiffs would have re-entered without giving them notice—an assumption which I see no reason whatsoever for making—nothing could be said against them.

Then it is said (and a similar argument is based upon it) that notice ought to have been given of what was happening, but again, I can see no obligation in law or in propriety to give such a notice. What was happening in this case was that the plaintiffs, by a perfectly proper procedure, were pursuing their remedy. So long as the tenant was resisting, and attempting to get relief against forfeiture, they were bound to oppose her. They had no option save to oppose what she was doing. When that opposition came to an end, it so happened that the mortgagees had come on the scene ; but it does not in the least follow that, after the plaintiffs had disposed of the lessee and her application, they would necessarily have taken possession without informing the mortgagees. I do not think that we should be right in making any such assumption. The necessity of giving notice to the mortgagees in order to affect the mind of the court in the matter of terms, is something which I cannot

find exists. It seems to me the case is a perfectly plain and simple one. I cannot regard the conduct of the plaintiffs in not giving notice down to the time when the mortgagees came on the scene, as being anything in any way justifying the court in putting the plaintiffs in a position in which the mortgagees can obtain as against them relief without properly recouping the reasonable expenses to which they have been put in connection with this breach of covenant. The breach was committed by a person through whom the mortgagees derived title. The costs were incurred by the necessity of fighting that person. I cannot see how on principle it is right to say that the mortgagees ought to have relief except upon the terms *prima facie* of indemnifying the plaintiffs against the costs which they incurred. A B

I do not think there is any necessity to refer to any cases. They do not appear to me to throw any light upon the matter. In my judgment the judge can only have come to the conclusion that he did by taking into account matters which were not proper to be taken into account ; or by putting a wrong construction on the action of the plaintiffs in not joining the mortgagees, or giving them notice. If that circumstance is viewed in its proper light, it is not one which in my opinion ought to affect the judgment of the court in exercising its discretion. Therefore, the case is one in which this court is perfectly entitled, and having come to the conclusion to which it has come, is indeed bound, to interfere with the discretion of the judge. The result, therefore, is that the appeal must be allowed and the order of the master restored. C D

I must now deal with two minor points which have been referred to. The first is that the judgment obtained against the lessee for costs ought to be assigned to the mortgagees. That, indeed, is not disputed ; and, indeed, it was offered at an early stage in this litigation ; and there is no objection to incorporating a provision to that effect in the order. Secondly, it is said that the costs in question, which are the plaintiffs costs in the proceedings against the lessee, ought only to be party and party costs, and not solicitor and client costs. I am satisfied that there is nothing in that point. *Prima facie* the principle is that the plaintiffs should be indemnified against proper expenses, reasonably incurred. They will not get that indemnity if all they obtain are the party and party costs which the lessee was ordered to pay. E F G

MACKINNON, L.J. : I agree, and I do not think I need to add anything.

FINLAY, L.J. : I also agree, and I do not desire to add anything.

Appeal allowed with costs. Master's order restored subject to insertion therein of provision that plaintiffs transfer the benefit of the judgment, if the mortgagees so require. Costs of the appeal, as part of the terms of relief, to be as between solicitor and client, but otherwise as between party and party. H

Solicitors : Trower, Still & Keeling (for the appellants) ; Hewlett & Co. (for the respondents).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

CHIPCHASE v. CHIPCHASE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P., and Henn Collins, J.), July 21, 1939.]

Husband and Wife—Proceedings before justices for desertion and maintenance—Presumption of death of previous husband—Not heard of for over seven years—Banns of second marriage read in wife's maiden name—Validity of second marriage—Marriage Act, 1823 (c. 76), s. 22.

The appellant had been married in 1915, but shortly afterwards her husband deserted her and she had not seen him or heard of him since 1916. In 1928, she married the respondent. For this wedding the banns were read in her maiden name, and she was married in that name.

The present proceedings were summonses taken out against the respondent and based on charges of adultery, desertion and failure to maintain. The appellant gave evidence that she had disclosed to the respondent her previous marriage, and that, for at least two years before her second marriage, she had been commonly known by her maiden name. The justices held that, there being no evidence that the first husband was dead, the first marriage was still subsisting, and the second one invalid. They further held that the second marriage was void, because the appellant had given her wrong name intentionally and wilfully, and there had therefore been no due publication of the banns. The wife appealed to the Divisional Court:—

HELD: (i) it was impossible to say that there was no evidence that the first husband was dead, having regard to the presumption of law that a person who has not been heard of for over seven years is dead.

(ii) in order to invalidate a marriage on the ground of want of due publication of banns, it is not sufficient to show that a party knowingly and consciously gave a wrong name. A wilful intention to conceal identity must be proved.

[EDITORIAL NOTE. The absence of a person without being heard of for seven years raises a presumption that he or she is dead. This presumption is rebuttable by evidence that the person has been alive during that period or by proof that he or she is subsequently alive, but, until the presumption is rebutted, it must be taken as proved that that person is dead. Again, any person can acquire a name by reputation, and the acquisition of such a name can be proved only by proving that the person has consistently used that name, and has been known and addressed by that name by persons having dealings with him or her. This is a matter of evidence and the court has only to be reasonably satisfied that, at the material time, the person was known by the name contended for. In the case of banns of marriage, there is the further requirement, that publication in a false name, must be in a name false to the knowledge of both parties to the intended marriage and must be used with the intention of concealment. Unless both these facts are proved, the marriage is valid.

AS TO PRESUMPTION OF DEATH, see HALSBURY, Hailsham Edn., Vol. 13, pp. 629-634, para. 701; and FOR CASES, see DIGEST, Vol. 22, pp. 165, 166, Nos. 1408-1422.

AS TO PUBLICATION OF BANNS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 572, 573, para. 859; and FOR CASES, see DIGEST, Vol. 27, pp. 46-49, Nos. 246-298.]

Cases referred to:

- (1) *Re Phene's Trusts* (1870), 5 Ch. App. 139; 22 Digest 164, 1402; 39 L.J. Ch. 316; 22 L.T. 111.
- (2) *R. v. Tibshelf (Inhabitants)* (1830), 1 B. & Ad. 190; 27 Digest 47, 261; 8 L.J.O.S.M.C. 120.

- (3) *R. v. Wroxton (Inhabitants)* (1833), 4 B. & Ad. 640; 27 Digest 47, 254; 2 L.J.M.C. 64.
- (4) *Wiltshire v. Prince* (1830), 3 Hag. Ecc. 332; 27 Digest 48, 262.
- (5) *Orme v. Holloway (falsely calling herself Orme)* (1847), 5 Notes of Cases, 267; 27 Digest 47, 259.
- (6) *Midgeley (falsely called Wood) v. Wood* (1859), 4 Sw. & Tr. 267; 27 Digest 48, 269; 30 L.J.P.M. & A. 57.
- (7) *Small v. Small & Furber* (1923), 67 Sol. Jo. 277; 27 Digest 48, 276.

APPEAL by the wife against a decision of the Hendon justices whereby they dismissed a complaint based on charges of adultery, desertion, and failure to maintain. The facts of the case are fully set out in the judgments.

H. J. Phillimore for the appellant.

B. Stuart Horner for the respondent.

SIR BOYD MERRIMAN, P.: This is an appeal from the Hendon justices who dismissed a complaint by a wife against her husband based on several charges of adultery, desertion and failure to maintain respectively, on the ground that the wife had failed to prove that there was an existing marriage. We have come to the conclusion that it is essential that this case should be re-heard by the justices, for we think that there are matters in connection with the two points, on which the justices gave their decision, to which they have not yet given proper or sufficient attention. I wish to say, however, that the justices decided this matter as one of law and expressed their willingness, on the face of their judgment, to do anything that they could to help if the matter were taken to a higher court. They have given us the benefit of a very full note and a very careful statement of their reasons, and it is only in order to help them when this matter is reconsidered that I think it necessary to go somewhat fully into the points that have arisen.

This wife had formerly been married to a man named Leetch. Without going into the details of her evidence, it is quite plain that, very soon after her marriage in 1915, he deserted her and, according to her evidence, she has never seen him or heard of him since Jan., 1916, which was within a year of her marriage. The wife having given evidence on this point, and having given such evidence as she was able to give about the circumstances in which the husband left her, relied on the presumption that he was dead when, in 1928, she went through the ceremony of marriage with the man against whom she brought the present complaint. The justices have held that having married Leetch in 1915, and, there being no evidence that the marriage was not lawful or that it had been dissolved or set aside by process of law, about which point there is no dispute, and that there was no evidence that Leetch was dead and that, therefore, they were of opinion that the marriage with Leetch was a subsisting marriage and that the ceremony with the defendant, the respondent to this appeal, in Aug., 1928, did not appear to them to constitute a valid and binding marriage. I am going to deal first with this point. On the face of the

- wife's evidence, she had not heard of her husband for more than seven years at the time when she went through the ceremony of marriage with the man whom she is now charging as her husband ; in fact, 12 years or thereabouts had elapsed at the time of the second ceremony of marriage. It is quite true that she was asked questions about the nature of the
- A** inquiries she had made, opportunities she had of inquiring from his relatives, and so forth, but her evidence was that she had not heard of her husband from the moment to which I have already referred, at the beginning of 1916, and had no idea whether he was dead or alive. The justices had given their decision expressly on the ground that, there being
- B** no evidence that Leetch was dead, they were of opinion that the first marriage was still subsisting. It seems to me impossible to say that there was no evidence that Leetch was dead, having regard to the presumption which arises in circumstances of this kind. That presumption—I am taking the statement of it from the judgment of SIR G. M. GIFFARD, L.J.,
- C** in *Re Phene's Trusts* (1), at p. 144—is that the law presumes a person who has not been heard of for over 7 years to be dead, but in the absence of special circumstances draws no presumption from that fact as to the particular period at which he died. I need not read for present purposes the rest of the statement of the legal doctrine. Once it is shown that
- D** the wife has not heard of her husband for 7 years that presumption arises. It is not, of course, an irrebuttable presumption, and it may take very little evidence to rebut it having regard to the particular circumstances of a particular case, but, if that proposition is established affirmatively to the satisfaction of the justices, then it is impossible to
- E** say there is no evidence of a husband having been dead. It is in that direction, in my opinion, that the question of the nature of any such inquiries that the wife has made arises. There is nothing in this statement of presumption which I have quoted, about reasonable belief or inquiries or probability of life or any of those things to which counsel
- F** for the respondent has referred us. However, if a person was given ground for supposing that the other party to the marriage was alive and deliberately turned a blind eye and refused to make obvious inquiries, it might very well be that the court would not accept it as proved that the party had not been heard of for 7 years. It seems to me that in
- G** discussing this question the reasonableness of inquiries that have been made in regard to the circumstances of the case, whatever they may be, should be ascertained. It is in this connection that that matter is important, but once it has been established to the satisfaction of the tribunal that the party has not been heard of for 7 years, then the
- H** presumption arises although, of course, it is a presumption which can be rebutted.

In this particular case the question is whether the wife was entitled to rely on that presumption. At the time when she went through the ceremony of marriage in 1928, not merely 7, but 12 years, had elapsed, but it goes without saying that the justices have got to judge of that

question as it appears to them in 1939. The wife, on the one hand, is entitled to pray in aid the lapse of yet another 10 years, during which she says she has not heard of her husband. The husband, on the other hand, might be shown by some evidence, the nature of which we are unaware, but which it is suggested is in existence, actually to have been alive in 1928. In taking into account the further lapse of 10 years since the ceremony of marriage in 1928, it will, no doubt, be open to the justices to discount that further lapse of time in connection with the non-appearance of the husband, by reason of the fact that the second marriage did not take place in the name of Leetch, but in the wife's maiden name. To put the matter in another way, there was nothing in the nature of the second marriage itself to attract the attention of the first husband, if, in fact, he was alive. Those are all the circumstances which the justices will be able to take into account. At the end of it all the question remains: is it established that the husband had not been heard of for 12 years or so before the second ceremony of marriage, and is there anything in the evidence to rebut the presumption that he was dead? I do not feel that that approach to the matter has been considered by the justices at all. I want, before leaving this part of the case, to observe that it is very necessary to distinguish the consideration of the presumption which I have been discussing, and the considerations which apply to the Matrimonial Causes Act, 1937, s. 8. Under the latter section, once the spouse has satisfied the court that there is reasonable ground for supposing the party to be dead within the terms of the section, the marriage may be dissolved, and once the decree absolute has been pronounced, it is completely irrelevant whether the party is afterwards shown to have been alive at the material time or not. That, of course, is not the case in connection with the presumption that I am now discussing, for if it is shown that the husband is alive, this second marriage may be declared to be null and void at any time. In my opinion, therefore, the justices must re-hear the matter on the question of whether the wife had established that at the time when she went through the second marriage the husband must be presumed to have been dead, and unless there is anything which justifies them in refusing to find that the husband had not been heard of for the preceding period of 12 years, or which rebuts the presumption arising therefrom that he was dead, something in effect to show that he was alive after 1928, they ought, in my opinion, to say that she has established that the marriage was valid and subsisting in so far as that point is concerned, and decide the rest of the case accordingly.

The justices have also decided that the second marriage was not valid and subsisting on the ground that there was no due publication of the banns. They found that the wife gave her wrong name intentionally and wilfully, and that there was no due publication of banns. They therefore held that the marriage was void to all intents and purposes. It is quite true, that the wife, not having heard of her husband as she

- says for 12 years, and never having had any real home with him, was married in her maiden name. She says that she had disclosed to her second husband the fact that she had been married to Leetch and, therefore, both parties knew of the use of the false name. The question, however, is whether the misuse of her maiden name does bring about the
- A result that there was no due publication of banns, and, therefore, nullity of the marriage to all intents and purposes. It may be that it does, but I am not satisfied on the material before us that the justices' minds have been directed to the real question. Evidence was given that for 2 years at any rate before this marriage, the wife had been commonly known
- B by her maiden name. Counsel for the wife assures us that he has in fact got evidence, which could be placed before the justices, and which carries that common use of her maiden name very much further back than that; some seven years, I think he told us, before the ceremony of marriage. I think it is quite clear that the justices have not had their minds directed
- C to the established interpretation of the Marriage Act, 1823, s. 22, on which this question depends. The wording of the Act is:

Provided always, that if any persons shall . . . knowingly and wilfully intermarry without due publication of banns or licence . . . the marriages of such persons shall be null and void to all intents and purposes whatsoever.

- D It is required by sect. 7 that the true christian name and surname shall be given to the parson for the purpose of publication of banns. Our attention has been called to *R. v. Tibshelf (Inhabitants)* (2) and *R. v. Wroxton (Inhabitants)* (3), which show quite plainly that the words "knowingly and wilfully" were deliberately introduced into sect. 22 of
- E the Act of 1823 in order to mitigate the hardship which had arisen under the earlier Act and was exemplified by the case of *R. v. Tibshelf (Inhabitants)* (2), that it was quite immaterial whether the falsity in the declaration had arisen by accident or design and whether such design be fraudulent or not. I am content for the purposes of directing the
- F minds of the justices to the points they have to decide, to call attention to the fact that, in *R. v. Wroxton (Inhabitants)* (3), DENMAN, C.J., cited with approval the case of *Wiltshire v. Prince* (4) decided in the Ecclesiastical Courts after the Act of 1823 had passed, in which DR. LUSHINGTON expressly founded his judgment of nullity on the fact
- G that both the man and woman were aware that banns had been published in a manner calculated to conceal the identity of one of the parties. The same appears even more emphatically in the judgment of SIR H. JENNER FUST in *Orme v. Holloway* (5), where he says the construction of this Act is that, in order to set aside a marriage on the ground of undue
- H publication of banns, it is necessary for both the parties to be cognisant of fraud; it is necessary first to prove that there has been a fraud and secondly that both parties were cognisant of the fraud and knowingly and wilfully entered into the marriage without due publication of banns. The other authorities, to which our attention has been called, such as *Midgley (falsely called Wood) v. Wood* (6), are to the same effect. The object

of this Act was to prevent clandestine marriages ; there must be an element of intentional concealment of identity before it can be said that the marriage is void for undue publication of banns. I do not think that that element of the matter has been sufficiently considered by the justices. It is quite true that the case of *Small v. Small* (7) was cited. In that case unquestionably there was the element of deliberate concealment, and the motive was quite plain. It may be, of course, that this is such another case but, at any rate, the wife must have the opportunity of establishing, as her counsel says she is able to establish, that the name in which she was married was the name by which for years she had been commonly known, and that there was no intention to conceal her identity in the circumstances of this particular case. A

I have dealt with the two points separately but, of course, there is a certain amount of connection between the two issues with which the justices have to deal. The more successful the wife is in proving that her husband had completely disappeared beyond her ken, the more likelihood is there, after the short history of the earlier marriage in 1915, in her reverting, and reverting notoriously, to her maiden name. If it is established to the satisfaction of the justices that her maiden name was the name by which she was commonly known, and which she was using amongst her friends and acquaintances, there would be the strongest possible evidence that it was not used for the purposes of concealment. The more completely the justices are satisfied that the husband has disappeared, the less is it likely that it would be used for the express purpose of concealing the particular marriage from him and his relations. However, these are all matters which will have to be considered by the justices, but considered from the point of view from which they have not hitherto been considered. If, of course, the justices come to the conclusion that the wife had established that it is a subsisting marriage, it will then be for them to deal with the merits of the case which have not hitherto been fully before them. B C D E F

HENN COLLINS, J. : I am of the same opinion. The present appellant, the wife, took out summonses against the present respondent, her husband, which were grounded on the fact that he was the husband. His answer was : " I am not your husband," and he based that contention on two grounds, first, that at the time when he went through a ceremony of marriage in 1928 with the present appellant she was a married woman, the wife of a living husband, and, secondly, that his own marriage had been celebrated without due publication of banns. The appellant's answer to the first point was : " I have not heard of the man that I married in 1915 since the year 1916 or thereabouts, a lapse of more than 7 years, and I was entitled in 1928 to the presumption of law in my favour that my husband had died, and I can show that that presumption has not since been rebutted, down to the year 1939, when these proceedings were heard, because in that time no sign of him has been forthcoming." G H

Upon that matter we have the careful statement of the justices of the reasons for their contention. They have held that in those circumstances they have no evidence that William James Leetch is dead. That appears to have been a wrong approach to the matter. As soon as it was established, if it was established in fact, that the former husband,

- A William James Leetch, had not been heard of for 7 years, then undoubtedly there was evidence for their consideration that he was dead, and it was more than evidence because it was a presumption and conclusive evidence until it was rebutted by evidence which showed, in fact, that he was alive. I am not for one moment going to trespass on the question of fact which is still for their determination : namely, whether she is or is not entitled to the benefit of that presumption, but because I feel that their approach is the wrong one, the case ought to go back to them for reconsideration of the whole matter.

- As to the second point, namely, the undue publication of banns, the matter seems to me to rest thus. The justices seem to have thought that the fact that a party to a marriage knowingly and wilfully, in the sense of consciously, used a name to which she or he is not by law entitled, is conclusive of the matter. Again I think that that is a wrong approach. I think the real question has been accurately propounded in *Wiltshire v. Prince* (4), in which DR. LUSHINGTON founded his judgment on the facts that both the man and woman were aware that the banns had been published in a manner calculated to conceal the identity of one of the parties. I think the word "calculated" in that connection, taken along with the words "knowingly and wilfully," is used in the sense of design to conceal the identity of the parties. It will, therefore, be for these justices to consider what I feel certain they have not had brought to their attention, namely, the question whether in giving her original maiden name, as the present appellant did, she intended wilfully to conceal her identity. That is a matter on which I form no opinion at all on the evidence ; it is entirely for the justices, and I think that, on that ground also, the case should go back to them for re-hearing.

I think that SIR BOYD MERRIMAN, P., has expressed himself conclusively about it ; the question really is whether both spouses intended that her identity should be concealed.

- G Case remitted to the justices for re-hearing.

Solicitors : *Wingfields, Halse & Trustram* (for the appellant) ; *Edgar H. Hiscocks* (for the respondent).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

Re WALKER, PUBLIC TRUSTEE *v.* WALKER.

[CHANCERY DIVISION (Luxmoore, L.J., sitting as an additional judge),
July 28, 1939.]

Bankruptcy—Forfeiture clause—Annuity—Discharge from bankruptcy operating after death of testator and before any payment of annuity due—Whether forfeiture clause operates—Bankruptcy Act, 1914 (c. 59), ss. 26 (9), 28 (2), 29 (2), 38 (2) (a), 47 (1). A

The testator, who died on Nov. 16, 1938, in his will directed his executor "to pay out of the income of my estate the sum of £250 per annum to my brother Leonard Unett Walker during his life until he shall assign charge or otherwise dispose of the said income or some part thereof or become bankrupt or do something whereby the said income if belonging to him or some part thereof would become payable to or vested in some other persons." Leonard Unett Walker was adjudicated bankrupt on Sept. 29, 1937. He applied for his discharge, and on Nov. 15, 1938, it was ordered that he be discharged as from Dec. 15, 1938 :— B

HELD: the trustee in bankruptcy's title to the annuity would, but for the forfeiture clause, have taken effect as on Nov. 16, 1938, on which date the annuity to Leonard Unett Walker would have vested in him. The forfeiture clause therefore operated to prevent the annuity vesting. C

[EDITORIAL NOTE. The question here is whether for the purposes of the operation of the forfeiture clause, the material date is the death of the testator, or the date at which the first instalment of the annuity became legally payable. The decision is in favour of the former date, it being held that the annuity vested at the date of the death. D

AS TO FORFEITURE CLAUSES, see HALSBURY, Hailsham Edn., Vol. 2, pp. 199-203, para. 270; and FOR CASES, see DIGEST, Vol. 5, pp. 669-673, Nos. 5937-5956.] E

Cases referred to :

- (1) *White v. Chitty* (1866), L.R. 1 Eq. 372; 5 Digest 664, 5898; 35 L.J.Ch. 343; 13 L.T. 750.
 - (2) *Re Forder, Forder v. Forder*, [1927] 2 Ch. 291; Digest Supp.; 96 L.J.Ch. 314; 137 L.T. 538.
 - (3) *Ancona v. Waddell* (1878), 10 Ch.D. 157; 5 Digest 669, 5935; 48 L.J.Ch. 116; 40 L.T. 31.
 - (4) *Re Evans, Public Trustee v. Evans*, [1920] 2 Ch. 304; Digest Supp.; 89 L.J.Ch. 525; 123 L.T. 735.
- F

ORIGINATING SUMMONS to determine whether upon the true construction of the testator's will the trust to pay out of the income of the testator's estate the sum of £250 per annum to Leonard Unett Walker during his life until the happening of any of the events therein mentioned had failed or determined by reason of the bankruptcy of Leonard Unett Walker during the lifetime of the testator. The facts and arguments are fully set out in the judgment. G

Sir Hugh Lucas Tooth for the Public Trustee, the plaintiff.

R. Cozens Hardy Horne for the first defendant.

J. A. Wolfe for the second defendant.

Roger W. Turnbull for the third and fourth defendants. H

LUXMOORE, L.J. : By his will dated Dec. 28, 1931, John Walker directed the Public Trustee (who was appointed executor and trustee of his will) :

To pay out of the income of my estate the sum of £250 per annum to my brother Leonard Unett Walker during his life until he shall assign charge or otherwise dispose of the said income or some part thereof or become bankrupt or do something whereby the said income if belonging to him or some part thereof would become payable to or vested in some other persons whichever of the said events first happens and if the trusts hereinbefore declared shall fail in the lifetime of my said brother my trustee shall pay the said sum of £250 per annum to all the children of my said brother in equal shares during the lifetime of my said brother. And I declare that my trustee shall pay the sum of £250 to the personal representatives of my brother for one year after his death for the benefit of his family.

A The testator died on Nov. 16, 1938, and his will was proved by the Public Trustee on Mar. 14, 1939. The testator's brother, Leonard Unett Walker, survived him. He has had three children, namely, the defendants Marguerite Kathleen Iris Marshall, John Bryan Walker and Penelope Ann Walker. He was adjudicated bankrupt on Sept. 29, 1937. He subsequently applied for his discharge in bankruptcy, and on Nov. 15, 1938, the day before the testator's death, an order was made in the county court of Kent, holden at Canterbury :

that the bankrupt's discharge be suspended for one month and that he be discharged as from Dec. 15, 1938.

B On May 5, 1939, the Public Trustee took out the originating summons, which is now before me, for the determination of the question whether upon the true construction of the will of the testator the trust to pay out of the income of the testator's estate the sum of £250 per annum to Leonard Unett Walker during his life until the happening of any of the events therein mentioned has failed or determined by reason of the bankruptcy of Leonard Unett Walker during the lifetime of the testator. The defendants to the originating summons are Leonard Unett Walker and his three children. It is admitted that if there had been no discharge in the bankruptcy the forfeiture clause would have been effective notwithstanding the words of futurity in which it is couched, and the gift over to the children of Leonard Unett Walker would have taken effect. It is argued, however, that, as the discharge took effect before any payment in respect of the annuity had been made or could legally have been demanded, the court, in construing the provisions of the forfeiture clause, ought to stretch the words so as to confine their operation to the existence of a bankruptcy at the date when the first payment in respect of the annuity was made or could have been demanded legally.

C In support of this argument, reliance was placed on a number of cases in which the material bankruptcy, though existing at the date when the gift became operative, had been annulled before any payment in respect of that gift had been made or could be demanded. The earliest of those cases is *White v. Chitty* (1). In that case the material words of the clause of forfeiture were [at p. 373] :

Provided always, and I hereby declare, that if my said sons or grandsons, or any or either of them, shall respectively be outlawed or declared bankrupt, or shall

assign, charge, or incurber his or their respective life interest or life interests in the said trust premises respectively, or any part or parts thereof respectively, or shall do or suffer anything whereby the same or any part thereof respectively would, through his or their act or default, or by operation or process of law, or otherwise, if belonging absolutely to him or them, become vested in or payable to some other person or persons, then and thenceforth the rents to which, but for this provision, he or they respectively would be entitled, shall, during the remainder of his or their life interests therein respectively, from time to time sink into and be added to and form part of my general personal estate.

Before the testator's death one of his sons had been adjudicated bankrupt. No creditors' assignee had been appointed, but at the date of the testator's death the bankrupt son had not obtained his discharge. Some four months after the testator's death, the bankruptcy was annulled with the consent of the creditors. The question to be determined was whether the forfeiture clause had taken effect or not. SIR W. PAGE WOOD, V.C., after reading the forfeiture clause, said, at p. 375 :

Now, these words, certainly, so far as they go, would compel the court to hold . . . that this bankruptcy, though having taken place anterior to the date of the will, is such a bankruptcy as, if it were continuing, would authorise the court to declare that a forfeiture had taken place, . . . although the words of futurity in this case [that is, the case before him] are rather stronger than those which occurred . . .

in certain cases to which reference had been made in the argument before him. He added, at p. 376 :

The testator's attention is clearly not directed to the declaration of bankruptcy, or to the period when the declaration may take place ; but only to this—that the property intended for the objects of his bounty shall not pass to a stranger. He does not wish that the gift shall be a benefit to be conferred upon creditors, or upon any one other than the devisee. The true intention of his will, therefore, requires that the words of futurity should be stretched so as to include a bankruptcy existing at the date of his death. In this case, the bankruptcy which existed at the death of the testator never proceeded beyond this. There was such an official assignee appointed as that the estate of Charles Chitty vested in him, but no creditors' assignee was appointed ; nothing more was done ; the official assignee took no proceedings by ejectment or otherwise to recover possession ; and he never was in possession, for before any rents had accrued, or could possibly accrue, the bankruptcy was annulled. I quite agree . . . that the annulment of the bankruptcy could not have affected the rights of the plaintiffs, if a forfeiture had already occurred. But the question is, has a forfeiture occurred, when, before any actual demand made, or possession taken by the official assignee, before one sixpence had accrued to him, the bankrupt, by his diligence and activity, obtained an annulment of the bankruptcy, so that at the time when the first rents accrued, there was no hand but his to receive them ? That involves, to some degree, the question of the effect of annulment, and of what appears to be the state of the authorities on the subject.

After dealing with some of the earlier authorities, SIR W. PAGE WOOD, V.C., continued at p. 377 :

But here the annulment was made with the consent of the creditors. Then I have to consider—regard being had to all the authorities . . . whether or not this gentleman, having succeeded in getting the bankruptcy annulled before any part of the property was acquired under the forfeiture clause, must be regarded as having forfeited his rights, on the ground that, before the testator died, this adjudication took place. I think, having regard to those cases in which the courts have stretched the words of testators, by making expressions which sound in the future apply to the past, in order to effectuate the intent, and to prevent the fund going into other hands than those of the objects of his bounty, I am bound to hold that the act of forfeiture in this instance never occurred, because this gentleman has always been in possession and receipt of these rents, nobody else having been in a position to receive them.

But it has, I think, been made plain by the later cases that, if any payment has been made or could have been demanded between the time when the gift takes effect and the date of the annulment, the fact of the annulment will not prevent the operation of the forfeiture clause.

- I think it is sufficient to mention *Re Forder* (2). In that case, under
- A the testator's will (the testator having died in 1910) a beneficiary became entitled on the death of his mother to a share in the income of the residuary estate. He was also entitled under the will in expectancy upon the death of his sister to a further share of the income, and in the event of his becoming the longest liver of his sister and the other beneficiaries, to the entire
- B income and capital of the testator's estate. The will provided that, in the event of any beneficiary becoming bankrupt or assigning, charging or incumbering his or her share, such beneficiary should forfeit such share, which should thereupon devolve as thereinbefore provided in case of his or her death. The mother died on Dec. 14, 1925, leaving the
- C beneficiary, who was then an undischarged bankrupt, and his sister her surviving. The testator's estate comprised a large number of freehold cottages, many of which yielded weekly rents, besides investments in stocks and shares and a sum outstanding on mortgage. It had been the custom of the trustees to state half-yearly accounts of income on
- D May 2, and November 2 in each year. On Apr. 7, 1926—that is 4 months after the death of the mother—the bankruptcy was annulled. The summons was taken out to determine whether the forfeiture clause had taken effect or not, and when it came before CLAUSON, J., there was evidence that, after deducting outgoings from the gross amount of income
- E received by the surviving trustee during the half-year ending May 2, 1926, there was in the trustee's hands a net balance available for distribution; but there was no evidence that at any time between the death of the mother and the annulment of the beneficiary's bankruptcy the trustee had in his hands moneys immediately payable. CLAUSON, J., held that the forfei-
- F ture clause had not taken effect. The matter went to the Court of Appeal, where further evidence was admitted showing that for a number of years it had been the practice of the trustees after discharging current outgoings to prepare a half-yearly account on May 2 and Nov. 2 in each year, of the rents and income received by them, and then divide
- G and pay the undistributed balance of income amongst the beneficiaries. During the currency of the half-year their practice had been to make monthly payments of £20 to the mother on account of her ultimate share of the current half-year's income, and one of such payments had been made to her on Nov. 1, 1925, and another on Dec. 1, 1925, imme-
- H diately preceding her death. In the several months between the date of her death and May 2, 1926, the surviving trustee had at different times paid himself certain moneys on account of his share of income, indicating thereby that there was income then available for the other beneficiaries. It was held, reversing the decision of CLAUSON, J., that, upon the further evidence, it was clear that in the interval between the mother's death and

the annulment of the bankruptcy there was in the hands of the surviving trustee actual income of the beneficiary's share, which could be treated as payable to or retained or appropriated for his benefit, and that although the balance payable on May 2, 1926, to the beneficiaries had not then been ascertained, there was money in the hands of the trustee which would have been payable to the beneficiary's trustee in bankruptcy unless the forfeiture clause operated, and that consequently the annulment was not in time to save the forfeiture, and that, upon the true construction of the forfeiture clause, the forfeiture enured to prevent any portion of the share, whether of income or capital, from passing to the beneficiary who had become bankrupt and to deprive him of all interest as a beneficiary under the will. A B

LORD HANWORTH, M.R., after referring to *White v. Chitty* (1), said, at p. 308 :

The best test whether the clause operates appears to be stated in *Ancona v. Waddell* (3), before HALL, V.C., where he says that one has not to see whether in fact the money had been paid over or how the money actually stood, but the test is whether "it could be said that there was any actual income of the share which could be treated as payable to, or retained for or appropriated for the benefit of this residuary legatee." C

In the present case there was no annulment of the bankruptcy, there was only a suspension of its discharge until a date after the testator's death ; that is, Leonard Unett Walker was a bankrupt at the testator's death and remained a bankrupt until Dec. 15, 1938, when the order for discharge became effective. The question is whether the decisions with regard to annulment apply to the case where, although there has been no annulment, there has been a discharge after the gift to be considered became effective. The effect of an annulment is not the same as that of a discharge ; each depends upon the relevant provisions of the Bankruptcy Acts. Annulment is dealt with in sect. 29. Subsect. (1) confers powers upon the court to annul a bankruptcy. Sub-sect. (2) provides that : D E

Where an adjudication is annulled under this section, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the official receiver, trustee, or other person acting under their authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court may appoint, or, in default of any such appointment, revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court may declare by order. F

So that where an annulment takes place, in the absence of any express direction to the contrary, there is an immediate reversion in the person whose bankruptcy is annulled of that person's property which remains in the trustee's hands. The provisions with regard to discharge are to be found in the Bankruptcy Act, 1914, s. 26, as amended by the 1926 Act. This section gives power to the court to order the discharge of a bankrupt. Subsect. (9) provides that : G H

A discharged bankrupt shall, notwithstanding his discharge, give such assistance as the trustee may require in the realisation and distribution of such of his property as is vested in the trustee . . .

Sect. 28 provides what is to be the effect of a discharge. Subsect. (1)

states from what the bankrupt shall not be released. Subsect. (2) states that :

An order of discharge shall release the bankrupt from all other debts provable in bankruptcy.

A It is to be observed that there is no provision, as in the case of annulment, for the revesting of any of the bankrupt's property in the bankrupt on his discharge. It is necessary therefore to consider what became vested in the trustee in bankruptcy under consideration. Sect. 38 is the section which enumerates the property of the bankrupt which vests in the trustee. I need not refer to it in detail. It is sufficient to state that B it includes, under subsect. (2) (a) :

All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge . . .

C In the present case, therefore, the annuity of £250 given to Leonard Unett Walker, which took effect on the testator's death, although nothing was legally payable in respect of it until the expiration of 12 months after the testator's death, would but for the forfeiture clause have vested in the trustee in bankruptcy and would not have revested in Leonard Unett Walker when the discharge became effective. Assuming that D there had been no forfeiture clause, it is true that if, before the trustee in bankruptcy had reduced the after-acquired property in possession by giving notice of his claim to the executors of the will, Leonard Unett Walker had been able to dispose of his interest therein to a third party, that third party's title would have prevailed against the trustee in E bankruptcy ; but this result would have been brought about by reason of the express provisions of sect. 47 (1) of the Act, which provides that :

F All transactions by a bankrupt with any person dealing with him *bona fide* and for value, in respect of property, whether real or personal, acquired by the bankrupt after the adjudication, shall, if completed before any intervention by the trustee, be valid against the trustee, and any estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction.

Apart from this provision, and as between the trustee in bankruptcy and the bankrupt, the vesting of the after-acquired property is complete and cannot be affected by the order for discharge.

G If any authority is required for the view which I have expressed, I think it is to be found in *Re Evans, Public Trustee v. Evans* (4), where LORD STERNDALÉ, M.R., said, at pp. 315, 316 :

H I may say that the son obtained his discharge some months after the testator's death, but the bankruptcy was not annulled, and therefore any property coming to the bankrupt by a title which accrued before his discharge would vest to the trustee in bankruptcy.

It follows from what I have said that the decisions as to annulment of a bankruptcy are not applicable to the case of a discharge. In the present case the discharge only operated as from Nov. 15, 1938. The trustee in bankruptcy's title, but for the forfeiture clause, would have taken

effect as on Nov. 16, 1938, on which date the annuity given to Leonard Unett Walker would, apart from that clause, have vested in him.

In my judgment, the forfeiture clause operated to prevent the vesting and at the same time transferred the annuity to the children of Leonard Unett Walker. I therefore declare that, on the true construction of the testator's will and in the events that have happened, the annuity of £250 directed to be paid to Leonard Unett Walker during his life until the happening of any of the events therein mentioned has failed and determined by reason of his bankruptcy subsisting at the death of the testator. I have come to this conclusion with some regret because one cannot help appreciating that it is a hardship on Mr. Leonard Unett Walker that his discharge should have been applied for at so short a time before the testator's death; but I am satisfied that it is impossible for me to put any other construction on the will. The costs of all parties as between solicitor and client must be paid out of the testator's residuary estate.

Declaration accordingly.

Solicitors: *Bennett, Welch & Co.* (for all parties).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

PAPADIMITRIOU v. HENDERSON.

[KING'S BENCH DIVISION (Goddard, L.J., sitting as an additional judge),
July 20, 21, 1939.]

Insurance—Marine insurance—War risk policy on hull and freight—Vessel sequestered by Spanish insurgents while on lawful contract voyage—Documentation of vessel—Loss of anticipated freight—Insurable interest—Marine Insurance Act, 1906 (c. 41), s. 67—Institute Time Clauses (Freight), cl. 5.

The plaintiff had insured his vessel for a certain period under a policy of insurance to cover war risks. The amount of the insurance included a specific sum of £3,500 in respect of freight and/or chartered freight and/or anticipated freight. This amount was greater than that for which charters had been arranged during the currency of the policy, but there was a short period covered by the policy for which no charter had been arranged. The vessel was chartered to agents of the Spanish Republican Government to carry from Odessa to Oran certain goods which were expressly allowed by the terms of the policy, but were in the nature of conditional contraband when consigned to a country at war. When the vessel was about 150 miles east of Malta, the master, as a result of an agreement between the owner and the consignees of the cargo, was ordered to put back to Piræus, the home port, but shortly after putting back the ship was overhauled, seized by an insurgent warship, taken to Palma, and eventually appropriated by the insurgent government. There was no evidence of formal prize court proceedings. At the time of the vessel's capture the master did not have in his possession a copy of the charterparty which had been prepared in London and which did not reach him before sailing, and it was contended that the vessel was not properly documented, and had therefore invited condemnation. It was also contended that the loss of the ship was due to the wilful misconduct of the owner or master in proceeding on the voyage knowing that there was a risk of capture. On the question of the insurance of freight it

was argued that the plaintiff could recover only in respect of freight actually earned, and that there was no insurable interest in problematical freight :—

HELD : (i) an owner or master of a neutral ship proceeding on a contract voyage is not guilty of wilful misconduct which would avoid a policy simply because there is a risk of capture.

A (ii) there was no evidence upon what ground the vessel was condemned, and no reason to suppose that she was condemned for having irregular papers.

(iii) in fact the vessel was properly documented.

(iv) the measure of indemnity in respect of freight had been fixed at £3,500, and the plaintiff was entitled to recover that amount.

(v) the plaintiff had an insurable interest in the anticipated freight.

B [EDITORIAL NOTE. Two questions of importance were argued in this case. In the first place, it was said that it was misconduct for a master to commence a voyage in which he knew there was a risk of capture, and, secondly, it was said that there was no insurable interest in anticipated freight. Both these questions have been answered in the negative and the insured has been held entitled to recover.

C AS TO MISCONDUCT OF MASTER, see HALSBURY, Hailsham Edn., Vol. 18, pp. 297, 298, para. 420 ; and FOR CASES, see DIGEST, Vol. 29, p. 207, Nos. 1661-1669.]

Cases referred to :

- (1) *Robertson v. Petros M. Nomikos, Ltd.*, [1939] 2 All E.R. 723 ; Digest Supp. ; 108 L.J.K.B. 433 ; 160 L.T. 542.
- D (2) *Forder v. Great Western Ry. Co.*, [1905] 2 K.B. 532 ; 8 Digest 65, 442 ; 74 L.J.K.B. 871 ; 93 L.T. 344.
- (3) *Trinder, Anderson & Co. v. Thames & Mersey Marine Insurance Co., Trinder, Anderson & Co. v. North Queensland Insurance Co., Trinder, Anderson & Co. v. Weston, Crocker & Co.*, [1898] 2 Q.B. 114 ; 29 Digest 196, 1562 ; 67 L.J.Q.B. 666 ; 78 L.T. 485.
- E (4) *Bell v. Carstairs* (1811), 14 East, 374 ; 29 Digest 196, 1561.
- (5) *Thompson v. Hopper* (1858), E.B. & E. 1038 ; 29 Digest 205, 1642 ; 27 L.J.Q.B. 441 ; 32 L.T.O.S. 38.
- (6) *Scottish Shire Line, Ltd. v. London & Provincial Marine & General Insurance Co., Ltd.*, [1912] 3 K.B. 51 ; 29 Digest 173, 1300 ; 81 L.J.K.B. 1066 ; 107 L.T. 46.
- F (7) *Barclay v. Cousins* (1802), 2 East, 544 ; 29 Digest 102, 598.

ACTION against a Lloyd's underwriter on a policy of insurance effected for the purpose of covering the plaintiff's ship *Ellinico Vouno* against war risks. The policy provided for an insurance of £18,500, being £15,000 on the hull and machinery, and £3,500 on the freight and/or chartered freight, and/or anticipated freight. The facts and arguments are fully set out in the judgment.

F. A. Sellers, K.C., and *A. A. Mocatta* for the plaintiff.

Sir Robert Aske, K.C., and *A. J. Hodgson* for the defendant.

H *Aske, K.C.* : The underwriter is liable only for a loss which was fortuitous, and a risk deliberately incurred is not fortuitous : *Forder v. Great Western Ry. Co.* (2), *Trinder, Anderson & Co. v. Thames & Mersey Marine Insurance Co.* (3), *Bell v. Carstairs* (4), *Thompson v. Hopper* (5). Loss may be recovered only in respect of freight actually at risk, not of anticipated freight ; otherwise the insured would have no insurable

interest : *Scottish Shire Line, Ltd. v. London & Provincial Marine & General Insurance Co., Ltd.* (6).

Sellers, K.C., was only called on to argue the question of insurance of anticipated freight and referred to *Barclay v. Cousins* (7).

GODDARD, L.J. : This is an action brought by Mr. Papadimitriou, A
a Greek shipowner, against a Lloyd's underwriter on a policy of insurance effected on June 3, 1938, for the purpose of insuring his ship *Ellinico Vouno* against war risks during the period from Apr. 30, 1938, to July 30, 1938. The plaintiff was contemplating a charter at this time for the purpose of carrying goods from Odessa to some port in the Western B
Mediterranean, the first port contemplated being Marseilles. The cargo was to be carried for the then Government of Spain, and was to consist of lorries and spare parts. A good deal of difficulty arose about the charter, because although Marseilles was the port to which the goods were to be carried, the Spanish Government desired to change the port C
of destination and substitute for Marseilles the port of Oran in Tunis, a port which is a French port. At the time when the ship got to Odessa to load, the matter was still being negotiated in London, and of course that took considerable time, because the London brokers had to communicate with Piræus where the plaintiff lived and had his business. At D
the time when the master was at Odessa, and the goods were about to be loaded, this question had not been settled, and the Russian export organisation, Inflat, then acting for the Russian Government, I suppose, were anxious to oblige the Spanish Government by shipping these goods to Oran. The master had to be given very considerable discretion, E
because in a letter dated Apr. 29, which was handed to him before the sailing from Piræus to Odessa, the plaintiff had told him this : .

Port of discharge. They have not yet accepted the option for Oran with 2s. extra, which I have asked for with *peage* dues at Oran at their charge. If they accept it, then on signing the bill of lading, they will be obliged to declare to you for where you are destined. Knowing this you will wire to Candilli to get you ready F
the required quantity and you will fix then the date of arrival.

After some considerable trouble, the captain at last found that the bill of lading was made out to Oran, and at an interview which he had shortly before he actually sailed, the bill of lading was handed to him, and he signed it, but in fact at the moment he signed it, according to G
his evidence, the name of the port had not been written in, but it then was filled in for Oran, and the captain was willing to accept that under the discretion which had been given to him in the letter ; and in point of fact an agreement was come to between the owners and the charterers, which was embodied in a memorandum, which was attached to the H
charterparty, under which Oran was substituted for Marseilles.

The captain sailed on May 12, and when he arrived in the Bosphorus an attempt was made by one of the agents, I think a man named Dabovich, to stop him, telling him that he had some urgent orders for him, but not orders from the owners. The captain, I think reasonably

- thinking that there might be further trouble about the port of destination, which had then been settled, and it not being suggested to him that the message which it was sought to communicate to him came from the owners, refused to stop, and proceeded on his voyage. Thereafter, a great many cables and wires were exchanged between the various
- A** persons interested in this cargo and the owners, with the result that the first definite order which was given to the captain by his owners, the first order that he was bound to obey, reached him on May 17. It was agreed with the persons interested in the cargo that the captain should be instructed to proceed to Malta for orders. The policy, as I have said,
- B** was a war policy. It was a policy to cover the whole risks, and it may well be that at this time the shippers of the Spanish Government, who were to be the receivers of the cargo, were anxious about its safety, because they may have known, and they probably would know, that insurgent warships were at large in the Western Mediterranean. How-
- C** ever, it was not until then that they came to any agreement with the owners as to the ship proceeding to Malta for orders instead of going straight for Oran as the charterparty provided. Then the next thing that happened was that on May 18, the captain wirelessly his position—he was able to keep the owners informed by wireless
- D** of his position—and I think that on that date the owners were requested to agree, and finally agreed, on terms, that the ship should return to Piræus. At the time that the captain got his orders to return, he had got to within about 160 miles east of Malta. The only information that had reached anybody at this time, was that trouble
- E** might be experienced off Cape Bon, which, of course, is quite near to Oran.

- The captain obeyed these orders received from his owners. He put about in the afternoon, as soon as he got the orders, but shortly after that he was overhauled by one of the insurgent warships, the ship was
- F** seized, a prize crew was put on board and the ship was taken to Palma, which was then occupied by the insurgent forces. The captain and his crew were kept prisoners on the ship. Eventually, the ship was appropriated by the insurgent Government. Whether it was formally condemned, I have no evidence, except that the captain was told that she
- G** had been condemned in the Prize Court. I have no evidence as to whether or not there was a regularly constituted Prize Court at Palma, nor have I any evidence upon which I can find the ground upon which she was condemned. One may speculate on it as much as one likes ; the fact was, of course, that the bills of lading clearly showed that the goods which were
- H** on board were destined for the Spanish Government. It was the buying organisation of the then Spanish Government who were the consignees of the goods, and the goods were certainly of the class which, when consigned to the government of a country then at war, would be regarded as contraband ; they were in a class of what is commonly called conditional contraband, goods which might be of assistance to the army forces and which, if

consigned to the government of the country, a Prize Court would probably have no difficulty in considering to be contraband. However, in the policy they were goods which were expressly allowed to be carried on the ship. The policy excluded the vessel from going to any Spanish port or Spanish possession in the Mediterranean. It warranted that no arms or ammunition or instruments of war or materials of a similar nature should be carried, but the warranty was not to exclude the carriage of cars or trucks, benzine, coal, coke or similar things. So the policy expressly allowed this cargo to be carried, albeit it was a cargo, as I have said, which was in the nature of conditional contraband, and it being consigned to a port so near to Spain as Oran, I have no doubt that, if it were considered by a Prize Court, no court would have any difficulty in applying the doctrine of continuous voyage. So it is at least likely—I do not say more than that—that if this ship was brought into a Prize Court, that she was condemned because she was carrying a cargo of contraband. However that may be, the ship was condemned. The seizure was made on the high seas on May 19, and it became a constructive total loss to her owners.

Counsel for the underwriter has taken two main points. First, he said that this loss was caused by the wilful misconduct of the owner—I do not know whether of the master, but of the owner—in insisting on going on with the voyage when he had been warned against so doing. I certainly cannot hold here that there was any wilful misconduct at all or any sort of misconduct. The fact was that the vessel was proceeding upon its chartered voyage. It continued to proceed along its chartered voyage. The owner was under no obligation that I know of to divert his vessel from that voyage unless, of course, she was obviously running into danger. He would not want to lose his ship, and no doubt he would give instructions to his captain to avoid that if he could. The only definite warning that the owner or anybody had, was that some trouble, that is to say, some search or stoppage for the purpose of search, might be expected off Cape Bon; and when the owner was asked to order the ship to proceed to Malta for orders, as soon as terms were arranged under which she should proceed to Malta, where he was not bound to allow her to go, he gave those orders. As soon as he was requested, and the terms were arranged under which she should put about and go back to Piræus, she did, and there is no evidence before me to show that anybody was expecting that one of the Spanish warships belonging to the insurgent forces was lurking, to use a familiar expression, east of Malta. Even if there had been, I think it would be a very dangerous doctrine to lay down in the courts of this country that the captain of a neutral ship or the owner of a neutral ship or the owner of a ship belonging to a country at war, is guilty of wilful misconduct if he tries to proceed with his contract voyage, simply because there is a risk of capture, as there must always be a risk of capture during a war, which is the very reason why shipowners and merchants insure against war

risks. Of course, if it was a case in which the shipowner got warning that blockade had been established at a particular port or that a ship was lying waiting at a particular point, and the shipowner deliberately sent his ship forward to that point to run the blockade, it may be that there would be, in certain cases, an inference to be drawn that he was not endeavouring to carry out the voyage, but was endeavouring to get his ship captured, and that, of course, would be wilful misconduct.

In the last war it would have been a serious thing for this country if it was said that every shipmaster who continued his contract voyage to this country, when it was known that there were submarines at large in the Channel or in the approaches to the Channel, was guilty of wilful misconduct, because there was a risk that his ship would be seized and sunk, whether it was a neutral ship or British ship. I certainly should be very sorry to lay down any such doctrine, that the shipowner who had dispatched his ship on what was to him a perfectly lawful voyage, should be held guilty of wilful misconduct, because he had continued on that voyage and was doing his best to fulfil it, more especially when one finds that when he was instructed to order the ship to return, he did order his ship to return. On that point I am quite clear. Then it is argued that the ship was not properly documented; it was not carrying proper documents, and this was an insurance against war risks. To send a ship to sea without proper documents is inviting condemnation if she is stopped and searched, because it is well known that if the searching vessel finds that a ship's papers are not in order, or are in doubtful order, they will take her in, and if the Prize Court thinks she is carrying false papers, they may condemn her. There are two considerations which arise here. First, I have no evidence at all as to why the ship was condemned, if she ever was condemned. For all I know, she may simply have been seized and held by superior force, but even assuming that she was brought before a Prize Court—and the only evidence I have of that, as I have already said, is that the captain was told she had been before a Prize Court, but he was not present at any proceedings, and there is no evidence before me as to whether she was before a properly constituted Prize Court or what the decision of the Prize Court was—I do not know on what ground she was condemned, and there is no more reason to suppose that she was condemned for carrying irregular papers than that she was condemned for carrying contraband. In fact, was she not properly documented? She had put to sea without the master being in possession of the charterparty, on very understandable grounds; the charterparty had been fixed in London and at the time she put to sea, the charterparty had not reached Piræus, her home port, and it did not reach Piræus until after she had left for Odessa. The captain had been given a letter by his owner, showing the terms of the charterparty, which no doubt showed that her destination was Marseilles, as it was under the charterparty until the agreement was come to. The bills of lading were perfectly clear. There was no attempt to conceal anything.

The bills of lading showed that the goods were shipped to Oran, and there was an indorsement :

Freight and all other conditions and exceptions as per charterparty dated [the date was left out, because at the time the bills of lading were signed, nobody knew what the date was] for the present voyage and agreement for Oran

the present voyage being, according to the terms of the charterparty, A
to Marseilles, but there was an agreement for Oran.

Then it was said—I think the point was not much persisted in—that as the blanks in the charterparty are mostly filled in in typewriting, the document had a suspicious aspect, irregular on the face of it, because Oran is written in in ink. The suggestion is that that would raise a B
suspicion, because the searching officer would say to himself : “ Oran has been written in at another time.” That argument, I think, would apply equally to any bill of lading, because any bill of lading is partly in print—at all events, every bill of lading I have ever seen is partly in print with blanks which could be filled in at any time—but I have never C
heard it suggested that because the words are not printed in or typed in, that throws any suspicion upon the authenticity of the document ; nor can I accept the argument that because most of the blanks were filled in in typewriting, this document is in any way suspicious or irregular because the word Oran is written in in ink. It shows perfectly clearly the way D
things were going on. It shows, and this is much more important from the point of view of the searching officer, who the consignees were, namely, the organisation of the Spanish Republican Government. As a matter of fact, no case has been called to my attention, and counsel for the underwriter has stated that he knows of no case, which decides exactly E
what documents are to be carried upon a ship. No doubt, ordinarily speaking, if the ship is under charter, there would be with the captain a charterparty ; but there is no authority for saying that a charterparty must be carried in time of war. Of course, it is conceded, and everybody knows, that ships frequently have to go to sea without a copy of the charter- F
party in their possession, because, as happened in this case, the charterparty is fixed in London and the ship is in a foreign port at the time the charterparty is fixed, and the charterparty has not reached the master by the time he sails. In my opinion there is nothing in the second point. G

The last point in the case is simply a question of the amount that is to be recovered. This point is perhaps one of some difficulty. It arises on the insurance of freight, and all cases which deal with freight insurance I think as a rule raise questions of difficulty. The policy states that there shall be insurance for £18,500, being £15,000 on the hull, machinery, H
etc., and £3,500 on the freight, and/or chartered freight and/or anticipated freight. Now this is a new expression, “ anticipated freight,” which is brought into this policy. I say new, because it is an expression which, in spite of several cases which are reported of freight insurance, has not occurred in any case hitherto reported. The main question arises

on cl. 5 of the Institute Clauses, which are incorporated in the contract. Cl. 5 of the Institute Time Clauses (Freight) provides this :

In the event of the total loss . . . of the steamer the amount underwritten by this policy . . . shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered.

- A Now what has happened in this case is this. The freight for the particular voyage on which the ship was engaged at the time of seizure, has been paid, so no question arises about that. Then she had been fixed for charter from a port near Marseilles, Caronte, to Hamburg, and the amount of freight which she would have upon this voyage, was £2,842.
- B The question which arises is whether the plaintiff can recover only the £2,842, or whether he can recover the £3,500 which is written in the policy. If one regarded this matter as merely a matter of construction, it would be difficult to say—I think impossible to say—that he is not entitled to recover the £3,500, because the Institute Clauses provide that
- C if the ship becomes a total loss, the amount underwritten, which is £3,500, shall be paid in full. There cannot be clearer words than that, and if the parties have agreed that the sum of £3,500 is to be paid in full on the ship becoming a total loss, as a mere matter of construction, I see no reason why that should not be so. Of course this class of case
- D is complicated by various rules that apply to contracts of insurance, rules with regard to indemnity and rules with regard to insurable interest. In my opinion I ought to give effect to the clear terms of the policy. The parties are saying by the policy, “I, the shipper, have a profit-earning ship, a ship with which I can earn profit, and I want to insure that, if
- E this ship is seized during the time the policy is current and effective, I shall recover a certain sum which is anticipated” —“anticipated freight” I think it means—“because it is anticipated that I shall be able to earn at least that sum, if not more, during the period.” As I say, it is certain that she could have earned £2,842 upon one voyage, not a very great
- F distance from Marseilles round to Hamburg, and there would have been time, of course, after that voyage—I have not had any evidence as to the exact time that it would take, or might be anticipated to take, for a voyage from the South of France round to Hamburg, but it would not be very long, and thereafter the ship would have an opportunity of
- G earning further freight.

- H It seems to me to be well settled by the cases to which counsel for the underwriter has referred me, that there can be no doubt as to the right to recover where a contract has been fixed and where the ship has started on a voyage in anticipation of a future voyage. I do get assistance from a recent case of *Robertson v. Petros M. Nomikos, Ltd.* (1), where LORD WRIGHT considered this point. His opinion on this point is *obiter*, since it was not necessary for the decision in that case, because, though the ship had been chartered, all that it was sought to recover was the freight which had been actually chartered. LORD WRIGHT, in the course of his opinion, stated his view of the true construction of cl. 5. The

reasons he gave, although *obiter*, I must say appear to me to be quite convincing. He said, at p. 729 :

The policy is a time policy, and the intention may be to secure that, even if the vessel at the time of the casualty has no cargo on board (that is, is in ballast) and has no charter, there shall be no question of insurable interest, though it is not likely that any underwriter would think of raising such a question in a case of this type. The intention may be to provide that the owner's interest in the profit-earning capacity of his ship, which is certainly a good interest in a business sense, should be deemed a sufficient insurable interest for purposes of this policy. I should see no legal obstacle why this agreement should not receive effect. Cl. 5 deals with actual, as well as with constructive, total loss.

My attention was also called to the Marine Insurance Act, 1906, s. 67, which says :

(1) The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy to the full extent of the insurable value, or, in the case of a valued policy to the full extent of the value fixed by the policy, is called the measure of indemnity.

Now it seems to me that the measure of indemnity here is fixed in the same way as on an insurance of goods the amount of the insurance is fixed by valuation. It is fixed at £3,500. I think therefore that I am justified in holding that the plaintiff is entitled here to recover £3,500 in respect of freight, and having suffered a total loss, the result is that the judgment will be for £18,500 with costs.

Judgment for the plaintiff with costs.

Solicitors : *Holman, Fenwick & Willan* (for the plaintiff) ; *Ince, Roscoe, Wilson & Glover* (for the defendant).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

GATTI v. SHOOSMITH.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and Finlay, L.JJ.), July 24, 1939.]

Practice—Time for appeal—Appeal entered late—Mistake of legal adviser—Discretion of court to extend time—R.S.C., Ord. 58, r. 15, Ord. 64, r. 7.

Owing to a misreading of the rule, the applicant was a few days too late in entering an appeal. The intention to appeal had been notified to the respondent's solicitors, by letter sent within the time specified by the rule. The applicant asked that the time might be extended on the ground that the failure to enter the appeal within the time limited was due to the mistake of a legal adviser :—

HELD : (i) there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time ; and whether the matter shall be so treated must depend on the facts of each case.

(ii) the facts of this case made it one where the discretion of the court ought to be exercised, and leave to appeal given.

[EDITORIAL NOTE.] The authorities in the exercise of the discretion of the Court of Appeal to extend the time for appealing were a little conflicting, and in some of the authorities it appeared that the alteration in the rule in 1909 had been overlooked. The matter is put beyond doubt in the present case.

AS TO EXTENSION OF TIME FOR APPEAL, see HALSBURY, Hailsham Edn., Vol. 26, pp. 116-118, paras. 229, 230 ; and FOR CASES, see DIGEST, Practice, pp. 805-

807, Nos. 3682-3698. See also YEARLY PRACTICE OF THE SUPREME COURT, 1939, pp. 1282-1284.]

Cases referred to :

- (1) *Re Coles & Ravenshear*, [1907] 1 K.B. 1; Digest, Practice, 806, 3688; 76 L.J.K.B. 27; 95 L.T. 750.
- (2) *Baker v. Faber*, [1908] W.N. 9; Digest Practice, 806, 3690.
- (3) *Selwyn (A. H.), Ltd. v. Baker*, [1924] W.N. 195; Digest, Practice, 806, 3692.
- (4) *Kevorkian v. Burney*, [1937] W.N. 345; [1937] 4 All E.R. 97; Digest Supp.; 157 L.T. 492.
- (5) *Wood v. Manchester Corpn.*, Yearly Practice of the Supreme Court, 1939, p. 1283; Digest, Practice, 806, 3693.

- A** *Hon. H. L. Parker* for the appellant.
H. O. Danckwerts for the respondent.

APPLICATION for leave to appeal notwithstanding that the time for entering an appeal had expired. The appeal was not entered in time owing to a misinterpretation of R.S.C., Ord. 58, r. 15, by one of the appellant's legal advisers. The respondent's solicitors had, however, been advised by letter, written within the strict time, that an appeal would be entered.

C *Parker* : The court has a completely unfettered discretion in cases of mistake. In 1909, R.S.C., Ord. 58, r. 15, was altered and it was held that the court would not act so readily under Ord. 58, r. 15, as under Ord. 64, r. 7. The YEARLY PRACTICE, 1939, sets out the authorities at pp. 1282, 1283. The matter was fully argued, and the cases considered in *Kevorkian v. Burney* (4) where the appeal was allowed, and the time extended.

D It was admittedly the settled practice that a blunder or a mistake was not a ground for the exercise of the discretion of the court, as Ord. 58, r. 15, stood before 1909, yet, in a proper case, it was always a ground for the exercise of discretion under Ord. 64, r. 7. Since 1909, by reason of the alteration then made in Ord. 58, r. 15, the court has had an unfettered discretion.

E *Danckwerts* : Notwithstanding the alteration of Ord. 58, r. 15, the settled practice has been not to extend the time for appealing merely because there has been a misreading of the rule. On the facts of the present case, it would be unreasonable to give the plaintiff an indulgence. The case was a pure question of fact. Having regard to the circumstances of the case and the practice which has been consistently followed, the time for appeal should not be extended.

F SIR WILFRID GREENE, M.R. : Before 1909, Ord. 58, r. 15, which is the order regulating the time for appeals to this court, was in a different form from that in which it is now cast. Under the order as it then stood, the power of this court to extend the time for appealing required some special reason, because the appeal could not be brought except by special leave of the Court of Appeal. Under the rule as it then stood, the case of *Re Coles & Ravenshear* (1) was decided. That was a case

where counsel had misconstrued the rule, and, as a result of the advice given, the appeal was out of time. It was there held that the fact that the delay was due to a mistake of a legal adviser, did not constitute a ground for giving the special leave which the rule required. It is right to point out that in that case, as in subsequent cases, this court very much disliked the imposition of a fetter upon its discretion, which compelled it to refuse leave in cases where some unfortunate slip, the rectifying of which could have done no harm to anybody, had taken place. Nevertheless, at that time there was a current of authority under which this court conceived that its discretion was fettered in that way. In 1908 *Baker v. Faber* (2) came before this court. That was a case where the matter in question was an application for a new trial, and the power of the court to extend the time with regard to that application was one which rested on Ord. 64, r. 7. Ord. 64, r. 7, was in different language from that of Ord. 58, r. 15, as it then stood, and under that rule, the necessity of some special leave (with the emphasis, so to speak, on the word "special") did not exist. This court held in that case that a mistake by counsel in advising his client as to the time within which an appeal could be brought was a sufficient ground under Ord. 64, r. 7, to justify the court in extending the time. COZENS-HARDY, L.J., as he then was, was party to the decision in *Re Coles & Ravenshear* (1), and so was FARWELL, L.J., and they both dealt with it under the special language of Ord. 58, r. 15, and, therefore, considerations were involved which did not apply where Ord. 64, r. 7, was the governing rule. COZENS-HARDY, L.J., there suggested that the matter might be brought to the attention of the Rule Committee. Apparently it was brought to the attention of the Rule Committee, because in May, 1909, the rule was altered. The particular drafting machinery that was adopted, was to strike out the reference to "special leave of the court of appeal," and to preface Ord. 58, r. 15, with the words:

Subject and without prejudice to the powers of the Court of Appeal under Ord. 64, r. 7.

That therefore puts the matter of enlarging the time under Ord. 58, r. 15, under Ord. 64, r. 7, as the governing rule. One would have thought that that change, coupled with the decision in *Baker v. Faber* (2), would have been sufficient to enable this court to say that *Re Coles and Ravenshear* (1) no longer held good, in so far as it had been considered to be an authority compelling this court, in cases where the delay was due to the slip of a legal adviser, to refuse to entertain an appeal which was out of time, and I cannot help thinking that that result would have taken place earlier had it not been for the fact that, in 1924, *Selwyn (A. H.), Ltd. v. Baker* (3) came before this court. There the objection that the appeal was out of time was taken at the hearing of the appeal as a preliminary objection, and the explanation of the delay which was given by counsel for the appellants, was that the mistake was due to a misconstruction of the rule by the appellants' solicitors. SIR ERNEST POLLOCK, M.R., and WARRING-

TON and SARGANT, L.JJ., upheld the preliminary objection, and based their decision upon *Re Coles & Ravenshear* (1), which SIR ERNEST POLLOCK, M.R., said made it quite clear that a mere mistake was not a sufficient ground for extending the time for appealing. Whether or not the omission to call the attention of the court on that occasion to the case of *Baker v. Faber* (2), and the alteration of the rule, was due to the fact that, apparently, the objection was taken when the appeal was opened, I do not know, but the report does not show that those matters were brought to the attention of the court. I cannot help thinking that if they had been, the court would have regarded the alteration in the rule as restoring to it that freedom of discretion, the loss of which had been so much regretted. In a later case, *Kevorkian v. Burney* (4), after a full argument of these matters (although the facts were not the same there as they are here) SCOTT, L.J. (by way, it is right to say, of dictum only) in reference to *Re Cole and Ravenshear* (1) and the argument of counsel in the case before him that that case governed the Court of Appeal, said, at p. 99 :

. . . I notice that the change in the form of the rule and the subsequent decision reported in the WEEKLY NOTES, 1908, [*Baker v. Faber* (2)] were neither of them drawn to the attention of the court, and I cannot help feeling that, had the court had its attention directed to those cases, the very important change in the position caused by the change in the form of the rule would have led to a different decision of this court.

He thus said exactly what I said a moment ago, and I respectfully agree with the view which he there took.

Just to make the matter complete, there is mentioned in the 1939 YEARLY PRACTICE, at p. 1283, *Wood v. Manchester Corpn.* (5). In that case, the Court of Appeal extended the time in a case where the applicant's solicitor, on finding that his client's union was not prepared to take her case beyond the divisional court, had omitted to take his client's instructions as to appealing, and in that case SCRUTTON and ATKIN, L.JJ., said that the "vested interest" argument no longer carried the same weight as formerly, and that the time for appealing was now constantly extended in cases where 20 years ago it would not have been.

On consideration of the whole matter, in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say "may be," because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think is the proper rule which this court must follow is : that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time ; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be

facts in a case which would make it unjust to allow the appellant to succeed upon that argument.

The discretion of the court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised. If ever there was a case in which it should be exercised, I should have thought it was this one. We are not, I think, concerned here with any question at all as to the merits of this case or the probability of success or otherwise. The reason for the appellant's failure to institute his appeal in due time, was a mere misunderstanding, deposed to on affidavit by the managing clerk of the appellant's solicitors—a misunderstanding which, to anyone who was reading the rule without having the authorities in mind, might very well have arisen. The period involved is a very short one, it is only a matter of a few days, and the appellant's solicitors, within time, informed the respondent's solicitors by letter of their client's intention to appeal. That was done within the strict time, and the fact that the notice of appeal was not served within the strict time, was due entirely to this misunderstanding. On the facts of this case, it appears to me that the case is one where the discretion of the court ought to be exercised, and, accordingly, leave will be given.

MACKINNON, L.J. : I agree.

FINLAY, L.J. : I also agree.

Leave to appeal given.

Solicitors : *Gasquet, Metcalfe & Walton* (for the appellant) ; *Walmsley & Stansbury*, agents for *E. W. Marshall Harvey & Dalton*, Bournemouth (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

Re BROOKS' SETTLEMENT TRUSTS, LLOYDS BANK, LTD. v. TILLARD.

[CHANCERY DIVISION (Farwell, J.), June 27, 1939.]

Choses in Action—Assignment—Expectancy—Voluntary settlement of interests under marriage settlement—Sum appointed under special power in marriage settlement after voluntary settlement—Trustee of voluntary and marriage settlements same person—Whether trustee can be permitted to retain appointed sum when requested to hand it over to settlor of voluntary settlement.

A marriage settlement executed in 1904, gave the wife a special power of appointment among her children, and, in default of appointment, the settled funds were to be divided equally between the children of the marriage. In 1929, before any exercise of the power of appointment had been made, A. J. T., one of the children, executed a voluntary settlement of all his interests under the marriage settlement. In 1939, the wife exercised the special power of appointment in favour of A. J. T., appointing to him £3,517 and releasing all her rights in that sum, so that, but for the voluntary settlement, it would have become immediately

payable to him. The plaintiff bank was, in 1939, the trustee of both settlements, and, in this summons, asked whether it ought to retain the sum of £3,517 as trustee of the voluntary settlement, or comply with a request of A. J. T. and hand it over to him :—

HELD : at the date of the voluntary settlement A. J. T. had no interest in the appointed sum other than that of a mere expectancy, and, as an assignment of a mere expectancy was unenforceable in equity against a volunteer, the trustee ought not to be allowed to retain the appointed sum.

[EDITORIAL NOTE.] The courts will not specifically enforce a contract to assign an expectancy unless there is a valuable consideration for that contract. The voluntary assignment, so far as it related to an expectancy, operated as a contract to assign that interest if and when it fell into possession, and was, therefore, not enforceable. The judgment takes the matter one step further, and says that trustees cannot be permitted to retain monies in their hands in such a case, but will be ordered to pay such monies over to the person entitled thereto.

AS TO ASSIGNMENT OF EXPECTANCIES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 439, 440, para. 807; and FOR CASES, see DIGEST, Vol. 8, pp. 496, 497, Nos. 613-621.

Cases referred to :

- (1) *Northumberland (Duke) v. Inland Revenue Comrs.*, [1911] 2 K.B. 343; 37 Digest 479, 764; 80 L.J.K.B. 866; 104 L.T. 506; *on appeal* [1911] 2 K.B. 1011.
- (2) *Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697; 8 Digest 497, 619; 72 L.J.Ch. 218; 87 L.T. 714.
- (3) *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; 20 Digest 334, 770; 58 L.J.Q.B. 75; 60 L.T. 162.
- (4) *Meek v. Kettlewell* (1843), 1 Ch. 342; 8 Digest 496, 617; 13 L.J.Ch. 28; 2 L.T.O.S. 205.
- (5) *Lovett v. Lovett*, [1898] 1 Ch. 82; 37 Digest 478, 760; 67 L.J.Ch. 20; 77 L.T. 650.

ADJOURNED SUMMONS for the determination of the question whether the trustees of a voluntary settlement of all the settlor's interest under a marriage settlement could be called upon to hand over to the settlor certain moneys in their hands which had been appointed to him under a special power of appointment in the marriage settlement.

On Nov. 14, 1904, a settlement was made in contemplation of a marriage shortly thereafter solemnised between Arthur George Tillard and Emily Katherine Close Brooks. Under that settlement the trustees thereof were to hold certain stocks, funds and shares, called the settled fund, upon trust to pay the income thereof to the wife during her life without power of anticipation. The wife was then given a power of appointment under which she might appoint the income of the settled fund to her husband during his life if he should survive her. By cll. 7 and 8 of the settlement the trustees were to hold the settled fund subject to the above trusts in trust for such issue of Emily Katherine Close Brooks by the then intended or any other marriage in such manner in all respects as she should by deed or will appoint and, in default of or so far as there might not be any such appointment, the trustees were to hold the settled fund in trust for all the children or any child of Emily Katherine Close Brooks

by the then intended or any other marriage who, being sons should attain 21 years of age, or being daughters should attain that age or marry, in equal shares if more than one. The present trustees of the settlement were Lloyds Bank Ltd., the plaintiffs.

There were five children of the marriage, of whom Arthur James Tillard, born on Dec. 26, 1906, was one, and he was a defendant to the summons. A The husband, Arthur George Tillard, died on Oct. 20, 1914, and Mrs. Tillard has, since that date, remained a widow.

On May 8, 1929, a voluntary settlement, of which the plaintiffs were the trustees, was made by Arthur James Tillard of all his share and interest whether vested or contingent to which he was then, or might B thereafter, become entitled, whether in default of appointment or under any appointment thereafter to be made or on failure of any such appointment, of and in the trust property which was then, or might at any time thereafter, become subject to the trusts of that settlement. The trustees of the voluntary settlement were to hold the income thereof upon C protective trusts for the benefit of Arthur James Tillard during his life, and after his death the trustees were to stand possessed of the capital and future income of the trust fund upon certain trusts for his children or remoter issue, and, if there should be no such child who should attain a vested interest, the trustees were to stand possessed of the D trust fund in trust for the settlor absolutely. There was also a provision for the settlor to appoint the income of the trust fund after his death for the benefit of any wife of his, and further powers for the raising of certain sums for this benefit or the benefit of any child or issue of his, but so that no exercise of these powers should have any effect during the E lifetime of Mrs. Tillard.

On May, 15, 1939, Mrs. Tillard by deed poll, in exercise of the power given to her by the settlement of 1904, irrevocably appointed, *inter alia*, a sum of £3,517 less the costs of raising that sum to Arthur James Tillard. By the same deed poll Mrs. Tillard released her life interest in the sum F so appointed, and also released that sum from the power given to her by the settlement to confer on any husband whom she might leave surviving her the right to receive any portion of the income of the property subject to the trusts of the settlement.

Notwithstanding the provisions of the voluntary settlement of 1929, G the defendant claimed that the sum of £3,517 so appointed to him by the deed poll of 1939 should be paid over to him, and not held by the plaintiffs as the trustees of the voluntary settlement.

The defendant, on Nov. 6, 1933, had married Dorothy Vera Hope-Falkner, but there had been no issue of the marriage. The only persons H interested at the time of the summons under the trusts of the voluntary settlement were the defendant Arthur James Tillard and his wife, who was also made a defendant.

Herbert L. A. Hart for the plaintiffs.

Norman C. Armitage for the defendant Arthur James Tillard.

E. G. Eardley-Wilmot for the defendant Mrs. Tillard and for unborn persons who might be interested under the voluntary settlement.

FARWELL, J. : [His Lordship stated the terms of the documents]
By the voluntary settlement of May 8, 1929, Arthur James Tillard
A assigned to the plaintiff bank :

All the part or share parts or shares and other interest whether vested or contingent to which the settlor is now or may hereafter become entitled whether in default of appointment or under any appointment hereafter to be made or on failure of any such appointment of and in the trust property which is now or may at any time hereafter become subject to the trusts of [the marriage settlement of Nov. 14, 1904].

B These words show an intention that all interests under the settlement of 1904, which the son might then or thereafter have, should pass to the trustees of the voluntary settlement, and there is no doubt that, as a matter of construction of the voluntary settlement, the appointed sum
C was included in the property assigned to the trustees. Counsel on behalf of the wife of Arthur James Tillard, who also represents persons who may hereafter become interested, that is, the unborn children of his marriage, has argued that this should be conclusive of the matter ; but the legal position of such a settlement has to be considered. The question
D which thus arises is how far an attempt to assign what is taken under a special power of appointment is operative. The following statement of the principle is to be found in FARWELL ON POWERS, 3rd Edn., p. 310 :

The exercise of a power of appointment divests (either wholly or partially according to the terms of the appointment) the estates limited in default of appointment and creates new estates, and that, too, whether the property be real or personal.

E This statement was adopted by HAMILTON, J., in *Northumberland (Duke) v. Inland Revenue Comrs.* (1). The exercise of the power of appointment divests *pro tanto* estates in default of appointment, and it is impossible to say that, until the appointment is made, the son has an interest under
F the marriage settlement other than that in default of appointment. The appointment, therefore, gave him an interest which he had not had before. No doubt the appointment must be read into the settlement, but that does not alter the position. The son had no more than a mere expectancy under the marriage settlement until the appointment was
G made. That being so, the son, when he assigned his interest under the settlement to the trustees of the voluntary settlement in the words I have quoted, was assigning, or purporting to assign, something to which he might become entitled *in futuro*—not a contingent interest, but a mere expectancy. It is clear on the authorities that he cannot be
H compelled to allow the trustees to retain the appointed sum, and that he can call on the trustees to pay it over to him. In *Re Ellenborough, Towry Law v. Burne* (2) BUCKLEY, J., said, at p. 700 :

The question is whether a volunteer can enforce a contract made by deed to dispose of an expectancy. It cannot be and is not disputed that if the deed had been for value the trustees could have enforced it. If value be given, it is immaterial what is the form of assurance by which the disposition is made, or whether

the subject of the disposition is capable of being thereby disposed of or not. An assignment for value binds the conscience of the assignor. A court of equity as against him will compel him to do that which *ex hypothesi* he has not yet effectually done. Future property, possibilities, and expectancies are all assignable in equity for value: *Tailby v. Official Receiver* (3). But when the assurance is not for value, a court of equity will not assist a volunteer.

BUCKLEY, J., then cites a passage from *Meek v. Kettlewell* (4) and points out that that passage was not overruled when the case went to the Court of Appeal, and that the rule in that case is still binding. A

I was also referred to *Lovett v. Lovett* (5), where, on facts very similar to those here, ROMER, J., based his decision partly on construction and partly on estoppel. That authority is nevertheless in favour of the view I have taken of this case. I regret to have to come to the conclusion to which the law forces me to come, as it is plainly contrary to the intention of the settlor at the time the voluntary settlement was executed, but the principle of law which I have stated makes it impossible to enforce the voluntary settlement, even to the extent of permitting the trustees of that settlement to retain, as subject thereto, the money in their hands. B
C
There must therefore be a declaration that the trustees ought to hand over to Arthur James Tillard the sum of £3,517 on the footing that the voluntary settlement did not operate as a valid assignment or declaration of trust in respect thereof.

Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of the appointed sum. D

Solicitors: *Bird & Bird* (for the plaintiffs); *Dawson & Co.* (for the defendants).

[Reported by MAURICE SHARE, ESQ., Barrister-at-Law.] E

SPIRA v. SPIRA.

[COURT OF APPEAL (Scott, Finlay and du Parcq, L.J.J.), July 27, 1939.] F

Practice—Summons for judgment under R.S.C., Ord. 14, r. 1—No attendance by defendants—Judgment signed—Negotiations—Lapse of time for appealing—Unsuccessful application to extend time for appealing—Application under R.S.C., Ord. 27, r. 15, to set aside judgment—Whether judgment had been obtained “by default.”

The plaintiff in an action for money lent made an application for judgment under R.S.C., Ord. 14, r. 1. Owing to a mistake, the defendants' solicitor did not attend the summons, and judgment was signed. There ensued protracted negotiations, which proved unsuccessful. The defendants applied for leave to appeal out of time, but this was refused. They then applied under R.S.C., Ord. 27, r. 15, for leave to set aside the judgment, and contended that it was a judgment obtained by default:— G

HELD: a judgment obtained under Ord. 14, r. 1, is not a judgment obtained on default, and Ord. 27, r. 15, had therefore no application to the present case. H

[EDITORIAL NOTE. The point here is simply whether or not the judgment obtained under R.S.C., Ord. 14, is a default judgment, and, therefore, one which could have been set aside on terms.

AS TO DEFAULT JUDGMENT, see HALSBURY, Hailsham Edn., Vol. 19, pp. 263-265, paras. 562, 563; and FOR CASES, see DIGEST, Pleading, pp. 160, 161, Nos. 1423-1434. See also, YEARLY PRACTICE OF THE SUPREME COURT, 1939 p. 426.]

Cases referred to :

- A (1) *Evans v. Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646; Digest Supp.; 106 L.J.K.B. 568; 157 L.T. 311.
 (2) *Haigh v. Haigh* (1885), 32 Ch.D. 478; 18 Digest 250, 1939; 55 L.J.Ch. 190; 53 L.T. 863.
 (3) *Hopton v. Robertson* (1884), 23 Q.B.D. 126, n.; 21 Digest 418, 15.

B APPEAL by the defendants from a decision of HALLETT, J., dated July 13, 1939, whereby he upheld a decision of Master BURNAND refusing to set aside a judgment obtained by the plaintiff under R.S.C., Ord. 14, r. 1.

The facts of the case are fully set out in the judgments.

C *G. O. Slade* for the appellants.

P. B. Morle for the respondent.

Slade : It is submitted that it is wrong to say that Ord. 27, r. 15 does not apply to a judgment obtained under Ord. 14. There are many examples where this procedure is applicable, for example, where a plaintiff has applied for judgment under Ord. 31, r. 21 because a defendant has failed to comply with an order for discovery or for interrogatories. Ord. 27, r. 15 says "*any* judgment by default may be set aside." The default in this case was the failure to take steps under Ord. 14, r. 1 to prevent judgment being given. "Judgment by default" means anything short of an adjudication on the merits. The word default should not be construed narrowly. This court has power to revoke any judgment not obtained on a consideration of the merits of the case, or by consent. *Evans v. Bartlam* (1). [Counsel also referred to *Haigh v. Haigh* (2) and *Hopton v. Robertson* (3).] Here it was not inadvertence on the part of a party but on the part of the solicitor. The court can see to it that the plaintiff is not damnified, by putting the defendants upon terms.

Morle : The question here is, has Ord. 27, r. 15 any application. It does not confer upon the court power to set aside *any* judgment. It is the default of pleading rule. There are various other defaults that can be committed. The mere failure to attend a summons under Ord. 14 is not a default; a defendant who has no defence will merely stay away, but that is not a default. A judgment under Ord. 14 is an adjudication on the merits. The only remedy open to the defendants was to ask the judge to extend the time for appealing. That is a matter for the discretion of the judge, and there was ample ground for refusing that application.

(He was stopped by the court.)

SCOTT, L.J. : I propose to deal with this case shortly, although it was fully, forcibly, and clearly argued before us by counsel for the

appellants, against whom an order for summary judgment was made on Apr. 12, 1939, under R.S.C., Ord. 14, the summons for judgment having been originally taken out many months before, during 1938, upon a writ issued in July, 1938. The proceedings were between the plaintiff and his two brothers, and the action was a claim on a specially indorsed writ for money lent and interest amounting to £1,500. After the issue of the writ, there were negotiations for settlement which lasted for many months. In the spring of 1939, these negotiations having failed, the plaintiff pressed for judgment upon an application of the usual type. By an accident, the defendants' solicitor failed to put in any affidavit, or to appear at the hearing. Therefore judgment was entered against the defendants. Then there ensued a few days later a correspondence beginning with a letter from the plaintiff's solicitor enclosing a copy of the order for judgment, which brought to the mind of the defendants' solicitor the fact that he had failed in his duty to his clients. He writes, in effect, expressing his regret and says that the defendants must appeal on the ground that if an account were taken nothing would be due from the defendants to the plaintiff. He also offered to pay personally all the costs thrown away by his failure to appear—a very proper letter in the circumstances. The proper thing to have done was to have taken proceedings to set aside this judgment, but this he did not do. The time for appealing was allowed to go by, and after that further negotiations took place on the footing stated in the letter of May 9, to the effect that the plaintiff would undertake not to enforce the judgment if certain terms were carried out. All the terms were on the basis of the existing judgment and performance by agreement of the various terms with a view of avoiding the necessity of enforcing the judgment. Then, nothing further being done, and the further negotiations not being fruitful, on June 1, 1938, the plaintiff's solicitor writes that his client is not willing to accept less favourable terms. Then the proceedings taken by the defendants were to appeal to the judge to extend the time for appealing from the original order of the master. That appeal was dismissed. Then the defendants' advisers applied under R.S.C., Ord. 27, r. 15 to set aside the original judgment on the ground that it had been signed in default of appearance to the judgment summons. The master took the view that the R.S.C., Ord. 27, r. 15, procedure was inappropriate. He said it was the practice in the King's Bench Division not to use it thus. There was an appeal from that decision to HALLETT, J., which was heard on June 13, 1939. The judge was disposed to take the same view that he had no power to set aside a judgment under R.S.C., Ord. 14, in proceedings which complied with the requirements of Ord. 14 in that all the necessary evidence was before the court, and there had been no answer to the evidence of the plaintiff. The judge said that, in those circumstances, he did not think R.S.C., Ord. 27, r. 15, applied, and he refused to allow the appeal. With regard to the question as to how far he dealt with the merits of the appeal before him, the gist of the matter

was that it was contended that they were to some extent referred to. The judge used the expression at one stage that he was not dealing with merits but jurisdiction, but in the order the merits were restated.

Upon those facts we are asked to say (i) that there was a default in regard to the proceedings under R.S.C., Ord. 14, by reason of the omission
A of the defendants' solicitor to take the necessary steps to appear at the hearing of the summons, and (ii) that, in the circumstances, the delay was due to the negotiations for a settlement, and that therefore, to do substantial justice to the parties, the judgment should be set aside.

In *Evans v. Bartlam* (1) LORD ATKIN laid down the principles which
B should guide the court. LORD ATKIN said in that case at p. 480 :

The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

LORD WRIGHT in the same case expressed similar views. Here I think
C the rules were strictly followed. LORD WRIGHT expressed the view that default proceedings ought not to interfere with the performance of justice. Counsel for the appellants says that that did happen here. I cannot see that it did. It seems to me that the plaintiff obtained judgment in strict compliance with the requirements of Ord. 14, and the fault
D lies with the defendants for not appealing in time. In so far as they did apply at a later date for an extension of time, that was a matter of pure discretion and the judge acted within his powers. After that an application was made on other lines of procedure under R.S.C., Ord. 27, r. 15. I think the answer to that was that there had been no such default
E in the proceedings under R.S.C., Ord. 14, as is contemplated by R.S.C., Ord. 27, r. 15, and that the matter is not one in which the discretion of the court should be exercised in favour of the defendants, who had complete knowledge of the situation, but negotiated, and, only when the negotiations ended, took the decision that they would like to vacate
F the judgment. They were then too late. For those reasons, the appeal ought to be dismissed.

DU PARCQ, L.J. : I am of the same opinion. The judge was right in the alternative view he took that, assuming he had jurisdiction under
G R.S.C., Ord. 27, r. 15, to set aside the judgment, he ought not to have done so. Here the defendants found out that judgment had been signed against them in time to appeal against it. They could then have applied to set aside that judgment. Instead of doing that, they proceeded to negotiate. When there was a breakdown in the negotiations, then they
H sought to set the judgment aside, but it was very late in the day.

The other question is one of difficulty. SCOTT, L.J., has said there was no default, and I am disposed to share that view. I think that when one looks at the terms of R.S.C., Ord. 27, r. 15., what is contemplated there is a failure to do something that a litigant is directed to do either by R.S.C., Ord. 27, or by one of the other orders. When one looks

at R.S.C., Ord. 14, r. 1, far from finding any order that the defendant is to do anything, the rule only says that the judge can order that the plaintiff should sign judgment

unless the defendant shall satisfy him that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally. . . .

A

There is no direction to the defendant. All that is said is that if he does not satisfy the judge that he has a defence, judgment shall be signed against him. It seems to me conceivable that cases of hardship may arise. There is a special provision for a defendant who fails to appear at the trial, it may be through no fault of his own. In such a case the court can intervene and set aside the judgment, on terms, although nothing wrong had been done by the plaintiff. In R.S.C., Ord. 14, proceedings, the right of appeal to a judge will usually be a sufficient safeguard, but the time for appealing may go by, and it may be very hard if it were not open to this court to set aside the judgment.

B

C

I think that absence is not a default, but I think the point should be left open, and it is not desirable to decide it finally. It may be desirable that the rule should be made clear and the attention of the Rules Committee drawn to it.

D

I agree that the appeal should be dismissed with costs.

SCOTT, L.J.: I agree with the last remark, that the matter might be considered by the Rules Committee. It is not essential here to decide the full scope of the rule.

I am asked by FINLAY, L.J., to say that he concurs with the judgments delivered.

E

Appeal dismissed with costs.

Solicitors: *Lucien Fior* (for the appellants); *H. M. Lyell* (for the respondent).

F

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

IN THE GOODS OF KNIGHT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), July 12, 19, 1939.]

G

Executors and Administrators—Letters of administration—Representation of deceased in action—Grant to Official Solicitor—Whether general grant or one limited to defending particular action—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162—Administration of Justice Act, 1928 (c. 26), s. 9—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1 (1).

H

The intestate had been killed in a motor car accident. Two other persons, injured in the same accident, desired to bring an action against the estate of the deceased under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1), and asked that the Official Solicitor might be granted letters of administration of the estate of

the deceased. The Official Solicitor asked that the grant should be limited to his defending the proposed action:—

HELD: the grant should be limited, as asked by the Official Solicitor, to his defending the proposed action.

[EDITORIAL NOTE.] The operation of the principle *actio personalis moritur cum persona* has in the past made it seldom necessary for the appointment of an administrator *ad litem*, but such appointments have been made where necessary. The provisions of R.S.C., Ord. 16, r. 46, which provide an alternative course to such an appointment, have also tended to limit the number of such grants. The judge has, however, seen his way to make the appointment in a case where it is alleged that the deceased was the person responsible by his negligence for injuries sustained in a motor car accident. No action could have been brought in respect of those injuries before 1934, and the present matter illustrates the procedure in an action against the estate of the deceased.

AS TO GRANT OF ADMINISTRATION *ad litem*, see HALSBURY, Hailsham Edn., Vol. 14, pp. 275, 276, paras. 486, 487; and FOR CASES, see DIGEST, Vol. 23, pp. 209-215, Nos. 2484-2555.]

Cases referred to:

- (1) *In the Estate of Simpson, In the Estate of Gunning*, [1936] P. 40; Digest Supp.; 105 L.J.P. 7; 154 L.T. 136.
- (2) *Pratt v. London Passenger Transport Board, Green v. Vandekar*, [1937] 1 All E.R. 473; Digest Supp.; 156 L.T. 265.

PROBATE MOTION for the grant of letters of administration of the estate of A. F. W. Knight to the Official Solicitor in order that there might be representation of the estate of the deceased in an intended action in the King's Bench Division. The deceased had sustained fatal injuries in a motor-car accident and had died intestate. The only estate was a policy of insurance against third-party risks. Two persons, injured in the accident in which the deceased met his death, desired to commence an action against the estate of the deceased in the King's Bench Division claiming damages in respect of their injuries, and they now applied by motion for a grant of letters of administration to the Official Solicitor, the parties entitled in priority having failed to apply. The grant was asked for solely that the person appointed might act as defendant in the above action, which had been brought under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1). The Official Solicitor desired the grant to be limited to appearing as defendant in the action.

Andrew Balfour for the applicants.

Theodore Turner for the Official Solicitor.

Balfour: In similar cases general grants have been made to nominees of the plaintiffs: *In the Estate of Simpson, In the Estate of Gunning* (1). There is, however, jurisdiction to make a grant to the Official Solicitor as administrator *ad litem* under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162, as amended by the Administration of Justice Act, 1928, s. 9.

Turner: The grant should be a grant *ad litem* only. There is power to make a representation order under R.S.C., Ord. 16, r. 46: *Pratt v. London Passenger Transport Board, Green v. Vandekar* (2). The Official

Solicitor does not desire to act otherwise than as defendant in the action. In the event of the action being successful and a judgment being obtained, the applicants would be entitled to a grant as creditors.

HODSON, J. : I will make an order under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162, as amended by the Administration of Justice Act, 1928, s. 9, for a grant of letters of administration to the Official Solicitor limited to his defending the proposed action by the applicants against the estate of the deceased. The grant will cease on the conclusion of that action.

Solicitors : *Pritchard, Sons, Partington & Holland*, agents for *Alan G. Hawkins & Co.*, King's Lynn (for the applicants) ; *The Official Solicitor*.

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

MONTREAL TRUST COMPANY AND ANOTHER v. CANADIAN NATIONAL RAILWAY COMPANY.

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright, Lord Romer), **July 6, 7, 21, 1939.**]

Privy Council—Quebec—Railways—Contract—Director directly or indirectly interested—Lease of house for chairman of directors—Railway Act of Canada, (R.S.C., 1927, c. 170,) s. 121—Canadian National Railways Act (R.S.C., 1927, c. 172).

The Canadian National Railway Co. is a company incorporated by a Dominion statute. It has no capital, stock or shareholders. Its incorporators are its directors, who are all chosen by the Governor-General-in-Council, and it is subject to the provisions of the Railway Act of Canada, 1927, excepting those provisions which are inconsistent with its own Act. The Railway Act of Canada, S. 121, provides that no director shall enter into, or be directly or indirectly for his own use and benefit interested in, any contract with the company other than a contract which relates to the purchase of land necessary for the railway. In Sept., 1929, the president and chairman of the railway company was serving in these capacities under an agreement which was due to expire in 1930. He was living, at his own expense, in a house in the city of Montreal. By an agreement of Sept. 23, 1929, he was engaged to continue to serve as president and chairman for a period of 5 years, and a proposal was set on foot that (in addition to his salary) he should be provided with free residential quarters, and on Sept. 17, 1929, a resolution was passed that a suitable and properly equipped residence should be leased for the use of the chairman. The house selected was that in which the president was then living, but a difficulty existed in that the owner would not further lease the property but would only sell, while the railway company would not buy but would only rent. Eventually one Decary, a director of the railway company, arranged with the appellant company to advance the money necessary to purchase the property and vest it in his nominee, one Séguin (the second appellant), the respondent company to lease the property for 10 years from Séguin, and this transaction was approved by a resolution of the directors of the railway company in Aug., 1930. The chairman died in Mar., 1933, and subsequently the legal advisers of the respondent railway company wrote to Séguin alleging that the lease was a nullity by reason of the part played by Decary in relation to

the lease and purchase of the property, and of the provisions of sect. 121 of the Railway Act. The appellants thereupon instituted proceedings for the recovery of the rent due under the lease:—

HELD : (i) in the circumstances the lease was a contract with the railway company in which a director, Decary, was directly or indirectly interested and the provision of a residence for an official of the company was not a purchase of land necessary to the railway within the meaning of the Act.

(ii) the contract was void and the rent irrecoverable.

[EDITORIAL NOTE. Two points arise in this case. The first is whether the contract was one in which a director was directly or indirectly interested. The second is, assuming that to be so, was the contract a nullity or was the only effect that the director's interest in it avoided. It is decided that the director was indirectly interested in the contract and that, that being so, the contract was a nullity and of no effect.

AS TO CONTRACTS IN WHICH DIRECTORS ARE INTERESTED, see HALSBURY, Hailsham Edn., Vol. 5, pp. 319-323, paras. 534, 535 ; and FOR CASES, see DIGEST, Vol. 9, p. 470, Nos. 3075-3082.]

Cases referred to :

- (1) *Foster v. Oxford, etc., Ry. Co.* (1853), 13 C.B. 200 ; 10 Digest 1148, 8125 ; 22 L.J.C.P. 99 ; 20 L.T.O.S. 224.
- (2) *Macdonald v. Riordon* (1899), 30 S.C.R. 619 ; 17 Digest 432, case c ; affg. Q.R. 8 Q.B. 555.
- (3) *Re Express Engineering Works, Ltd.*, [1920] 1 Ch. 466 ; 9 Digest 521, 3423 ; 89 L.J.Ch. 379 ; 122 L.T. 790.

APPEAL from a judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec [LETOURNEAU, BOND, GALIPEAULT, ST. JACQUES and BARCLAY, JJ.], dated Dec. 14, 1938, confirming a judgment of the Superior Court [DELORMIER, J.], dated Sept. 20, 1935. The judgment of their Lordships was delivered by LORD RUSSELL OF KILLOWEN.

Cyril Radcliffe, K.C., and *W. F. Chipman, K.C.*, for the appellants.

Louis S. St. Laurent, K.C., and *Hugh E. O'Donnell, K.C.*, for the respondents.

Radcliffe, K.C. : This was not Decary's contract. A lease is not a contract within the meaning of sect. 121, although a lease has got contractual elements. The effect of sect. 121 is not to avoid the transaction which is the contract, but is to avoid the interest of the director. The Court of Appeal held itself bound by the decision in *MacDonald v. Riordon* (2), but the facts in that case have no relation to the facts in the present case. Decary was acting at the request of the board and was not doing so in order to make any profit out of the transaction. The statutory position in Quebec under sect. 121 is the same as that which is to be found in this country as exemplified in *Foster v. Oxford Railway Co.* (1).

Chipman, K.C. : The plan to acquire the property was perfectly sound and it cannot be said to become invalid because an individual had to be found to purchase the property. Séguin in fact and in law was the owner and lessor of the property and the only contracting party

with the railway company. Sect. 121 was meant to provide protection for the corporators as against the directors; the directors here are the corporators and cannot have a different interest. The respondent has adopted the lease and cannot now repudiate it, and is estopped from setting up the invalidity of the lease against the appellants. [Counsel referred to *Re Express Engineering Works, Ltd.* (3).]

The respondents were not called upon.

LORD RUSSELL OF KILLOWEN: In this case the Montreal Trust Co. and one Séguin appeal from a judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec, which affirmed a judgment of the Superior Court. The judgment declared a lease by Séguin to the Canadian National Railway Co. to be illegal and void, and dismissed with costs an action for rent thereunder brought by the Montreal Trust Co. as transferee of Séguin's rights under the lease. Séguin was summoned as *mis-en-cause*. The relevant facts which led up to the action must be stated, the Canadian National Railway Co. being referred to as the railway company, and the Montreal Trust Co. being referred to as the trust company. The railway company is a company incorporated by a Dominion statute, 9 and 10 Geo. V, c. 13, now represented by R.S.C., 1927, c. 172. It has no capital, stock or shareholders. Its corporators are its directors, who (from 5 to 15 in number) are all chosen by the Governor-General-in-Council. It is subject to the provisions of the Railway Act of Canada (R.S.C., 1927, c. 170), excepting those provisions which are inconsistent with its own Act.

In Sept., 1929, the president and chairman of the railway company was Sir Henry Thornton. He had filled those offices for some 7 years. He was then serving in those capacities under an agreement with the railway company dated Sept. 2, 1925, at a salary of \$65,000.00 a year. That agreement was due to expire on Oct. 4, 1930. He was living, at his own expense, in a house, 1415, Pine Avenue, in the city of Montreal, which he leased from a Mr. Beardmore at a rent of \$6,000.00. His tenure was, however, precarious, because Mr. Beardmore was anxious to sell the house, and the lease contained a clause enabling Mr. Beardmore to terminate the lease on three months' notice.

By an agreement dated Sept. 23, 1929, and made between the railway company and Sir Henry Thornton, he was engaged to continue to serve as president and chairman for a period of 5 years from Oct. 4, 1928, and thereafter from year to year determinable by either party on 12 months' notice, at a salary of \$75,000.00 without any extra fees or remuneration of any description; and the agreement of Sept. 2, 1925, was cancelled as from Oct. 4, 1928. Apparently out of abundant caution, Sir Henry Thornton obtained an agreement (dated Oct. 25, 1929) from the Crown to the same effect, the salary of \$75,000.00 thereunder being expressed to be payable less the remuneration receivable under his agreement with the railway company. For some reason, not immediately

apparent, a proposal was set on foot that the president should (in addition to his salary of \$75,000.00) be provided with free residential quarters, and on Sept. 17, 1929, the executive committee of the directors passed a resolution (which was approved by the board of directors on Sept. 23, 1929), in the following terms :

- A Whereas in the opinion of the executive committee a suitable residence in Montreal for the chairman and president of the company is essential for the proper conduct of the company's business, it was unanimously resolved that the executive committee should undertake to lease a suitable and properly equipped residence for the use of the chairman and president of the company under such terms and conditions as the committee may subsequently deem proper.
- B Steps were then taken to provide the residence, the most obvious choice, if it were possible, being the house in Pine Avenue which was, and had for some time past been, Sir Henry's home. A difficulty, however, existed in the fact that Mr. Beardmore would not lease but would only sell, while the railway company would not buy but would only rent. At this point Mr. Decary becomes prominent in the story. He was president of the Title Guarantee and Trust Corpn., and a director of the railway company. He was also the head of a firm of notaries, Decary, Barlow & Joron. He was asked by his co-directors whether he could arrange the financing of a purchase of the Pine Avenue house.
- D He said that the Title Guarantee and Trust Corpn. would not finance it, but that he would try to get it financed elsewhere. Ultimately he did arrange with a Mr. Donaldson, the manager of the trust company, that the trust company would advance the money necessary to purchase the property on the terms contained in two letters. The first letter was from
- E Decary to Donaldson, dated June 24, 1930, as follows :

Referring to our conversation of the other day in connection with the Beardmore property on Pine Avenue, I, or my nominee subject to my personal guarantee, will purchase the above property for \$185,000.00 cash, the property subsequently to be rented to the Canadian National Railways for ten years, at a price representing $8\frac{1}{2}$ per cent. per year, net, outside of taxes of any kind, repairs and improvements.

- F You will make a loan for this amount of \$185,000.00 for ten years, at $6\frac{1}{2}$ per cent., the difference between the amount of interest paid and $8\frac{1}{2}$ per cent. to be applied as a sinking fund on the amount of the loan. Your company will be given a first mortgage on the property and an absolute transfer of the Canadian National lease as guarantee for the loan.
- G We should be in a position to complete this transaction during the first days of the month of July. Will you please advise if this is convenient to you, and oblige.

The second letter was from Donaldson to Decary, dated June 25, 1930, as follows :

- I have your letter of the 24th instant, in connection with the Beardmore property on Pine Avenue. The arrangement as outlined by you is quite satisfactory to us and we are prepared to make the loan for the amount stated, subject to satisfactory title.

Meanwhile Mr. Beardmore and Sir Henry Thornton had already come to terms, under which Mr. Beardmore agreed to accept and Sir Henry agreed to pay \$175,000.00 for the house and \$10,000.00 for sundry furnishings therein ; and the benefit of this contract was on July 9,

1930, at the request of Mr. Decary, assigned by Sir Henry Thornton to the *mis-en-cause* Séguin. Séguin was described by Mr. Decary in this request, which was made by letter dated July 4, 1930, as "my nominee." Séguin is himself a notary, and is in the employ of Mr. Decary's firm.

On June 16, 1930, the executive committee had passed a resolution A which was worded thus :

RESOLVED that the company rent from GEORGE H. SÉGUIN for a term of ten (10) years, commencing on Aug. 1, 1930, and expiring on July 1, 1940, that certain house bearing No. 1415, Pine Avenue West, in the City of Montreal, for an annual rental of FIFTEEN THOUSAND SEVEN HUNDRED AND TWENTY-FIVE DOLLARS (\$15,725.00) payable quarterly on Feb. 1, May 1, Aug. 1 and Nov. 1 of each year, the first payment to become due on Nov. 1, 1930, and subject to the following conditions on the part of the company, namely :—

To keep the house in good order of repairs during the entire term of the lease ;

To use the premises as a private residence only, and for no other purposes ;

To pay all taxes and assessments, general or special, or of any nature whatsoever which may be imposed on said property during the term of the lease.

The sum of \$15,725.00 is 8½ per cent. on the total sum payable to Mr. Beardmore for the house and furniture. This resolution was approved by the directors of the railway company on Aug. 19, 1930.

On Aug. 8, 1930, three notarial documents were executed and subsequently registered, namely, (i) a deed of sale by Mr. Beardmore to Séguin of the house and its contents and furnishings, the price being stated to be \$175,000.00 for the immovable properties and \$10,000.00 for the contents and furnishings of the house ; (ii) a lease by Séguin to the railway company for the term of 10 years from Aug. 1, 1930, of the house in consideration of \$157,250.00 payable by 40 quarterly instalments as therein mentioned ; and (iii) a deed of loan between the trust company and Séguin by which the trust company lent \$185,000.00 to Séguin, and Séguin bound himself to repay the loan on Aug. 1, 1940, to pay interest at 6½ per cent. in the meantime, and also to reduce the principal by annual repayments of 2 per cent. of the amount of the loan. As security Séguin hypothecated in favour of the trust company the house in Pine Avenue, and transferred to it his rights under the lease to the railway company.

Subsequently Séguin as " owner " of the house entered into an agreement to make certain repairs thereto at a cost not to exceed \$50,000.00. This fact need only be stated for the purpose of explaining the reference G to that sum in the following letter. On Nov. 6, 1930, Mr. Decary wrote a letter to Sir Henry Thornton containing the following passage :

As you have asked me also, I hereby agree on behalf of the owner of property 1415, Pine Avenue, which you now occupy, to sell you this property at any time during the term of its lease to Canadian National Railways for the sum remaining due to us on the advances of \$185,000.00 and \$50,000.00. In order, however, not to encumber my estate in any way this option would have to be exercised within 6 months following my death should I die before the expiry of your lease.

On Nov. 20, 1930, Sir Henry Thornton (by letter of that date) informed the Minister of Railways of this option to purchase, and stated that it was " of course assignable to any nominee of my own."

The rest of the story is soon told. Sir Henry Thornton died in March, 1933; and on Apr. 27, 1933, the legal advisers of the railway company wrote to Séguin alleging that "the lease executed on Aug. 8, 1930 . . . between the railway and yourself—acting for the benefit of Mr. Ernest Decary—is a nullity." The present action was commenced on Oct. 13, 1933, claiming payment of the instalments of rent due on May 1, 1933, and Aug. 1, 1933, respectively.

The point of the case can now be stated. It is claimed by the railway company that the lease is a nullity by reason of the provision contained in sect. 121 of the Railway Act (R.S.C., c. 170) which enacts:

No person who is a director of the company shall enter into, or be directly or indirectly, for his own use and benefit, interested in any contract with the company other than a contract which relates to the purchase of land necessary for the railway, nor shall any such person be or become a partner of or surety for any contractor of the company.

It is said that by reason of the part played by Mr. Decary in relation to the lease and the purchase of the property, the section operates to make the lease a nullity and of no effect. The trial judge and the appeal court have both taken this view, but as the result of different reasoning. Their Lordships also are of opinion that the action was rightly dismissed by reason of the section, but they prefer to base their view on a branch of the section different from that which found favour with the judges of the Court of King's Bench. Their Lordships are not concerned with any question but the validity of the lease. No question can arise in this action (to which Mr. Beardmore is not a party) in relation to the purchase from him and the conveyance by him to Séguin, or in relation to the hypothec by Séguin to the trust company. Indeed, by no stretch of the imagination can either transaction come within the section; they cannot in any sense be described as contracts with the railway company.

The case is otherwise with regard to the lease. To that document the railway company is a party, and by that document it enters into contractual relationship with Séguin. However, Séguin was admittedly, and to the knowledge of the railway company, merely the nominee of Mr. Decary. Subject to the rights of the trust company under the deed of hypothec, Séguin would have to account to Mr. Decary for the rent payable by the railway company under the lease. On the other hand, Mr. Decary would be bound to indemnify Séguin and keep him harmless from all liability imposed upon him as a lessor by virtue of the lease. In these circumstances their Lordships feel no doubt that the lease was a contract with the railway company in which Mr. Decary was directly or indirectly interested. So far the case falls directly within the words of the section. The appellants, however, contended that the whole transaction was not a profitable one, that Mr. Decary only acted in the matter at the instance of the railway company, and with no expectation of profit, that Sir Henry Thornton's option to purchase existed for the benefit of the railway company, and that in these cir-

cumstances it could not be said that Mr. Decary, if interested in a contract with the railway company, was interested therein "for his own use and benefit." Their Lordships cannot accede to this contention. Mr. Decary no doubt acted as he did at the request of the railway company and in order to achieve the result which was desired, namely, that a purchase by the railway company should be avoided and a lease from a purchaser should be obtained. This result was achieved by Mr. Decary finding a purchaser in the shape of his nominee who granted the desired lease, with the inevitable consequence that Mr. Decary became interested, and for his own use and benefit. Nor can the fact, if it be the fact, that the transaction is deemed unprofitable, affect the question. The lessor was Mr. Decary's nominee, and Mr. Decary represented no one but himself in procuring his nominee first to become the registered owner of the property, and then to execute the lease. Mr. Decary's interest in the lease was an interest which enured for his own use and benefit, and for the use and benefit of no one else. Nor can the existence of an option to purchase affect the question, for unless and until the option is exercised the position remains unchanged. It was further contended by the appellants that the case fell within the words of exception contained in the section, namely, "other than a contract which relates to the purchase of land necessary for the railway." Their Lordships will assume, without in any way indicating an opinion upon the point, that a lease of land is a contract which relates to the purchase of land. They are, however, of opinion that the land here in question was not "necessary to the railway" within the meaning of the section. "Railway" is defined by the Act (sect. 2 (21)) in such a way as to restrict its meaning, unless the context otherwise requires, to the track and its physical appurtenances. Their Lordships are unable to conceive how providing a residence for an official of the company could be a purchase of land necessary for the railway as defined by the Act. The result is that the case falls exactly within that branch of the section which prohibits a director from being interested in any contract with the company. Their Lordships prefer to base their decision upon that branch of the section, as they feel that there might well be a difficulty in saying that the lease in this case, in fact entered into by Séguin, though chosen for that purpose by Mr. Decary, was a contract "entered into" by Mr. Decary.

The question then remains, what is the effect of the prohibition contained in the section? It was contended that the effect was not to invalidate the contract, but only to avoid the director's interest in it, and to give rise to penalties under sect. 444. It was said that the effect produced by sect. 121 was no different from that produced by sects. 85 and 86 of our Companies Clauses Consolidation Act, 1845, as exemplified by the case of *Foster v. Oxford, Etc., Ry. Co.* (1), in which it was held that a contract between the company and a director was not avoided. The language of the two enactments is not, however, comparable and

the courts in Quebec decided that the contract was a nullity, being bound, as they said, by the decision of the Supreme Court of Canada in the case of *Macdonald v. Riordon* (2). That case was concerned with sect. 19 (16) of the Consolidated Railway Act, 1879, which was framed thus :—

A No person holding any office, place or employment in or being concerned or interested in any contracts under or with the company, shall be capable of being chosen as a director, or of holding the office of director, nor shall any person being a director of the company enter into, or be directly or indirectly, for his own use and benefit interested in any contract with the company, not relating to the purchase of land necessary for the railway, or be or become a partner of any contractor with the company.

B In that case a director of a railway company had by agreements with the firm of contractors who were constructing the company's line, become entitled to a share of the payments made by the railway company to the contractors. He brought an action to recover his share against
C the contractors, who pleaded that the agreements were null and void because they were prohibited by sect. 19 (16) of the above-mentioned Act. The trial judge allowed the claim, holding that making such contracts was merely a punishable offence which did not affect the civil rights of the parties. That judgment was reversed by the Court
D of Review (Montreal) on the ground that the contracts were prohibited by law and therefore void. The judgment of the Court of Review was affirmed on appeal by the Court of Queen's Bench for Lower Canada (Appeal Side), whose judgment was in turn affirmed by the Supreme Court of Canada and for the reasons given in the Court of Queen's Bench.
E It is sufficient, their Lordships think, to quote a passage from the judgment of WURTELE, J., in the Court of Queen's Bench. After referring to the contracts which section 19 (16) prohibited, he continued, at pp. 574, 575 :

F . . . and the effect of such a prohibition is to render such a contract illegal and void, although the statute itself does not state that it is so and only imposes a penalty on the offender. Our civil code, in art. 14, declares that prohibitive laws import nullity although such nullity is not expressed. . . .
. . . : In the present case the contracts were entered into in transgression of the provisions of the Consolidated Railway Act of 1879 which prohibited the appellant from entering into such contracts and which declared his act in becoming a party to them a misdemeanour and they are therefore void and without effect.

G It is true that the contracts there in question were not contracts with the company, but contracts which made the director interested in a contract with the company. Their Lordships, however, agree with the principle there laid down, that prohibition of a contract by statute
H renders the contract void and of no effect.

Their Lordships are of opinion that in the present case, the railway company, in taking a lease in which to its knowledge one of its directors was interested, made a contract prohibited by sect. 121. That contract is accordingly void and of no effect, and the action to recover rent thereunder was rightly dismissed. This appeal should accordingly be dis-

missed, and their Lordships will humbly advise His Majesty accordingly.

The appellants must pay the costs of the appeal.

Appeal dismissed with costs.

Solicitors: *Lawrence Jones & Co.* (for the appellants); *Freshfields, Leese & Munns* (for the respondents).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*]

BARSBY v. DONCASTER AMALGAMATED COLLIERIES, LTD.

[COURT OF APPEAL (Scott, Finlay and du Parcq, L.JJ.), **July 26, 27, 1939.**]

Mines—Coalmine—Contract of employment—Winding times—Necessity for workmen to be present in time to be taken down in cage—Plaintiff present in time but not taken down—Whether plaintiff an absentee—Coal Mines Regulation Act, 1908 (c. 57), s. 1.

The plaintiff was employed as a miner in the defendants' coalmine. His shift started at 6 a.m. and it was his duty to present himself by that time at the pit-head ready to be taken down. On Sept. 22, 1938, he arrived at the colliery at about 5.35 a.m. He then had to change his clothes, fill his water bottle, get his safety lamp and have it tested. He arrived at the pit-head shortly before the close of the winding period, but owing to the crowd of other men, he was not able to get into the cage before the last cage went down at about 5.57½ a.m. The defendants claimed that he was an absentee and refused to pay him any wages in respect of that day. Thereupon, the present action was brought claiming one day's wages. The defendants contended that it was the plaintiff's duty to present himself for work at such a time that he could be taken down in time to start his work by 6 a.m., irrespective of any other men who might also be waiting to be taken down:—

HELD: (i) the plaintiff's duty was to present himself at the colliery at such a time as would enable him, having completed the necessary preliminaries, to be taken down in time, provided that the employers carried out their part of the contract, and this duty he had fulfilled.

(ii) the defendants were under a duty to make some reasonable arrangement to enable the plaintiff to be taken down within the prescribed time. This they had failed to do, although he was present within the time that they had notified him that he must be present.

(iii) it was not possible to read into the contract of employment any term to the effect that it was the duty of the men as a whole to spread their arrivals more or less evenly over the whole winding period.

[EDITORIAL NOTE.] The hours of labour in mines are regulated by statute, but the matter is very complicated. A miner cannot proceed to his work straight away as is the case with any ordinary employee. He has to go to the baths to change his clothes, he must then fill his water bottle, have his lamp tested, and be searched for matches, etc. After these matters are satisfactorily completed, he must wait his turn to go down. Obviously there is much here for discussion between the parties, and the views of the Court of Appeal on the time the miner should arrive at the colliery premises are of much interest to those engaged in the industry. The case was regarded as a test case, but the court have treated it rather as a pure question of fact.

AS TO REGULATION OF HOURS IN MINES, see HALSBURY, Hailsham Edn., Vol. 22, pp. 762-765, paras. 1592-1595; and FOR CASES, see DIGEST, Vol. 34, pp. 729, 730, Nos. 1098-1103.]

APPEAL by the defendants from a decision of His Honour JUDGE HILDYARD at the Doncaster county court dated Apr. 1, 1939.

The facts of the case are fully set out in the judgments.

Cyril J. Radcliffe, K.C., and *J. B. Herbert* for the appellants.

J. Neal for the respondent.

- A *Radcliffe, K.C.*: The burden of proof of a breach of contract was on the plaintiff. The judge found that there had been a breach, because the defendants had not taken the plaintiff down the shaft, although he had been on the premises in reasonable time. The obligation on the defendants is to provide proper winding facilities. No other construction
- B can reasonably be put upon the contract. The obligation on the men is to get to their work at the pit bottom at the time when the shift begins. The plaintiff was disobedient in that he failed to avail himself of the facilities provided. Presentation at the end of a queue is not presentation for work.
- C *Neal* was not called on.

- D *Scott, L.J.*: A miner employed by the Doncaster Amalgamated Collieries, Ltd., at the Brodsworth Main Colliery in Yorkshire, claimed a day's wages in the following circumstances. He arrived at the pit-head at a time when there were a number of other workmen there in front of him, only a comparatively short time before the last cage on the morning winding down left the pit-head. By reason of other men being in front, he failed to get taken down before the winding period fixed under the Coal Mines Regulation Act, 1908 (as amended by the
- E Coal Mines Act, 1919, s. 1) expired. As he did not get down the pit, the colliery company treated him as missing the day's work, and did not pay him for that day. No question arises as to the amount. The miner contended that he was there within the time which the statute and his contract required him to be there in order to be taken down.
- F The colliery company said that he ought to have been there earlier, because he ought to have known that there would be other people waiting to go down, and to have made the necessary allowances so that he would be there early enough to get down. The county court judge, after hearing a considerable number of witnesses, found as a fact that
- G the man was there in time, and that the defendants had no answer to the claim, and gave judgment in his favour for the amount of the day's wages.

- H In truth, the real issue in the case raised by the six separate workmen who were claiming, and intended to be tried by the judge as a matter of principle for the men's guidance, was a question of the interpretation of their contract of employment, in the light of the statutory provisions affecting this question of the length of hours during which workmen in coal mines are allowed by statute to be underground on the normal shift, and the provisions for fixing the period of winding down and winding up on the return to the surface. In my view, on the facts of

the case, the judge's decision was inevitable, and no question of law seems to me to have been really put in issue by the way the case was presented and by the evidence which was given, and I see no ground for attempting to differ from the county court judge, as I think he decided it as a question of fact.

With that preliminary introduction, I go to the question of the contract and the legislation affecting it. Oddly enough, although this was an action on the contract, counsel for the plaintiff in the county court did not attempt to prove the contract of employment, treating it as a matter of fact which was probably common ground to both sides, and assuming that there was no particular term in the contract which affected the question as to what the terms of that contract were. We can say nothing beyond what appears from the judgment of the county court judge except this, that the carrying out of the contract of employment of a coal miner who is going to work underground has to be in accordance with the requirements of the Coal Mines Regulation Acts dealing with that topic.

The first Act is the Coal Mines Regulation Act, 1908. Sect. 1 (1) of that Act says :

Subject to the provisions of this Act a workman shall not be below ground in a mine for the purpose of his work, and of going to and from his work, for more than eight hours [by the Coal Mines Act, 1919, s. 1, altered to seven hours] during any consecutive twenty-four hours.

By the Coal Mines Act, 1931, s. 1, that period of 7 hours has become 7½ hours. Then subsects. (2), (3), (4) are as follow :

(2) No contravention of the foregoing provisions shall be deemed to take place in the case of a workman working in a shift if the period between the times at which the last workman in the shift leaves the surface and the first workman in the shift returns to the surface does not exceed . . .

the statutory time. Particular attention must be given to the phrase "between the times at which the last workman in the shift leaves the surface," that is to say, at the end of the winding period for winding the men down.

(3) The owner, agent or manager of every mine shall fix for each shift of workmen in the mine the time at which the lowering of the men to the mine is to commence and to be completed, and the time at which the raising of the men from the mine is to commence and to be completed, in such a manner that every workman shall have the opportunity of returning to the surface without contravention of the foregoing provisions of this section, and shall post and keep posted at the pit-head a conspicuous notice of the time so fixed, and shall make all arrangements necessary for the observance of those times in lowering and raising the men.

(4) The interval between the times fixed for the commencement and for the completion of the lowering and raising of each shift of workmen to and from the mine shall be such time as may for the time being be approved by the inspector as the time reasonably required for the purpose. . . .

The rest of subsect. (4) does not matter. I want to deal with the language of subsect. (3), and I omit the irrelevant words : "The manager shall fix for each shift the time at which the lowering of the men to the mine is to commence and to be completed and keep posted at the pit-head a conspicuous notice of the time so fixed." It was proved in the court

below that a notice in compliance with that subsection was so posted at the pit-head.

- There were at this pit-head two shafts which took men on this date down to the Barnsley Seam where the first day shift, the shift in question, were to work. I should say that those two shafts were No. 3 shaft and
- A No. 1 shaft, No. 3 shaft working, I think, in three shifts, and No. 1 shaft working in two day shifts, but not working a night shift as in the case of No. 3. The first day shift for No. 3 shaft is stated in the notice to have had for lowering or admission a period of 35 mins. in all, starting at 5.25 a.m. and ending at 6 a.m. No. 1 shaft had a similar total period
- B of 35 mins. from 5.20 a.m. to 5.55 a.m., thus beginning and ending five minutes earlier than the winding period for shaft No. 3. The word "admission" I myself think refers to the lowering down for admission to the mine. I say that because the comparable column for bringing the men back to the surface is described as raising or return; but it
- C does not matter for the purpose of the case whether the word "admission" there means admission to the cage or admission to the mine. That is the notice which was put up, and it is to be observed that under sect. 1 (3) of the Act it is provided that the period to be fixed by the manager is to be so fixed that every workman shall have the opportunity of returning
- D to the surface without contravention of the foregoing provisions of the section. That means that the two winding periods, one for lowering and the other for raising, must be strictly adhered to, so that the period below ground is not exceeded. The other provision in the subsection is that the manager shall make all arrangements necessary for the
- E observance of those times of lowering and raising the men. The only arrangement proved in evidence was this notice, which was the statutory notice, of the lowering and raising period, and a notice which the plaintiff said he had never seen, but I will read it, because it was in fact proved as part of the arrangements made for the observance of the time of
- F lowering and raising. It was dated Mar. 25, 1938:

- It has come to the notice of the management that a certain number of men and boys are persistently presenting themselves late for work at the shaft tops. The banksmen have been given instructions that in future anyone who is employed at shift times who presents himself at Nos. 2 or 3 shafts after the hours of 6 a.m., 2 p.m. or 10 p.m. and at No. 1 shaft after the hours of 5.55 a.m., 1.55 p.m. or 9.55 p.m. will be refused admittance to the pit, and the names of such persons
- G will be sent to the Ministry of Labour as absentees.

That was never brought to the attention of the plaintiff. No other arrangements for the observance of the times in lowering the men were proved in evidence.

- The position, therefore, was this, that, *prima facie*, if a man arrived
- H at the pit-head ready to be wound down in a cage between the beginning of the winding and the completion of the winding, taking the case of shaft No. 3, that is, between 5.25 a.m. and 6 a.m., he was carrying out what must have been an implied term of the contract. He could not get to his work except by going down in the cage, and, therefore, it is obvious that that must have been an implied term of the contract of

employment. There was a certain amount of evidence given in the case as to what a miner had to do on arriving at the colliery premises before he would be ready to go to the pit-head in order to be wound down. He had to call at the baths in order to change his clothes and put on his mining clothes ; he had there to get water to fill his water bottle for drinking ; he had to go from there to the lamp station and get his safety lamp ; he had to go with that from there to the station where his lamp was tested to see that it was properly locked, and where one out of every ten men was searched to make sure they had not got any matches, and so on. It is obvious that men might be late because the colliery company had failed to be reasonably expeditious in performing their part of the function that had to be performed in those preliminaries ; conversely, a man might be late at a particular place and be held up there. In the result, in this action, none of those preliminary questions affected the issue, because, on the findings of fact, into which I am not going, the judge disposed of them.

So the simple issue in the result was this. The man arrived at the pit-head, according to his evidence, very shortly before the close of the winding period, but he does not give the time at which he actually arrived. He formed up in the queue ; he took his kale, as they call it, (that is, his place in the queue), at No. 3 shaft ; he could not tell the time. Shortly afterwards, but I do not know how many minutes afterwards, he heard the call of the banksman, the man who, under the Act, is in charge of the winding down : " No more this morning," meaning that the last cage had gone and that no more men could be wound down, so that he did not get taken down. His case, as I have said, is that he was there in time and was not wound down, and therefore it was the fault of the colliery company that he lost his day's work.

The only other evidence which is important in respect of No. 3 shaft, is that with regard to the banksman, a man named Smeaton. The banksman is the title of the man whose duty it is under the Act to see to the winding down or up of the men. The cages here were double-decker cages, and this banksman was the banksman attending to the lower deck of the cage, there being another banksman attending to the men in the upper deck of the cage. He remembered the date, Sept. 22, 1938. He said :

We began at 5.45, and there was no winding down before that. I arrived at 5.32.

He added that he would be getting ready 3 mins. after arrival, that is to say, at 5.35 a.m. He started putting men in the cage at 5.43 a.m. ; that is, only 17 mins. before 6 a.m. Then he gave orders to wind down, and there were six cages, that is to say, six consecutive windings, of which the first had three short of full complement, the next one two short, the next one two short, the next one one short, and the other two were full, the complement for each deck being 30 men ; that is, 60 men to the whole cage. The last went down about 2½ mins. to 6, at the end of

the winding period. Then in cross-examination he said the buzzer (that is, the last buzzer) went just as the cage was coming up, and any one who came after $2\frac{1}{2}$ mins. to 6 would have been refused. In re-examination he said there was no cage in fact available between $2\frac{1}{2}$ mins. to 6 and 6 a.m. Those are all the facts as regards No. 3, and I do not think it is necessary to go into the question in relation to No. 1, which was also used for winding men down on the same shift for the Barnsley Seam, and where the circumstances were similar.

Upon those facts, which I think are really the whole of the facts relevant to the issue, the colliery company raised this question. They said that it is the duty of their men to arrive at the pit-head in such time that there is room for the whole shift to get down in the period allowed, which means that it must be their duty as a whole to spread their arrivals more or less evenly over all possible windings during the winding period. The answer to that which appealed to the county court judge and appeals to me is this, that that might have been a very reasonable term to put in the contract; it might have been a reasonable arrangement for the employer to make by agreement with the representatives of the men under sect. 1 (3) of the Act of 1908, but that, in the absence of any such general arrangement binding on the men and accepted by the men through the men's ordinary trade union representatives, it is impossible to read into the contract any such condition. The notice to which I referred, although the plaintiff in this particular action had not seen it, is a notice which seems to treat each man as a separate individual acting solely for himself, and without regard to the probability that if every one of the men of a shift act similarly for themselves there will be very few men at the pit-head at the beginning of the shift and a congestion of men towards the end of the shift, all having been anxious to have the maximum time for breakfast, and so on, at home, and not wanting to be unduly early. There was no evidence at all of any such arrangement having been made. The action was brought by the man on the simple ground that he had carried out the terms of the contract according to the pit-head notice as to winding times, had presented himself in sufficient time, and had not been taken down, and the judge accepted that argument. There was one cross issue which perhaps confused the discussion to some little extent. The man appears to have contended that as long as he arrived within the colliery premises so that he had time to go to the baths, to the lamp cabin, and so on, and get through the necessary preliminaries before he was qualified to ask for admission to the cage, he had done all as he was required to do under the contract. That, in my view, cannot be so. It must be a term of the contract of employment to which every man is a party that he will present himself at the pit-head at a time which will enable the company to wind him down in accordance with their duties under the statute, because they cannot exceed the winding times without committing an offence punishable by prosecution under the statute.

Therefore I think the question in the case was simply and solely, was this man at the pit-head in accordance with the requirements of his contract, interpreting it in the light of the Coal Mines Regulation Act, 1908? The judge decided that he was, and that, under the individual contract sued on, in the absence of any proof of a special term of the contract about arrangements in regard to others, he could not say that the defendants had shown any ground for escaping the conclusion that they had failed to make arrangements to enable this particular plaintiff to be wound down within the time required by the Act, although he had been present within the times that they had notified him he must be present in order to be wound down. Therefore, in my opinion, this appeal must be dismissed with costs. A
B

In the course of the argument I raised the question as to whether any attempt had been made at this particular pit for the management to get the miners' representatives, the trade union representatives, to consider this question of some rota or other method by which the arrivals at the pit-head could be distributed over the time so as to prevent this sort of happening. No doubt that question, my own question, and that of my colleagues, if they agree, may be duly considered in the future. C

FINLAY, L.J.: I agree. In my view, the decision of the county court judge was here a decision on a question of fact, and a decision which there was ample evidence to support. The action was one to recover a sum, undisputed as to the amount, in respect of wages, and to that the answer that was made was that on the date in question the plaintiff neglected to comply with the rules of the colliery and to present himself for work as required. The county court judge, having heard the whole case, found this: D
E

I find that the plaintiffs did present themselves for work at such a time as could reasonably be expected to bring them to the pit head in time for such work, and that they did nothing to cause any delay, and, in my opinion, they thereby fulfilled their obligations under their contracts. F

The evidence shows, as I think, perfectly clearly that the plaintiff was there in ample time, that he in no way was the cause of any delay, and, further, that he arrived at the pit-head in time to have been conveyed down, and that the reason, for which he was in no way responsible, why he did not get conveyed down, was that there was a great crowd of other men. In my opinion, it is simply impossible for us to say that the county court judge was in any way wrong in the conclusion of fact—for it is a conclusion of fact and nothing else—at which he arrived. I am not going through the evidence; it would be a waste of time. G
H

There are two other observations which I will make, and they are these. In the first place, it was admitted that there was a breach of contract or breach of duty by the company in that the banksman in charge of the cage at No. 3 shaft was there too late; he only began lowering at 5.47 a.m., and he did not get there at all until later than he ought

- to have been there. It was contended by junior counsel for the appellants that, though that was true, none the less it could not have produced any effect, because the cages were not in fact full when he did begin to wind. With regard to that, it is essentially a question of fact. All I can say is this, that the county court judge who heard the whole thing
- A said: "It is not possible to say what would have been the position if journeys had been made regularly from 5.25 a.m. or even from 5.35 a.m., but certainly if 35 mins. lowering had been provided even from 5.35 a.m., all the plaintiffs would have been taken down to the pit bottom." I decline to say that that finding was wrong. The other matter about
- B which I want to say a word is this, and it is following what SCOTT, L.J., has just said. It appears that there had been trouble, due, as one gathers, to men crowding, I suppose from the natural desire, as SCOTT, L.J., has said, to have as long as possible for breakfast and only just get there in time. Probably it would be quite right that some arrangement should
- C be made with regard to that. I can only think that it was unfortunate that instead of endeavouring by arrangements with the men's representatives to meet that situation, this somewhat arbitrary action was taken on this particular day, and it is no doubt still more unfortunate for the defendants that the arbitrary action, in my opinion, resulted in
- D their breaking their contract with the plaintiff, a man who had not the slightest responsibility for the difficulties, if difficulties there were, which had arisen. I entirely agree with SCOTT, L.J., that this appeal fails.
- E DU PARCQ, L.J.: I am of the same opinion. In this case the first question is: What is the contract? It seems to be common ground that we should have derived no assistance from looking at such written memorandum as exists. As in many cases, this is a contract in which
- F most of the terms are to be implied from the well-known circumstances of the employment. There is no doubt at all that the plaintiff was employed as a weekly servant, that he was entitled to be employed on the day in question and given work if he did not break his contract; perhaps it is more accurate to say if he showed himself to be ready and willing to do his work. What is said in effect is that he was not ready
- G and willing, in a technical sense, to do his work. It has been contended that it is for him so to act, whatever other people may do, subject only to the employers providing lifts, that he will be underground ready to begin work, that is to say that he will not miss at any rate the latest lift. I think that is a wrong view. The man's duty is to present himself,
- H as the county court judge found, in such time as would be reasonably sufficient to enable him to equip himself for work, to receive the lamp, to go through the other necessary preliminaries, and to be taken down, provided that the employers carried out their part of the contract. It seems to me that the judge could hardly have come to any other conclusion than that the plaintiff did perform that duty. He says that he

got into the queue in which it was necessary to stand in order to get a lamp at, as nearly as may be, 5.35 a.m. I say that because he says that he only had to go a few yards from the time office, where he particularly observed that the time was 5.35 a.m., in order to station himself in the queue. The question was asked of the manager, Mr. Goode, whether that would be proper time at which to station himself in the queue for the lamp, and Mr. Goode said 5.35 a.m. in the queue is ample time. What happened on this occasion was that it turned out not to be ample time, by reason of circumstances over which the plaintiff had no control. It may be said that the employers had no control over those circumstances either. I think the answer to that is that, far from the employers being able to say that the plaintiff must make such arrangements as will prevent the action of others from making it difficult or impossible for him to take one of these lifts, it is for the employers, if anybody, to make such arrangements. The terms of the Coal Mines Regulation Act, 1908, s. 1 (3), make it a duty of the employers to make all arrangements necessary for the observance of those times, that is to say, the times to be fixed as provided by the Act in lowering and raising men. I agree with what has been said by the other members of the court as to the desirability of some such arrangement (which I should have thought could be made in a perfectly friendly way and about which nobody could complain) being made. In these days labour is well organised, and I should have thought that this was a matter which it was in the highest degree desirable, from the point of view both of employers and workmen, should be made the object of some arrangement. I have no doubt that, apart from any such arrangements, the employers have a right, and indeed a duty, to make some reasonable arrangement which makes it possible for all the men to get taken down without a scramble, and it is to be hoped that such an arrangement will be made.

Appeal dismissed with costs.

Solicitors: *Hosking & Berkeley*, agents for *Gichard & Co.*, Rotherham (for the appellants); *Corbin, Greener & Cook*, agents for *Raley & Sons*, Barnsley (for the respondent).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

MILBANK v. MILBANK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.),
July 27, 1939.]

Divorce—Desertion—Husband's petition—Collusive petition by wife within statutory period dismissed—Whether collusive petition interrupts period of desertion.

The petitioner's wife deserted him in 1929. In Apr., 1936, the wife, in collusion with the husband, presented a petition for divorce on the ground of his adultery, and this petition remained on the file until dismissed on the wife's application on Apr. 28, 1937. On Aug. 26, 1938,

the husband presented the present petition for divorce on the ground of his wife's desertion for 3 years immediately preceding the presentation of this petition :—

HELD : as the earlier petition had been presented in collusion with the husband, he was precluded from saying that a state of desertion continued during the period that that petition was on the file, and the present petition based on desertion must therefore be dismissed.

A **EDITORIAL NOTE.** It has been decided that the prosecution of a petition during the statutory period interrupts the period of desertion. It was questioned in this case whether that was so in the case of a petition presented as the result of a collusive arrangement between the parties, and it is held that where the party asserting desertion is a party to the collusive bargain, the period of desertion is interrupted.

B **AS TO EFFECT OF PETITION ON DESERTION,** see **HALSBURY**, Hailsham Edn., Vol. 10, pp. 658, 659, paras. 968, 969; and **FOR CASES**, see **DIGEST**, Vol. 27, pp. 319-321, Nos. 2978-2999.]

Cases referred to :

(1) *Crewe v. Crewe* (1800), 3 Hag. Ecc. 123; 27 Digest 333, 3133.

(2) *Stevenson v. Stevenson*, [1911] P. 191; 27 Digest 320, 2986; 80 L.J.P. 137; 105 L.T. 183.

C (3) *Chapman v. Chapman & Thomas*, [1938] P. 93; [1938] 1 All E.R. 635; Digest Supp.; 107 L.J.P. 30; 158 L.T. 424.

(4) *Cohen v. Cohen*, [1939] 2 All E.R. 596; Digest Supp.

D **DEFENDED PETITION** by the husband for divorce on the ground of his wife's desertion for 3 years immediately preceding the presentation of the petition. The petition was adjourned for argument by the King's Proctor as to whether the fact of a previous petition for divorce having been presented against the husband by collusion between himself and his wife within the 3-year period prevented desertion from running against the deserting spouse for so long as that petition remained on the file. **E** The facts are fully set out in the judgment.

Hon. Victor Russell for the petitioner.

Theodore Turner for the King's Proctor.

F **SIR BOYD MERRIMAN, P. :** The parties were married on July 25, 1922. On Apr. 18, 1929, the wife went to South Africa on the pretext of going for a holiday, but, without going into unnecessary detail, the subsequent history has made it perfectly plain that at the time when she left home she intended to desert her husband. I have no doubt that **G** thenceforward, as she has said more than once in writing, she had no intention whatever, if she could help it, of setting up home with her husband again.

Under the Matrimonial Causes Act, 1937, the husband is obliged not merely to prove that his wife was guilty of desertion in the inception, **H** but that she was in desertion during the 3 years immediately preceding the presentation of the petition. It is in that connection that this difficulty arises. On Apr. 14, 1936, the wife presented a petition for dissolution on the ground of the husband's adultery. That petition was first served on the husband on May 20, 1936. There were two subsequent amendments with which I need not deal in detail, except to observe that

one was to correct the date of the alleged adultery, which was originally charged as being committed on Nov. 9, 1934, and was subsequently amended to allege adultery committed on Mar. 9, 1935. I mention that in passing, because, when I come to deal with the circumstances in which that petition was presented, it remains unexplained and unexplainable how any allegation of adultery in connection with Nov. 9, 1934, ever came to be made at all. However, that petition which was served on May 20, 1936, came before me in its amended form as an undefended cause on Feb. 8, 1937. There were circumstances about the presentation of the case which left me in the gravest possible doubt, which I need now only say was admitted to be amply justified, whether there was any substance in the case whatever. One of the things which caused me the very gravest disquietude about that case was the evidence of a partner in the firm acting for the wife, who gave evidence before me of a kind that I did not regard as very convincing. However, I adjourned the case, referring the papers to the King's Proctor for investigation. The result of that was that on Apr. 28, 1937, the suit was dismissed on the wife's own application on the ground that it had been presented in collusion. The present petition, as I have already stated, was dated Aug. 26, 1938. On that statement of dates it would follow that, assuming that the wife had deserted the husband and remained in a state of desertion until negotiations for this collusive petition began, and assuming that, after the petition was dismissed, she remained in a state of desertion, the husband cannot complete the 3 years necessary to establish his case. He must prove desertion for 3 years immediately preceding the presentation of the petition, without counting the whole time during which the petition—subsequently dismissed on the grounds of collusion—was upon the file of the court. To be precise, the date, Apr. 14, 1936, on which the petition was filed, was well within the 3 years, and that petition remained on the file of the court for rather over one year before it was dismissed. Accordingly counsel for the petitioner, in opening this petition, called my attention to the dates which I have just quoted before calling his evidence, and indicated precisely wherein the difficulty in this case lay. With his consent I adjourned the case without hearing the evidence of the petitioner in order that I might obtain the assistance of the King's Proctor not merely on such law as might be involved after the facts had been ascertained, but also on the elucidation of the facts themselves in so far as they affected the question whether the period of desertion could run during the time when this admittedly collusive arrangement, and these admittedly collusive proceedings, were upon the file. The result is that to-day's hearing has taken place with the advantage of my having the assistance of counsel for the King's Proctor both on the question of fact and on the question of law.

I am not going to read the earlier letters in the correspondence because I am satisfied beyond any doubt whatever that the intention of the wife when she went to South Africa was, and a long time thereafter remained,

- an intention to desert her husband. However, the difficulties begin with proposals which were put forward by the husband in the year 1933. Again I do not propose to read the letters having regard to the husband's perfectly frank admission as to what the purpose of the transaction was. It was perfectly plain that, by June, 1933, when correspondence was
- A passing between the parties, he had told his wife that he desired to get married again ; that he would do anything reasonable for her, although he was not prepared to go the length of assenting to the somewhat exorbitant terms which she herself had put forward, provided that she was prepared in some way or another to facilitate their obtaining their
- B freedom. The wife, in a letter written on Nov. 8, 1933, said that she was sorry the divorce affair was going to be so expensive in England, and that should the proposed Bill—which even then it was contemplated should be introduced into Parliament—fail, she was willing to forego half the sum that he had mentioned to her, in order that he should make some
- C use of the law to effect his relief. There is a short silence in the correspondence but the gap is filled by the discretion statement which is put in by the husband. At some date in 1934, which has not been precisely ascertained, he received an invitation from a firm of solicitors, on the instructions of his wife, to call upon them. I have already referred
- D to the fact that a partner in this firm gave evidence before me on the hearing of the wife's petition. In effect, it was proposed to the husband that if he was so anxious for a divorce as the previous letters had shown, he should provide the necessary evidence. The husband's version of the matter—which I accept in every detail—was that he told the solicitors that
- E he had always led a perfectly good life, and that he loathed the idea of anything connected with adultery, but that if it would help the case he would very unwillingly provide the evidence. He was asked how the expense would be provided for, and he undertook to pay all the costs. Then, as the husband had not a solicitor, these solicitors suggested the
- F name of a firm which would act for him in the proceedings. The husband went to this firm and instructed them to do whatever was necessary, putting himself, as he phrases it, entirely in their hands. He told counsel for the King's Proctor that, from the time it was realised in 1933 that the divorce would have to be in England, he was prepared to commit adultery
- G or to appear to do so in order to get his freedom. When he found he could not get the divorce in South Africa, he had probably told his wife that he was ready to be divorced in England but that it would be expensive, and he was accordingly not surprised at being sent for by his wife's solicitors. Indeed, he said that it was he who wanted the divorce, and
- H his wife was bringing the proceedings because he wanted her to do so. He added, in answer to a question by myself, that before he left his wife's solicitors it had been agreed (i) that he should provide the necessary evidence (ii) that he should go to the solicitor suggested by these solicitors in order to get the matter through smoothly and (iii) that he should pay all the costs. Everything, he added, that happened afterwards was

done in accordance with that agreement. What happened afterwards was that it took him a very long time to overcome his almost unconquerable loathing of the procedure to which he was subjecting himself. However, eventually he brought himself to that point, and arranged to spend a week-end at the Bonnington Hotel with a woman whom he had picked up for the purpose. He telephoned to his solicitor when he was expecting to be there; his solicitor in turn telephoned or informed the wife's solicitors, and the inquiry agents were duly at that hotel ready to give the necessary evidence. These are the admitted facts. If ever there was a case which comes exactly within the words of SIR WILLIAM SCOTT in *Crewe v. Crewe* (1), this is the case. He said, at pp. 129, 130 :

Collusion may exist without connivance, but connivance is (generally) collusion for a particular purpose. Collusion, as applied to this subject, is an agreement between the parties for one to commit, or appear to commit, a fact of adultery, in order that the other may obtain a remedy at law as for a real injury. Real injury there is none, where there is a common agreement between the parties to effect their object by fraud in a court of justice.

It is quite clear on this statement of the facts that it is impossible to escape the conclusion that for at least the whole of the period between the filing of that petition and the hearing before me, that petition was not merely presented, but prosecuted, in collusion, and it is with that case only that I am dealing. I say that advisedly because in the course of the argument it became quite plain, and I am not expressing any opinion about such a case, that it is possible, at any rate, that quite different considerations might apply if, for example, a petition innocently presented was, after the material date, prosecuted in collusion. Here, at any rate, it is undisputed and, indeed, undisputable, that between Apr. 14, 1936, and Feb. 8, 1937, at least, the parties, these spouses jointly, were engaged in presenting a collusive petition of the kind I have just described by reference to SIR WILLIAM SCOTT's definition, and were both actively engaged in promoting that petition in fraud, of course, and by mutual agreement. I say at least during that period, because I have said sufficient about the earlier correspondence to make it clear that the agreement did not originate or collusion did not originate merely with the presentation of the petition. It had been contemplated and was maturing for a considerably longer period. It is unnecessary to go into detail on that point because the period to which I have alluded is all within the material 3 years.

The question of law which emerges from this statement of facts is whether it is possible for the husband to assert that during that period his wife was deserting him without cause. It is quite clear that, if the husband himself had presented that petition, it would be impossible for him to assert that, during its continuance on the file of the court, his wife's absence continued to have the quality of desertion. That is established by the decision of the Court of Appeal in *Stevenson v. Stevenson* (2), where, delivering the judgment of the court, SIR H. H. COZENS-HARDY, M.R., stated, at p. 194 :

The presentation of the petition [in that case after 18 months of desertion] and its

continuance on the files of the court prevented the subsequent desertion from being without excuse. She was praying the court to require her husband to keep away.

- However, this petition was not presented by the present petitioner, the husband, but by a deserting wife. If that petition, unsuccessful as it turned out to be, had been presented by the wife *in invitum*, the husband
- A would not have been precluded on its dismissal, from counting the period during which that petition was on the file of the court as part of the necessary 3 years' period. As I understand the law which was declared by HODSON, J., in *Chapman v. Chapman* (3), leaving out the very peculiar circumstances of that case, which for the present purposes are immaterial,
- B it is as follows. The deserting spouse against whom such an unsuccessful petition is brought may cross-charge desertion, and is not precluded from counting the period between the presentation of the petition and the presentation of the cross-charge by the fact that there was on the file of the court a petition the result of which would be no doubt for the time being
- C that the deserting spouse could have got an order preventing her husband from attempting to resume cohabitation. The case also goes further in deciding that though it may be necessary to substitute further proceedings on the part of the deserting spouse to establish his or her rights, the interval between the presentation of the first cross-charge and any
- D subsequent cross-charge is immaterial, having regard to the fact that the proceedings all the time were being prosecuted by the husband on his initiation. Of course, it goes without saying, and counsel for the King's Proctor does not attempt to dispute this, that there being no obligation on a party to recriminate or make cross-charges, if the first petition is un-
- E successful and is disposed of, the deserted spouse could subsequently bring proceedings for desertion to which the period during which that petition was on the file could establish no bar at all. It really comes to this, therefore, that this being neither the one case nor the other; neither the case of a deserting spouse having barred himself by presenting a
- F petition during the crucial time and leaving it on the files of the court, nor the case in which the deserting spouse has brought a petition *in invitum* against the deserted spouse, under which heading does this case fall? And it is that which I propose to decide. It has been admitted in the plainest and most categorical terms in this case that this petition was
- G instituted and prosecuted at the husband's instance, by his procurement, by his agreement, at his expense, agreed to in advance, and that every single thing which was done in order to enable his wife to get a divorce "as for a real injury," to quote SIR WILLIAM SCOTT again, was done by agreement between the parties that the husband should
- H "commit or appear to commit a fact of adultery." He has told me, and I believe him, that, in fact, no adultery was committed at all, for reasons which he has given. However, that refinement is unnecessary having regard to his admission about the arrangements which were made. I think that the point of the decision in *Stevenson v. Stevenson* (2), followed as it has been recently by the Court of Appeal in *Cohen v.*

Cohen (4), is that whatever may be the continuing intention of the deserting spouse, the deserted spouse is precluded from saying that a state of desertion continues while he or she is praying the court by proceedings initiated by him or her to keep away, to require the other spouse to keep away. That was the effect of the wife's proceedings which, as I have said, would be no handicap to the husband if he had A no part or lot in it. However, they were brought about by his procurement, by his agreement in the fullest sense of the word, and it seems to me to be impossible in law without ignoring the decision of the Court of Appeal in *Stevenson v. Stevenson* (2)—and I may add, the various cases under the Matrimonial Causes Act, 1937, in which judges of this Division, B including myself, have followed and applied *Stevenson v. Stevenson* (2) to cases of desertion which have arisen under this Act—to allow this husband to say that the 12 months, during which this collusive petition was being actively prosecuted, was a period during which his wife was deserting him without cause. He was paying her to pray the court to C require him to keep away. In these circumstances I cannot hold as a matter of law that the husband has established that which he is bound to prove, namely, that his wife has deserted him without cause for the period of at least 3 years immediately preceding the presentation of the petition. The correspondence shows clearly that the petitioner D was waiting with eager anticipation for the passing of the Act—even as long ago as 1933—which, if he had been content to wait for it, would long ago have given him his freedom. However, he chose, however reluctantly, quite deliberately, to embark upon this conspiracy to impose a fraud on the court, and I am afraid he must take the consequences E of what I am convinced is the legal result of that unfortunate decision on his part.

Petition dismissed.

Solicitors: *Gedge, Fiske & Co.* (for the petitioner); *The Treasury Solicitor* (for the King's Proctor). F

[Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.]

THE PEOPLE OF THE STATE OF NEW YORK *v.* HEIRS OF THE LATE JOHN M. PHILLIPS AND OTHERS. G

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright, Lord Romer), **July 3, 4, 17, 1939.**]

Privy Council—Quebec—Practice—Concurrent findings of fact—Dismissal of appeal.

Where there are concurrent findings of two courts on pure questions of fact, the Board does not interfere with the judgments, where the appeal is on a question of fact. H

The appellants claimed from the first respondents, the heirs of one Phillips deceased, damages for an alleged conspiracy between Phillips, one Connolly and one Seely, to cheat and defraud the City of New York over the construction of sewers in the borough of Queens in the City

of New York. Phillips before his death had deposited over \$300,000 with the Montreal Safe Deposit Company the third respondent. This sum was seized by means of a conservatory attachment effected before judgment in July, 1928, and the moneys by agreement were handed to the Crown Trust Co., the second respondent, pending the result of the litigation. The trial judge, after consideration of the evidence before him, was unable to find that the conspiracy was proved, and on appeal the judgments of the members of the court were similarly directed to the facts, each member of the court coming to the conclusion that the case was not proved :—

HELD : there had been concurrent findings in favour of the defendants by two courts in Quebec, on pure questions of fact, and, as nothing was to be found in the conduct of the proceedings, or in the judgments of the courts to induce the Board to act otherwise, the Board adhered to the rule which it has laid down for itself, that is, not to interfere with concurrent findings of two courts on pure questions of fact.

[EDITORIAL NOTE. There is a well-known rule of both the House of Lords and the Judicial Committee of the Privy Council that they will not overrule concurrent findings of fact in the courts below. It was argued that the present case did not come within this rule, but their Lordships have rejected this argument and stated the rule in general terms.

AS TO PRINCIPLES GOVERNING JURISDICTION OF JUDICIAL COMMITTEE, see HALSBURY, Hailsham Edn., Vol. 11, pp. 230, 231, para. 446; and FOR CASES, see DIGEST, Vol. 16, pp. 162-164, Nos. 650-679.]

Cases referred to :

- (1) *Moung Tha Hnyeen v. Moung Pan Nyo* (1900), L.R. 27 Ind. App. 166; 16 Digest 163, 653.
- (2) *Robins v. National Trust Co.*, [1927] A.C. 515; Digest Supp.; 96 L.J.P.C. 84; 137 L.T. 1.
- (3) *Allen v. Quebec Warehouse Co.* (1886), 12 App. Cas. 101; 16 Digest 163, 660; 56 L.J.P.C. 6; 56 L.T. 30.
- (4) *Whitney v. Joyce* (1906), 75 L.J.P.C. 89; 16 Digest 163, 661; 95 L.T. 74.
- (5) *St. Francis Hydro Electric Co. v. R.*, [1937] 2 All E.R. 541; Digest Supp.

APPEAL from a judgment of the Court of King's Bench (Appeal Side), for the Province of Quebec [BERNIER, LETOURNEAU, HALL, WALSH, ST. JACQUES, JJ.], dated June 29, 1938, dismissing an appeal from a judgment of the Superior Court [MERCIER, J.] dated Nov. 23, 1934. The facts are fully set out in the judgment of their Lordships delivered by LORD ATKIN.

Aime Geoffrion, K.C., and *Ernest Bertrand, K.C.*, for the appellants.
Louis S. St. Laurent, K.C., and *Hugh E. O'Donnell, K.C.*, for the respondents the heirs of the late John M. Phillips.

John T. Hackett, K.C., for the respondents, the Crown Trust Co. and the heirs of the late Francis Phillips.

Geoffrion, K.C. : The trial judge only saw some of the witnesses, the evidence of the others was taken on commission. Essential facts are matters of inference in the case, and the inferences here are irresistible. A jury in New York found these two men guilty, and this was affirmed by the higher courts. The reasons given by the judges for their finding of fact were wrong. The rule with regard to concurrent findings of the courts below not being interfered with by the Board, on a question of

fact, is not an absolute one. [Counsel referred to: *Robirs v. National Trust Co.* (2), *Allen v. Quebec Warehouse Co.* (3), *Whitney v. Joyce* (4), *St. Francis Hydro Electric Co. v. R.* (5).]

Counsel for the respondents were not called upon.

LORD ATKIN: This is an appeal from the Court of King's Bench (Appeal Side), Quebec, confirming a judgment of the Superior Court (MERCIER, J.) in favour of the defendants, the present respondents. The action arises in unusual circumstances. The plaintiffs are the People of the State of New York and they sue the defendants, the heirs of the late John M. Phillips, for damages for an alleged conspiracy between Phillips, one Connolly and one Seely to cheat and defraud the city of New York over the construction of sewers in the borough of Queens in the city of New York. The plaintiffs right of action is based upon sects. 1222, 1224, 1225, 1226 and 1229 of the Civil Practice Act of the State of New York, art. 76, the effect of which appears to be to vest in the People of the State any action which a public corporation in the State would have for wrongful dealing with its funds, and to secure that such action shall be commenced by the Attorney-General of the State. The jurisdiction of the courts of Quebec is derived from the fact that the plaintiffs found that Phillips before his death had deposited over \$300,000 with the Montreal Safe Deposit Co., a sum which they allege to be part of the proceeds of the fraud, though for this purpose that is irrelevant. They seized this sum by means of a conservatory attachment; and thereby under Quebec procedure founded jurisdiction in the Quebec Courts to entertain the present action. No question as to the right of suit falls to be determined by their Lordships in the view they take of this case: for in their opinion there have been concurrent findings of fact in favour of the defendants by the two courts in Quebec, and nothing is to be found in the conduct of the proceedings or in the judgments of the courts to induce the Board to depart from its usual rule in such a case not to interfere with such concurrent findings. It is only necessary to state in outline the nature of the case before the Quebec courts. Connolly was president of the borough of Queens and as such had large powers over contracts for the borough both in determining specifications and in rejecting all tenders. He could only accept a tender which was not the lowest with the approval of a special board of the city. Seely was an assistant engineer in the employ of the city in charge of sewers in the borough of Queens. Phillips was originally a salesman of the Lock Joint Company, one of whose activities was the manufacture of concrete sewers. It appeared that at the time in question there were two forms of concrete sewers, monolithic where the sewer was cast in the trench in which it was to lie, and precast sewers which were cast by the side of the trench and then lowered into it. The Lock Joint Company specialised in the latter type. Phillips at the beginning of the history was, as stated, a salesman on commission. Later he bought the sewers

from the Lock Joint Company and resold them to the contractors : and at a later stage he acquired from the company the plant necessary to produce the precast sewers in this borough, manufactured them himself and therefore sold his own product to the contractors. The substance of the conspiracy alleged was that Phillips induced Connolly to specify the lock joint type of sewers for sewer contracts in the borough, that, in concert with Phillips, Connolly took care that tenders only of contractors friendly to Phillips should be accepted, that, in concert with Seely, Connolly procured that the specifications should contain such onerous conditions as to the other, the monolithic, type, as to put it out of competition, and that all this was done to enable Phillips to charge the contractors and to procure the city to pay to the contractors extortionate prices for the sewers—as was alleged, six or eight times as much as was charged for similar sewers in similar conditions in other parts of New York and elsewhere. In 1927 an inquiry was ordered by the Governor of New York into the affairs of the borough of Queens, and as a result in July, 1928, an indictment was found against Connolly, Seely and Phillips for a conspiracy to defraud the city. Phillips died before arraignment : Connolly and Seely were tried and convicted. They were sentenced to fine and imprisonment : and their conviction was affirmed by the appellate Division and by the Court of Appeals of New York State.

The issue in this case was substantially the same as in the criminal proceedings in New York. The evidence had, of course, to be given afresh. Most of the witnesses were examined on commission in New York. The evidence was therefore not identical with that given in the criminal proceedings, and different counsel appeared for the parties. It was not, of course, suggested that the civil issue was determined by the conviction in New York of Phillips's alleged co-conspirators.

The trial judge, MERCIER, J., considered afresh the whole of the evidence. The only complaint made of his judgment in point of law is that he laid down that there was a heavy onus on the plaintiffs and that it was necessary for them to prove their case as clearly as they would have to prove it in a criminal proceeding. Their Lordships consider this criticism to be ill founded. The proposition of the judge has been laid down time and again in the courts of this country : and it appears to be just and in strict accordance with the law. On the survey of the whole of the facts the judge was unable to find that the conspiracy was proved. It is unnecessary to consider in detail the judge's comments on the facts. With some it might be difficult to agree : in particular their Lordships are clearly of opinion that no inference hostile to the plaintiffs' case could be drawn from the fact that they did not call as their witnesses the two convicts Connolly and Seely. The judgment as a whole is, however, obviously directed to the right issues, and represents the judge's judicial view of the facts. He says, as he was entitled to, that he was unfavourably impressed by the evidence of four of the plaintiffs' witnesses

whom he names : and on the whole concludes that the case is not made out. The judgments of the members of the Court of Appeal are similarly directed to the facts : and each of them comes to the conclusion that the case was not proved. Mr. Geoffrion, for the plaintiffs, in his forcible argument, contended that in this or that particular they had formed a mistaken view of the evidence ; but in turn they directed their minds A to the right issue, they pointed out some respects in which the evidence did not bear out the pleaded case, and they dwelt upon the difficulties that arose from what they thought to be established, viz., that the so-called extortionate prices must have been known to many other persons in the employ of the city or the contractors other than the alleged parties B to the fraudulent conspiracy. Their judgments are based on fact and cannot be impugned in point of law. In the words of the judgment of the Board in *Moung Tha Hnyeen v. Moung Pan Nyo* (1), cited in the judgment of the Board delivered by LORD DUNEDIN in *Robins v. National Trust Co.* (2), at p. 518 : C

There has been nothing to show that there has been a miscarriage of justice, or that any principles of law or of procedure have been violated in the courts below.

In these circumstances their Lordships feel bound to adhere to what LORD DUNEDIN in the case just cited calls " the rule of conduct which the Board has laid down for itself," viz., not to interfere with concurrent findings of two courts on pure questions of fact. The reasons for the rule are very obvious : and it may be remembered that the reasons apply with added force where the findings concurrently acquit a party accused of a crime, and where the claim is against a dead man's estate. It need only be observed in conclusion, as will be manifest from what has been said, that their Lordships have not felt at liberty to discuss the facts so as to determine whether the conclusion is right or wrong. In accordance with their rule the appeal on fact has proved to be unavailable. Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal. D E F

Appeal dismissed with costs.

Solicitors : *Lawrence Jones & Co.* (for the appellants) ; *Blake & Redden* (for the respondents, the heirs of the late John M. Phillips) ; *Charles Russell & Co.* (for the respondents, the Crown Trust Company). G

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

KELNER v. KELNER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.),
July 27, 1939.]

Divorce—Gift of money by wife's father in contemplation of marriage—Joint account in names of husband and wife—Marriage taking place and subsequently dissolved—Whether gift made to parties jointly—Married Women's Property Act, 1882 (c. 75), s. 17.

The petitioner's father had, in contemplation of his daughter's marriage, placed £1,000 in an account in the joint names of himself, the petitioner and the respondent, his then prospective son-in-law, on the terms that it was to become the property of the petitioner and the respondent on their marriage taking place, but otherwise was to revert to the father. The marriage took place, and the father thereupon withdrew his name from the account, leaving it in the joint names of the petitioner and the respondent. The marriage was subsequently dissolved on the ground of the respondent's desertion, and the petitioner thereupon claimed to be entitled to the whole of the money then standing to the credit of the joint account:—

HELD: the money was a gift to the petitioner and respondent jointly, and the petitioner was entitled to half only of the amount remaining in the account.

Joseph v. Joseph (1) distinguished.

[EDITORIAL NOTE. In *Joseph v. Joseph* (1) a somewhat similar payment was ordered to be given to the wife. The present case is, however, distinguished from that case on the ground that there the marriage was annulled, and here it has been dissolved. On the pronouncement of the decree of nullity, the purpose for which the money was provided failed *ab initio*, but here that is not the case.

AS TO INQUIRIES AS TO OWNERSHIP OF PROPERTY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 740, 741, para. 1211; and FOR CASES, see DIGEST, Vol. 27, pp. 260, 261, Nos. 2296-2305.]

Case referred to:

(1) *Joseph v. Joseph*, [1909] P. 217; 27 Digest 260, 2298; 78 L.J.P. 51; 100 L.T. 864.

APPEAL from a decision of MR. REGISTRAR LONG under the Married Women's Property Act, 1882, s. 17, whereby he decided that on the dissolution of the marriage between the parties on the ground of the husband's desertion the husband was entitled under the Act to a finding that half the sum of £593 standing in the joint names of himself and his wife must be paid to him. The following is the report of the registrar.

The parties were married on Jan. 15, 1933. The petitioner (wife) obtained a decree nisi for dissolution of the marriage on June 20, 1938, on ground of the respondent's desertion.

The wife's father had saved, as a working tailor, some £1,000 and upwards. Of his savings he placed £1,000 in the joint names of himself, his daughter and his prospective son-in-law. This was to become the property of the daughter and son-in-law on the marriage taking place on Jan. 15, 1933; but if the marriage did not take place by the agreed date, the money was to be handed back to the wife's father. By agreement, certain sums were drawn out of the account before the marriage. The attached list (admitted) shows the drawings; and, on the marriage taking place, the father withdrew his name from the account leaving it as it now stands, in the joint names of the then husband and wife. There is practically no dispute as to the facts save that the father says (and I accept his evidence) that the suggestion that the respondent's name should appear in the account jointly with his and his daughter's came from the respondent.

I have come, with the greatest reluctance, to the conclusion that I am bound to regard the payment of the sum of money as being an absolute gift. *Joseph v. Joseph* (1), to which my attention was directed, is in my view clearly distinguishable.

In my submission the money was a gift to the parties jointly and the respondent is entitled to half the present balance.

L. J. Acton Pile for the petitioner.

J. Roland Adams for the respondent. A

Pile : The case is governed by the decision in *Joseph v. Joseph* (1). This decision was not based on nullity, but rather on an analogy to a variation of a settlement. The registrar obviously thought that, on the facts, the money ought in justice to be paid to the petitioner. The Married Women's Property Act, 1882, s. 17, enables the court to consider B all the circumstances and to do justice between the parties. The money was provided by the father, originally for the petitioner, but the respondent persuaded her to let his name appear in the account. To that extent the money was in the joint names, but only for the purpose of the marriage. That is now at an end, and it is immaterial whether it C has been ended by dissolution or nullity.

Adams was not called upon.

SIR BOYD MERRIMAN, P. : It has been argued on this appeal that the registrar was wrong in not holding that the case was covered by the D authority of *Joseph v. Joseph* (1), and that there was no such absolute control by the husband over the fund standing in joint names as would create a gift, and in failing to realise that the court had power to deal with the matter equitably as between the parties. I emphasise that this is an application under the Married Women's Property Act, 1882, s. 17. E Under that Act, after whatever inquiries the court may think it necessary to make, the question remains : Whose property is this ? Is it the husband's or is it the wife's ? or does it belong to them both jointly ? It is wholly different from the procedure for variation of settlement which can be invoked on dissolution of marriage. That procedure assumes F that certain sums belong to one spouse or the other, and that they are settled in a particular way, and invokes the peculiar jurisdiction of this court to alter the disposition and settlement of the property.

This is the case of a Jewish marriage in which, in accordance with custom, money was provided by the wife's father by way of dowry. G The registrar states that the arrangement was that the money was to be placed in the joint names of the father, the husband and the wife before marriage upon the terms that it was to become the property of the husband and the wife on the marriage taking place before a specified date, or, if the marriage did not then take place, was to be handed back H to the wife's father. The only matter which was in dispute in this case is whether the husband initiated the suggestion, as the registrar finds that he did, that his name should be one of those in whose the account stood. The registrar has found that it was an undisputed fact that, if the marriage took place by the agreed date, the money was to be the

property of the wife and the husband. The marriage did take place by the appointed date, whereupon the father withdrew his name from the account, leaving it entirely at the disposition of the spouses. Though perhaps it is unnecessary to go into the details with which I have been provided, it was in fact drawn upon largely for purposes which, though
A primarily those of the husband, were no doubt also directly for the benefit of the spouses jointly. Five years later the marriage was dissolved, and there was then left a balance of some £583 odd in the account.

- In those circumstances is the wife entitled to the whole of that money,
B or are they each entitled to half of it? The registrar has found that there is no escape from holding that each is entitled to half. In the course of the argument it became abundantly clear that the registrar was right, and that there was no escape from this conclusion. Perhaps foolishly I suggested that there might be another way of giving effect to
C the suggestion of counsel for the petitioner that justice should be done by invoking the procedure for variation of settlement. That I am not called upon to decide one way or the other, because he has withdrawn all claim for variation of settlement, and relies only on his original application under the Married Women's Property Act, 1882, s. 17,
D and that is the point which I am deciding. It is perfectly clear on the registrar's findings, that there was no other conclusion to which he could possibly come. The suggestion that he was bound to find the other way on the authority of *Joseph v. Joseph* (1) is based on a complete misconception of what that case decided. The whole point of *Joseph v.*
E *Joseph* (1)—although there is no elaborate judgment by SIR JOHN BIGHAM, P.—as appears on the registrar's report is this: £400, the sum in dispute in that case, had been provided by the wife's relatives as joint property. Up to that point, the case resembles the present case, but it differs from the present case in that the marriage had been annulled, and
F in those circumstances the registrar in that case held that the money should be handed back to the wife, the purpose for which it was provided having failed *ab initio*. However, as appears on the face of the registrar's report, had the marriage subsisted, the money would have been and continued to be joint property. That is precisely what the registrar has
G found is the effect of the corresponding arrangement in the present case. I think he was entirely right and that there is no escape from the conclusion that this appeal must be dismissed as hopeless. I need express no further opinion, as I am no longer asked to do so, on the propriety or otherwise, if this arrangement was a settlement, of varying
H it in accordance with what are the obvious dictates of common sense.

Solicitors: *Edward Fail* (for the petitioner); *William Daybell* (for the respondent).

SMITH v. HARRIS.

[COURT OF APPEAL (Scott, Clauson and du Parcq, L.JJ.), July 19, 20, 1939.]

Negligence—Personal injuries—Motor cyclists—String of motor cyclists engaged on treasure-hunt—Sudden braking by leading cyclist—Injury to pillion rider on fourth motor cycle.

Practice—Slip rule—Damages awarded against two defendants—Judgment entered as “each defendant liable for half judgment”—Whether error can be corrected under slip rule.

The plaintiff was riding on the pillion seat of a motor cycle driven by the defendant H. This motor cycle was the fourth of a string of five, the drivers of which were engaged in a treasure hunt. The defendant P., who was leading the party, overshot a turning and braked hard. O., who was following P., swerved to his right, and stopped. M., who was next, swerved to his left, and stopped. H. braked hard, but his cycle struck that of O., and the plaintiff was injured in consequence. At the trial, the county court judge found that both defendants had been negligent and awarded damages against both of them. By an error, the judgment was recorded as “Order that each defendant liable for half judgment and costs.” The plaintiff appealed in order to get the form of judgment rectified. The defendant P. by cross-appeal, contended that the accident was due solely to the negligence of H., who had had time to avoid the consequences of any negligence on the part of P.

HELD : (i) there had been a concurrence in point of time of the negligence of both defendants, and they were both equally to blame.

(ii) the error in recording the judgment in the county court was one which might have been corrected under the slip rule.

EDITORIAL NOTE. The judgments in this case contain a careful consideration of the operation of the slip rule and of the application of the principles of the law on negligence to vehicles proceeding one behind the other. Both these matters are of considerable practical importance, but, at the same time, are matters in which each particular case falls to be decided on its own facts. The judgments must, therefore, be read as a guide to the proper method of the application of the law on these points, and not as an authority which will be binding even in a case where the facts are more or less similar to those here considered.

AS TO NEGLIGENCE IN RESPECT OF VEHICLES ON HIGHWAYS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 637-643, paras. 894-903; and FOR CASES, see DIGEST, Vol. 36, pp. 59-62, Nos. 366-400.

AS TO SLIP RULE, see HALSBURY, Hailsham Edn., Vol. 19, pp. 261-263, para. 561; and for Cases, see DIGEST, Practice, pp. 472-477, Nos. 1530-1580. See also YEARLY PRACTICE OF THE SUPREME COURT, 1939, pp. 440-444.]

Cases referred to :

- (1) *McLean v. Bell* (1932), 147 L.T. 262; Digest Supp.
- (2) *The Eurymedon*, [1938] P. 41; [1938] 1 All E.R. 122; Digest Supp.; 107 L.J.P. 81; 158 L.T. 445.
- (3) *The Heranger*, [1939] A.C. 94; Digest Supp.; 108 L.J.P. 12; 160 L.T. 241.
- (4) *Tidy v. Battman*, [1934] 1 K.B. 319; Digest Supp.; 103 L.J.K.B. 158; 150 L.T. 90.
- (5) *Sharp v. Avery & Kerwood*, [1938] 4 All E.R. 85; Digest Supp.
- (6) *Admiralty Comrs v. S.S. Volute*, [1922] 1 A.C. 129; 41 Digest 780, 6417; 91 L.J.P. 38; 126 L.T. 425.
- (7) *Singleton Abbey S.S. Owners v. Paludina S.S. Owners, The Paludina*, [1927] A.C. 16; Digest Supp.; 95 L.J.P. 135.

APPEAL by the plaintiff, and CROSS-APPEAL by the defendant Popplewell, from a decision of His Honour JUDGE DRUCQUER at the Brentford county court dated Feb. 16, 1939. The facts and arguments are fully set out in the judgment of SCOTT, L.J.

Edward Terrell for the appellant.

A *D. P. Maxwell Fyfe, K.C.*, and *F. G. Paterson* for the respondent.

Upon the appeal the judgment of DU PARCQ, L.J., is the judgment of the court. The cross-appeal is dealt with in all the judgments.

SCOTT, L.J. : A party of people were engaged on a treasure hunt, each on a motor cycle or on the pillion seat attached to a motor cycle, in the neighbourhood of Hever in Kent. The essence of a treasure hunt is that clues are set in various places arranged beforehand, the first clue giving an indication as to where the second clue will be found, and the second where the third will be found, and so on. Popplewell, who was apparently clever at finding clues, was asked by the rest, tacitly or otherwise, to take the lead, and was leading. They were proceeding in single file along a road near Hever, and had reached the point where a road running north-west and south-east turns off to Hever Station. They were in this order : The first cycle was occupied by Popplewell, who is the second defendant, the second cycle was occupied by Oldacre, the third by Marsh, the fourth by Harris, who is the first defendant in the case, with the plaintiff as his passenger, and behind him was Tarrant. They were all proceeding in line at about 25 to 30 miles per hour at this time, according to the finding of the county court judge. Popplewell the leader, with the others each about 8 yds. behind one another, found that he had over-run the turn to Hever, where he had been intending to lead the party. Seeing the signpost as he passed it, he realised he had overshot his turning point, and had to pull up short, in order to try and get round. Instead of swerving either to the left or the right in order to give those behind him a chance of avoiding him, he braked so suddenly and hard that Oldacre, who was on the second cycle, was spreadeagled on the ground on one side, Marsh did the same on the other side, and not unnaturally Harris following immediately behind Marsh, swerved out to avoid him, ran into Oldacre, who was on the ground, overturned, and the plaintiff was thrown off and suffered somewhat severe injuries.

The county court judge, who gave a carefully considered judgment, going into the facts closely, stated the facts as I have repeated them, and in regard to the stopping by Popplewell, said this :

H Seeing the signpost he braked hard, and stopped suddenly without giving any warning whatever of his intention so to do. As a result of his action, Oldacre, who was next behind him, was spreadeagled to the right and managed to stop without colliding with Popplewell's machine ; Marsh, who was next, spreadeagled to the left and ended up on the grass verge. Marsh said he did this to enable him to turn more easily up the side road ; I think he did it because he could not help it if he were to avoid colliding with Popplewell's cycle. Harris also braked hard for some 30 feet, and tried to get to the right of Oldacre, but he struck Oldacre's

machine with his motorcycle, his cycle turned over, throwing the plaintiff to the ground. Tarrant, the last of the line, escaped by turning to his left on to the grass verge. In my opinion Popplewell was clearly negligent in the way he drew up. I think also that the defendant Harris was negligent in that he did not have proper control of his machine. It is difficult to say in the circumstances who was the more negligent, Popplewell or Harris. Their joint and several negligence was the cause of the accident.

Then at the end, on the application of counsel for Popplewell, the judge A held that both defendants were liable to contribute equally. That was on an application for an apportionment under the Law Reform (Married Women and Tortfeasors) Act, 1935, to which I will refer in a moment.

I read the whole of that part of the judgment because in my view B this is a question of fact, and not of law, and I wanted to show that the judge so treated it. In this court, counsel for the appellant Popplewell contends that the judgment ought to have been, as a matter of law, against the defendant Harris, and against him only, and he submitted to us four propositions of principle in support of his argument as follows : C (i) If A.'s original fault has merely created the occasion for B.'s injurious act to C., A. will not be liable ; (ii) If the new act be a new and independent act of volition, not automatic, reflex, or without consciousness of what the actor is doing, the chain of causation will be broken, and the original wrong-doer will be relieved of liability ; (iii) It is imma- D terial that the intervening act is the probable consequence of the defendant's own wrongful act ; (iv) If the defendant's negligence as opposed to the consequences of his negligence, continues so that two direct causes operate at the same time, and lead to a common result, then there is no *novus actus*, and each actor will be the cause of the damage done. E I think I should read that as " a part cause of the damage done."

The argument which was addressed to us was this : that on the facts as stated by the judge, first there was really time for Harris to avoid the consequences of the initial negligence of Popplewell, and secondly, there was a possibility of his making a new and independent act of volition, in F other words, pulling up. The argument, as it seemed to me, was based essentially on the view that the inquiry into legal responsibility is identical with a mere inquiry into the chain of causation on an analysis of the sequence of events of a kind which, if you can say that as a mere matter of causation a new cause comes in, you must in law then say G that the person who set the chain of causation moving is thereby freed from all legal responsibility. In my view, that is to take too narrow a view of legal responsibility for either land or sea collisions, and it is too narrow, because it is not only the result of taking too narrow a view of the facts—that is to say, not having all the facts sufficiently in mind H at the same time—but it is misleading, because it tends when it is stated in those terms to draw away the attention of the judge or jury dealing with the issues of fact from what you might call the broad view of the circumstances of the case. In the present case, it appears to me obvious that there was a concurrence in point of time of the negligence of both

defendants, and that the question of sequence of causes, which has been so much discussed, does not in one sense arise at all in the present case, and the concentration of attention upon the mere question as to whether or not Harris could have stopped takes the mind away from the joint or contributory operation of the original act of Popplewell.

- A To my mind, the broad view of the facts is this. Here is a string of people, all with their minds a good deal engaged on a treasure hunt. They are following each other at 20 to 25 miles per hour, which is not an unreasonably fast speed for a country road, but, if they are following each other, one close behind the other, the followers not knowing how or when the leader is going to turn, and following so closely that, if anything very sudden happens to any one of the party except the last one, there may be a collision between that one and the one behind, or more than the one behind, that fact of itself makes a great difference in the speed which is reasonable in the circumstances. The essence of a band of motor cycles in a line such as that is that the speed should be so limited as to make it quite certain that each one, with the interval at which he is in fact following, can stop in time to avoid a predecessor in the case of any breakdown or sudden stop of any sort. That is a duty which is continuing all the time; it is operating at the moment when one of those ahead suddenly stops or breaks down, and if that accident is caused by the negligence of that rider, then obviously his negligence is the cause of the difficulties in which all the followers find themselves. I cannot imagine any case more aptly illustrating the effects of that negligence, in the disconcerting effect upon those following, than the present one.
- E In this case, the judge has found that Harris was so disconcerted by what happened that, even with the distance of the gap between him and Marsh, the one immediately in front of him, he was not able to stop in time. However, it is quite impossible, I think, for us sitting here as a Court of Appeal, in view of the judge's appreciation of the facts, to interfere with a decision of his that the negligence of Popplewell was in fact a contributing cause at the time that Harris failed to pull up, and collided with Oldacre, the second in the line. Indeed, if I were a judge of fact, which I am not, I should certainly say that I saw no reason whatever to differ from the judge's view on the facts, and, if it be necessary to imply a view to that effect as a proposition of fact on the ground that the judge has not sufficiently expressed it, I have no hesitation in reading it into the judge's judgment, and expressing my own view that that is a necessary finding in the circumstances of this case. It is quite impossible where there is a line of people moving in that way, one after the other, all engaged upon the game, all thinking of that, and an accident of this sort happens, to say that, when a predecessor breaks down, and a successor finds himself in difficulties, the breakdown is not part of the cause.
- H

It is quite true that in one sense the nautical phrase, "the agony of collision," which excuses errors at the last moment, is inapplicable here, but in another sense it is applicable, because in my view the mental effect

upon Harris's mind of so sudden and unexpected an event happening in that way must have been disconcerting. This principle cannot of itself justify the judge's view that the negligence of Popplewell was in existence as a part cause of the total breakdown of the whole string of cyclists, so as to make it a continuing cause of negligence, and that at the same time Harris's act was a fresh act of contributory negligence. A
I use the word "contributory" in the purely causal sense for the moment.

In all these cases, it is necessary to bear in mind what LORD WRIGHT said in the case of *McLean v. Bell* (1), at p. 264. I quoted it in a passage in a judgment delivered by myself in *The Eurymedon* (2), and I venture to read that passage, because it has, I think, a clear application to the facts before the court to-day, and expresses the view that I desire to express here. I said at p. 58 ([1938] 1 All E.R., pp. 131, 132): B

I confess to a feeling that much of the litigation which has taken place in the past upon this type of question has arisen through a tendency to substitute a too philosophical analysis of causation for a broad estimate of responsibility in the legal sense. I respectfully agree with a phrase of LORD WRIGHT in *McLean v. Bell* (1), at p. 264, "The decision, however, of the case must turn not simply on causation, but on responsibility." When a solution of problems of this type is sought solely in terms of causation, it is difficult to avoid the temptation of concluding that the last act or omission in point of time is of necessity not only the last link in the chain of causation, but the determining factor in the result, since *ex hypothesi* but for that last link the result would never have happened. But legal responsibility does not necessarily depend only on the last link. This is especially so in maritime collisions. . . . C D

Then I deal with maritime collisions, and the difference between them and land collisions, in the essential difference of stopping by reversing engines of a ship at sea being different from the power of braking in a motor car. Still bearing on that aspect, I want to quote a small passage from LORD WRIGHT in the case of *The Heranger* (3). That was a case of a collision in the Thames, an Admiralty appeal, and LORD WRIGHT, on a question of whether one ship ought to have reversed or not, said at p. 101: E

I do not think that a question of this character can properly be treated as a question of law. The Court of Appeal recently held in *Tidy v. Battman* (4), a common law action for negligence in a motor-car collision, that it was not proper to set aside the finding of a jury by reference to a rule of conduct which it was said was a rule generally binding and a rule of law. I may venture to quote what I said in that case in the Court of Appeal [p. 322]: "It is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt properly been applied in deciding other cases on other sets of facts." In all these cases of negligence, whether on sea or on land, the decision must be arrived at as a question of fact on all the circumstances of each case. Cases and precedents may perhaps help sometimes, but they are in truth a very doubtful guide at best in deciding any particular case. F G

In my view, this is *par excellence* one of those cases where the circumstances of the case are somewhat complex and essentially fall to be appreciated by the judge of facts. If he has expressed a final view on those facts then it is, even in the case of an appeal from a judge of the High Court alone to the Court of Appeal, one in which the Court of Appeal should be very slow to differ; still more so if it has been tried with a jury, and most slowly of all if it is an appeal from a county court judge, because the Act says in terms that appeals will be allowed on a question of law only. H

That is the answer, in my opinion, to the submission by counsel for the respondent that the case which he cited to us, *Sharpe v. Avery & Kerwood* (5), has any application to this case. That was a case of a motor car collision; the facts were different, but have some similarity, and counsel for the respondent went into the facts with us in sufficient detail to show that there was a good deal of similarity. In truth, in the result, he was, in my opinion, submitting that we ought to decide the present case in the way he asked us to do because the facts of *Sharpe v. Avery & Kerwood* (5) were very similar, and we ought, therefore, to follow that decision. That is obviously a misuse of citations of other decisions for the purpose of an appeal. I know that counsel for the respondent will not think I am blaming him for calling our attention to that case, but I merely say that because it seems to me so important that issues of fact should be treated as issues of fact, and that the decisions upon them should not be cited in other cases, unless there is a real principle of law laid down, and it is the principle itself that is wanted for citation. I cannot think that the decision in *Sharpe v. Avery & Kerwood* (5) laid down any fresh principle.

The other two cases cited by counsel for the respondent were *The Volute* (6) and *The Singleton Abbey* (7), two Admiralty appeals in collision cases, the former being the one in which LORD BIRKENHEAD's judgment was given upon questions of contributory negligence. That case has been frequently analysed, and neither in that case, nor in the opinion of LORD BLANESBURGH in *The Singleton Abbey* (7), is there any rule laid down inconsistent with the view taken in this case by the county court judge that both negligences, Popplewell's and Harris's, were in part the cause of the one disaster to the plaintiff. That being so, I think we ought to take the view, and take it very clearly and definitely, that the county court judge had evidence before him on which it was open to him to arrive at the conclusion at which he did, and that there is no ground in law for interfering with it. In my view the judge's judgment was a very good judgment, and I agree with it.

The cross-appeal I think ought to be dismissed with costs.

CLAUSON, L.J. : I agree. I wish to express my personal indebtedness to counsel for the respondent for a most interesting and, so far as I was concerned, a most instructive argument, but he has entirely failed to satisfy me that there was any error of law in the judgment of the county court judge. As I understand it, the facts as found by the county court judge are these : (i) that Popplewell made a mistake in suddenly stopping his machine, and thus thrusting Oldacre's machine into Harris's path ; (ii) that Harris, immediately before and at the time of this collision was driving his machine without its being under proper control, and I understand the county court judge to have held—and for myself I cannot see how he could avoid holding—that the fact that the lady was shot off her seat and injured was due to the combined effect of these two

mistakes of Popplewell and Harris. That would seem inevitably to lead to the conclusion that the judge was right in holding the two defendants liable in damages to the plaintiff. It was suggested that the sum found for damages by the county court judge was such that this court would have jurisdiction in some way to interfere with it. In my view the court has no such jurisdiction in the facts of the present case.

DU PARCQ, L.J. : As the appeal is being allowed, I think it is only right to say that the judge himself was not guilty of error of any kind. In the plainest language he said that he awarded the plaintiff £250 against both defendants, and it is quite clear that he meant what he said, that that was to be a judgment against both of them. It followed, of course, that the plaintiff would be entitled to get £250, if she could not get a contribution from one defendant, entirely from the other defendant. Then the judge went on, as he is now empowered to do by law, to say what contribution should be made as between the two tortfeasors. Most unfortunately, by some slip, I suppose a misunderstanding due perhaps to inattention or due, perhaps, to something going wrong in the office of the county court, the judgment was recorded in this way :

Order each defendant liable for half judgment and costs.

I do not in the least criticise the advice which counsel for the appellants told us that he gave, that it was not possible to get that corrected under the slip rule, because I know from my recollection that the cases about the operation of the slip rule are not very easy to reconcile, and he may well have thought, as I gather he did think, that he might be throwing away the costs of an application to the county court if he did apply on behalf of his client under the slip rule, but I wish to say, speaking for myself, that I do feel strongly that this could have been rectified under the slip rule. It is plainly a case where the judge made no mistake at all ; there was no desire to correct any error he had made. His manifest intention had been expressed by him, and had been erroneously interpreted by what must, I think, have been an accidental slip. Nobody would suggest that any official of the county court deliberately recorded something which was quite different from what the judge had said, and if it was not deliberately done, it seems to me that one may say it reasonably follows that it was accidentally done. I wish to say, because such a thing may occur again, that in my view it is quite open to a county court judge, if he finds that his clearly expressed judgment has been wrongly recorded in the books of the county court, to correct that as an accidental slip.

Now so far as the cross-appeal is concerned, there is very little that I wish to add. I asked counsel for the respondent in the course of the argument to be good enough to state shortly what he suggested would have been the proper direction to a jury, if there had been a jury in this case. I do feel that in cases of this kind, it is no bad test to consider how an

- argument would appear when put into the kind of language which it is necessary to use in addressing a jury. The common law of this country has been built up, not by the writings of logicians or learned jurists, but by the summings-up of judges of experience to juries consisting of plain men, not usually students of logic, not accustomed to subtle reasoning,
- A but endowed, so far as my experience goes, as a general rule, with great common sense, and if an argument has to be put in terms which only a school-man could understand, then I am always very doubtful whether it can possibly be expressing the common law. In fairness to counsel for the respondent, I ought to say that he responded at once to my invitation,
- B and put in clear language, if I may say so, what would have been a perfectly proper direction to the jury. It then appeared that one of the questions which he would have put to the jury would have been the question whether both these defendants were to blame, because in truth it was the negligence of each of them which contributed to cause the
- C accident. That precise question was, obviously, as it appears to me, put to himself by the judge, and he has answered it categorically. He says : " Their joint and several negligence was the cause of the accident." It would be pedantic perhaps to say that technically the negligence was not joint negligence ; they probably were not joint tortfeasors in the technical
- D sense, but what the judge means is obvious, that they were both guilty of separate acts of negligence, and that those separate acts of negligence in combination caused the injuries from which the plaintiff suffered, and caused her damage. That was precisely the point which he had to decide. He has answered the very question which ought to have been left to the
- E jury if there had been a jury, and I will only add, though perhaps it is irrelevant to do so, that if I had to sum up this case to a jury, and they had given any answer other than that which the judge has given to the question, I should have received their verdict with the utmost respect, but with some little surprise. I agree that this appeal should be allowed,
- F and the cross-appeal dismissed.
- Solicitors : *H. N. Robbins* (for the appellant) ; *William Hurd & Son* (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

Dictum of HENN COLLINS, J., at p. 971, *not approved.* *SQUIRE v. SQUIRE.* _____
[1948] 2 All E.R. 51.

G

ASTLE v. ASTLE (BY HIS GUARDIAN).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.),
July 28, 1939.]

- H *Divorce—Cruelty—Respondent of unsound mind—Test of legal responsibility—Application of common law rule—Matrimonial Causes Act, 1937 (c. 57), s. 2.*

The parties married in 1927, and shortly afterwards the husband committed violent assaults upon the petitioner, and also upon others, and in consequence he was in June, 1927, certified and received into a mental hospital. He improved, and was discharged some months later, but his wife was afraid of him and did not live with him. During

1931, he came to her house, and uttered such threats of violence that his wife, being apprehensive by reason of past experience, sought police protection. It was found as a fact that the respondent did not know the nature and quality of the acts which he committed in 1927, but that he did know in 1931 that he was uttering threats against his wife :—

HELD : (i) the acts committed in 1927 did not amount to cruelty because the respondent, by reason of his mental state, did not appreciate the nature and quality of such acts, and the wife was not entitled in respect of those acts to a decree. A

(ii) the respondent, knowing the nature and quality of his acts in 1931, was guilty of an act of cruelty, although he had been previously certified as of unsound mind.

(iii) although the isolated act of cruelty in 1931 was not, in itself, sufficient to entitle the petitioner to succeed, the earlier history must be taken into account as aggravating the consequences of the respondent's act, and the petitioner was, in consequence, entitled to a decree *nisi*. B

[EDITORIAL NOTE.] This case considers fully the defence of insanity to a charge of cruelty and how far the rule in *M'Naghten's* case (3) is applicable in such cases. It has been said that the remedy is the restraint of the insane party and not the release of the spouse. It was said, however, that acts of cruelty, against which the protection of the court could be shown, must be shown to proceed from malignity. It is, therefore, held that acts shown to have been committed at a time when the spouse was so insane as not to know the nature and quality of those acts are not in law acts of cruelty. They may, however, have been used to convert an isolated act of cruelty into one upon which a charge of cruelty may be successfully founded. C

Cases referred to :

- (1) *Hanbury v. Hanbury* (1892), 8 T.L.R. 559 ; Digest Supp. ; *previous proceedings*, [1892] P. 222.
- (2) *Kirkman v. Kirkman* (1807), 1 Hag. Con. 409 ; 27 Digest 286, 2579. E
- (3) *M'Naghten's Case* (1843), 10 Cl. & Fin. 200 ; 14 Digest 56, 229 ; *sub nom. McNaughton's Case*, 4 State Tr. N.S. 847.
- (4) *Hall v. Hall* (1864), 3 Sw. & Tr. 347 ; 27 Digest 323, 3022 ; 33 L.J.P.M. & A. 65 ; 9 L.T. 810.
- (5) *Yarrow v. Yarrow*, [1892] P. 92 ; 27 Digest 324, 3025 ; 61 L.J.P. 69 ; 66 L.T. 383. F

DEFENDED PETITION by the wife for divorce on the ground of cruelty. The facts and arguments are fully set out in the judgment.

J. Roland Adams for the petitioner.

Theodore Turner for the respondent. G

HENN COLLINS, J. : This is a wife's petition for dissolution on the ground of cruelty. The answer puts in issue the allegations of cruelty, and by an amendment, for which I gave leave, alleges that at the time the acts of cruelty, if any, were committed, the respondent was of unsound mind, and did not know the nature and quality of the acts he was committing. H

The parties were married on Apr. 12, 1927, and had lived together as man and wife for some 3 weeks only, when the respondent began a series of violent, even murderous, assaults upon his wife, and, incidentally, upon others. On June 16, 1927, the respondent was certified as insane,

and received into Cheadle Mental Hospital, suffering from acute mania. There he improved, and was allowed out on parole from time to time, and on one of these occasions told his wife that he had decided to kill her and to commit suicide. The petitioner was, of course, terribly alarmed, but with great presence of mind pretended to agree with him, and

A eventually persuaded him to go back to the hospital. From that institution he was discharged on Oct. 6, 1927, but his wife did not live with him, as she was afraid to do so. In Mar., 1931, while he was at liberty, and not under certificate, he came to the house in which his wife was living, and uttered threats of violence towards her and her
B family, which, in view of her past experience, caused the wife such real apprehension that she sought police protection. In Oct., 1937, the respondent was again certified, and has been under restraint ever since.

In those circumstances, it was naturally conceded that the wife had been the victim of cruelty, if cruelty is to be judged only from the stand-
C point of the one who suffers from the acts complained of. If, on the other hand, intention on the part of the actor is a necessary element of cruelty in a matrimonial suit, there would be no cruelty if the state of the respondent's mind was such that he did not know the nature and quality of his acts, and since I have come to the conclusion upon the
D facts that the respondent did not, by reason of disease of the mind, know, at the time he was committing them, the nature and quality of the acts which he committed in 1927, I have to decide which of these two contentions is right in respect of those acts.

The point is not, it seems to me, covered by direct authority, either
E as the law stood before the Matrimonial Causes Act, 1937, came into force, or, if that Act affects the matter, as the law now stands, and in deciding the point I am aware that I am travelling where SIR CHARLES BUTT, P., in the case of *Hanbury v. Hanbury* (1), would not tread.

The argument in favour of the view that a petitioner is entitled to
F relief in this court on the ground of cruelty, although the acts complained of were the outcome of insanity, runs thus : none of the accepted tests of cruelty in matrimonial causes takes account of anything but the effect upon the victim, or indicates that the acts must be knowingly or wilfully done. This is only to be expected, the argument runs, because
G the cases show that the primary, if not the only, ground upon which the court intervened in a case of cruelty was for the protection of the injured spouse. If, from the disposition and circumstances of the respondent, the petitioner was likely again to be exposed to similar treatment, unless the spouses were judicially separated, a separation
H was decreed without inquiring whether the respondent's actions proceeded from malignity or other cause. Hence it came about that, if the respondent's actions were caused by recurrent fits of insanity, with intervals during which there would be no excuse for non-cohabitation, a decree would be granted, but, if the insanity were such as to require permanent restraint, then, and then only, would a decree be refused,

the Lunacy Laws being assumed to afford a sufficient protection. That is, I think, a not unfair summary of the cases, if it be added that no case was called to my attention in which a decree was refused on the ground of the respondent's insanity. I do not pause to examine the cases in detail now, because their effect is reproduced in the charge of SIR CHARLES BUTT, P., to the jury in *Hanbury v. Hanbury* (1), to which I have already alluded. Then, the argument continues, there is nothing in the Matrimonial Causes Act, 1937, to alter the quality of cruelty, the only alteration in this regard being the nature of the available relief. Where a discretionary remedy by judicial separation would have been afforded, a decree of dissolution, subject only to the discretionary bars, must now be granted. This is a formidable argument, and one which I confess I have found attractive, but I have come to the conclusion that I cannot accept it. To begin with, to do so would be to introduce, or, if that be not the right word, to establish in this court a measure of legal responsibility not applied in any other court. On the facts of this case the respondent could not be held answerable outside this court, either civilly or criminally, for his assaults, and it is therefore a very strong step to say that in this court, by those self-same acts, he has done something which, in this court, is not only an offence, but may, and, indeed, must, since divorce is not a discretionary remedy, alter his civil status.

The argument with which I am dealing proceeds upon the footing that, short, at any rate, of insanity of such a degree as leaves no hope of recovery, but necessitates permanent confinement, the divorce court has not taken cognisance of the state of the respondent's mind. This doctrine has its most forcible expression in SIR WILLIAM SCOTT's judgment in *Kirkman v. Kirkman* (2) where he says, at pp. 409, 410 :

The persons of both parties, however, must be protected from violence. . . . If that safety is endangered by violent and disorderly affections of the mind, it is the same, in its effect, as if it proceeded from mere malignity alone ; it cannot be necessary, that, in order to obtain the protection of the court it should be made to appear to proceed from malignity.

That is, I think, the high-water mark of the argument, but, neither in that case nor in *Hanbury v. Hanbury* (1), nor in any other of the cases, is the test of legal responsibility which was established in *M'Naghten's* case (3) applied to the respondent's state of mind. Possibly the evidence in those cases would have been differently marshalled if the test applied in *M'Naghten's* case (3) had been its focus, but taking the evidence as it is to be gathered from the reports, in no case am I satisfied that it was such as to establish that the respondent did not know the nature and quality of his or her acts.

I do not, therefore, regard those cases as authorities for the proposition that, in this court, there is no degree of insanity that will afford an answer. Why should SIR CHARLES BUTT so carefully have guarded himself as he did in *Hanbury v. Hanbury* (1) if it were so, and how can one reconcile the judgment in *Hall v. Hall* (4) with such a view ? If there be a degree

of insanity which affords an answer to a matrimonial suit, how is it to be safely measured except by the test applied in all other courts? In *Yarrow v. Yarrow* (5) that test was, in fact, applied to the acts of the respondent, though it was doubted whether even that degree of insanity would afford an answer to a suit for divorce on the ground of adultery. No question of insanity in relation to adultery arises in this case, and I express no opinion on that matter.

There is one other consideration which points in the same direction. I have, after all, to deal with the statute law as it is to-day. The Matrimonial Causes Act, 1937, s. 2, on which this suit is based, is in these terms :

The following section shall be substituted for the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176 [and then follows the section that is substituted]: "A petition for divorce may be presented to the High Court . . . either by the husband or the wife on the ground that the respondent . . . (c) has since the celebration of the marriage treated the petitioner with cruelty. . . ."

I emphasise the word "treated," because that seems to me to connote a conscious action, and appears to indicate an action of which the doer knows the nature and quality. The indication may not be strong, and is probably not strong enough to found upon it an exception to the general rule of law. However, the reverse is the case. The presumption is against the exception, and the indication points in the same direction.

I have said that my conclusion of fact is that the respondent did not know the nature and quality of the acts which he committed in the year 1927, and since in my judgment intention or malignity is an essential ingredient in cruelty, if those acts stood alone, the petitioner could not be granted relief. However, as I have indicated, there was a threat in Mar., 1931. On that occasion he came to the house where his wife was living, and shouted that, though they might think themselves safe, neither his wife nor her family would live much longer. What was the respondent's state of mind at that date? He had been at liberty since Oct., 1927, and remained at liberty till Oct., 1936, some 5½ years after this threat, and, so far as I am aware, was sufficiently master of himself to commit no violence during that time. On the occasion in question there was no superior force to prevent him carrying out his threat; nothing, in fact, but his own self-restraint. Of course, it does not follow from that that he knew he was uttering a threat, but it seems probable that he did. The medical evidence, which I accept, is to the same effect, and I find that he knew he was uttering threats against his wife. Upon that view of the facts, he was responsible in law for what he then did.

The next question is whether this act of cruelty, an isolated act so far as he was concerned, was of such gravity as to justify a decree in the petitioner's favour. If I were to regard it as a single isolated act from the petitioner's point of view, an act without any antecedent history, I should probably answer in the negative, but to do so would be, I think, to take an artificial and technical view, and to lose sight of the realities of the case. With her past experience in mind, the threat had

for the petitioner a reality and force out of all proportion to that which it would have had, if he had not already made attempts upon her life. It was little wonder that she sought police protection. I think I must take the earlier history into account, not as aggravating the quality of his single act of cruelty, but as aggravating its consequences. For those consequences he is, in my opinion, responsible, although I have acquitted him of the acts which gave them their gravity. I think this case may be compared with those, not unfamiliar in the criminal courts, where far graver consequences than would have been anticipated have followed some slight assault owing to some physical infirmity of the victim. For these reasons I think the petitioner is entitled to the relief which she claims.

Decree nisi granted.

Solicitors: *Haslewood, Hare & Co.* (for the petitioner); *The Official Solicitor* (for the respondent).

[Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.]

KELLOCK v. KELLOCK (BY HER GUARDIAN).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Henn Collins, J.),
July 28, 1939.]

Divorce—Cruelty—Respondent wife of unsound mind—Acts of cruelty committed—Acts proceeding from conscious malignity.

The parties were married in 1915, and soon afterwards the wife began, without any provocation, to commit acts dangerous to the life and health of the petitioner. She continued in such conduct until 1931, when she was certified as insane, and removed to a mental hospital. She suffered from a disease known as manic depressive insanity, and while the acts complained of were manifestations of that disease, medical evidence showed that at all material times she knew what she was doing, and that she was doing wrong:—

HELD: the respondent had acted with a consciously wicked mind, and the disease from which she suffered was no answer to a charge of cruelty. The petitioner was therefore entitled to a decree *nisi*.

[EDITORIAL NOTE. Insanity is only a defence to a charge of cruelty when the act is the unconscious act of the party charged. It used to be said that the remedy lay in the restraint of the insane party and not in the release of the spouse. The question is more fully reviewed in the judgment in *Astle v. Astle*, p. 967, *ante*.

AS TO INSANITY AS A DEFENCE TO CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 652, 653, para. 958; and FOR CASES, see DIGEST, Vol. 27, p. 293, Nos. 2683-2694.]

Case referred to:

- (1) *Kirkman v. Kirkman* (1807), 1 Hag. Con. 409; 27 Digest 286, 2579.

DEFENDED PETITION by the husband for divorce on the ground of his wife's cruelty. The wife, being of unsound mind, appeared by the Official Solicitor as her guardian *ad litem*. The facts are fully set out in the judgment.

L. J. Acton Pile for the petitioner.

H. J. Phillimore for the respondent.

HENN COLLINS, J. : This is a husband's petition for dissolution of marriage on the ground of his wife's cruelty. The wife's answer is a denial of the charges, and she further says that, if she did any of the acts alleged, she was at the time not of sound mind, and was incapable of understanding the nature and quality and probable results of such acts.

- A The evidence satisfied me that, from time to time since almost the beginning of the married life in Mar., 1915, the wife committed acts which caused danger to the life, limb and health of the petitioner, that no act of the petitioner justified the wife's conduct, and that in some instances the wife's acts were done without even colourable provocation. She continued the same course of conduct, with shorter intervals between her outbursts, until, in February, 1931, she consulted a doctor, and was certified as insane and removed to a mental hospital. Since that date the spouses have not lived under the same roof. There has been no marital intercourse since 1923.
- C In April, 1932, she was discharged from the hospital, but the husband was justifiably afraid to live with her, and did not do so. In December, 1935, she was again certified and put under restraint in Cane Hill Mental Hospital, where she now is. The disease from which she suffers is, in medical terminology, manic depressive insanity. I am satisfied that
- D the wife's acts, of which the husband complains, were at all material times manifestations of that disease of the mind, and in those circumstances the question was propounded, how far, if at all, insanity of the kind in question is an answer to a prayer for dissolution founded upon cruelty. The disease manifests itself by periods of deep depression, in which
- E suicidal tendencies may, and in this case did, develop, and during which the mind is confused. These are followed by periods of inordinate elation, during which exaggerated and extreme reactions result from small stimuli. Slight restraint or fancied grievance may result, and did during the married life result, in homicidal tendencies, of which
- F the husband was sometimes the object. Between these phases of depression and exaltation, came periods, of uncertain duration, during which the patient either was, or appeared to be, normal. I have no doubt that the acts of the wife of which complaint is made were the outcome of disease of the mind, a disease which probably had its inception before marriage. At the same time, the medical evidence compels
- G me to find, as I would have inferred from the petitioner's own evidence, that the wife at all material times knew what she was doing, and that what she was doing was wrong. I have been referred to a number of cases from which I was invited to deduce that insanity in some degree
- H is an answer in a matrimonial suit, but having regard to what I find to be the facts, I do not think the question whether this is so, or what degree of insanity would afford an answer to a charge of cruelty, really arises in this case. It well may be that there is a degree of insanity which would afford an answer to a charge of cruelty, but I can find no colour in any of the cases for the view that a respondent, who has a

consciously wicked mind, is not responsible. That was the case here. To borrow a phrase from *Kirkman v. Kirkman* (1), at p. 410, the acts of the respondent have been "made to appear to proceed from malignity."

If the respondent had proved that which the pleader alleged on her behalf, the broader question would have arisen, but as it is, I do not think that it does.

The petitioner, therefore, is entitled to the relief he claims.

Decree nisi granted.

Solicitors: *H. W. Airey* (for the petitioner); *The Official Solicitor* (for the respondent).

[*Reported by J. F. COMPTON MILLER, Esq., Barrister-at-Law.*]

EDMONDS & CO., LTD. v. FAGIN.

[KING'S BENCH DIVISION (Oliver, J.), July 25, 1939.]

Contract—Quantum meruit—Contract to erect shop window—Wife's premises apparently owned by husband—Contract with husband partly guaranteed by wife—Request by wife to complete work—Whether wife liable for rest of contract price.

The plaintiffs agreed to erect a shop-window for F., the husband of the defendant, under the impression that he was the owner of the premises in question and a man of substance. The cost was to be £885, and was to be paid as follows: £200 with the order; £200 on completion; four quarterly payments of £100; and one payment of £85 plus the amount due for any alterations. The first payment of £200 was made, but the plaintiffs subsequently discovered that the premises in fact belonged to the defendant and were merely rented to F. They thereupon refused to proceed with the work, unless the defendant was prepared to guarantee the payments due under the contract. It was agreed that the defendant should guarantee the four quarterly payments of £100 and the one payment of £85. A considerable time afterwards the defendant wrote a letter to the plaintiffs in which she said that she had promised to guarantee the balance of £685. The plaintiffs, being unable to obtain any satisfaction from F., brought the present action:—

HELD: (i) the letter written by the defendant was a sufficient memorandum in writing, and, although it wrongly mentioned the sum of £685, it was a sufficient memorandum in respect of the lesser amount of £485.

(ii) with regard to the balance of the amount due, the defendant was, in all the circumstances of the case, liable on a *quantum meruit*.

[EDITORIAL NOTE.] A contract to pay a reasonable sum for work done is implied where work is done at the request of a party, and, it is here decided that, although the position may be complicated by the fact that that party has entered into an express guarantee and is the wife of a contracting party, still the implication of a contract can be made.

AS TO WORK DONE AT THE REQUEST OF ANOTHER, see HALSBURY, Hailsham Edn., Vol. 7, pp. 133, 134, paras. 189, 190, and pp. 144-146, para. 204; and FOR CASES, see DIGEST, Vol. 12, pp. 215-218, Nos. 1742-1780.]

ACTION to recover the balance alleged to be due from the defendant to the plaintiffs, payment of which had been guaranteed by the defendant; alternatively for work done at the request of the defendant for the benefit of her premises, or alternatively on a *quantum meruit*. The

facts of the case and the arguments are fully set out in the judgment.

M. Turner-Samuels and *J. Turner-Samuels* for the plaintiffs.

F. A. Sellers, K.C., and *H. Cedric Infield* for the defendant.

OLIVER, J. : This is an action by Edmonds & Co., Ltd., a firm of
A building contractors and shop fitters, against a Mrs. Doris Fagin, a
married woman, for the price of work done and materials supplied in
erecting a certain shop-front at Nos. 6-8, Station Road, Aldershot.
They sue her first of all, as guarantor of her husband's debt, and, in the
second place, they say that, if she did not guarantee her husband's debt,
B and/or to the extent to which she did not guarantee it, she is liable to
pay on the implied contract known as a *quantum meruit*.

The matter arose in this way. After the husband had had a somewhat
chequered financial career, during which he seems to have made little
or nothing, and his wife in July, 1936, paid his creditors, and bought his
C assets. She apparently fitted him out with some money, and he set up,
for the third or fourth time, in the business of a radio and cycle shop
at these premises, Nos. 6-8, Station Road. The freehold premises, as
did practically all other premises in which he carried on business during
the last ten years, belonged to her. There is a document, which purports
D to be dated Mar. 23, 1936, and records that on that day this defendant,
the wife, had let to Jacob Fagin the ground floor, garages, outhouses,
etc., at Nos. 6-8, Station Road, Aldershot, at the sum of £4 per week.
Only two weeks' rent were paid under that agreement. Mr. Fagin
determined to embark upon the installation of a very elaborate and
E expensive shop-front. His wife, although she lived in the same house
with him, apparently had no interest in it, although it was her own house,
and she took no part in the business of ordering the shop-front, or any
part in the discussions. Fagin got into touch with the plaintiffs and
entered into an agreement, under which for the sum of £885, which might
F be increased in case armour plate was substituted for alabaster glass, and
in respect of one or two other extras, they undertook to erect a shop-front.
The payments were to be as follows : £200 with the order—and a cheque
for £200 was handed over to Gould, the plaintiffs' representative, on
July 7—£200 on completion of the work, and the balance at the rate of
G four payments of £100 per quarter, and one payment of £85, or a larger
amount if any alterations took place. Fagin had succeeded in conveying
to the plaintiffs' representatives, I hope not on purpose, that he was the
freeholder of these premises. In those circumstances only were they
prepared to deal with him. How far that was from the fact no one
H knew better than he and his wife, but that was the impression created. By
July 21, the truth of the matter, or some part of the truth, had reached
the head office of the plaintiff company. It was then agreed that the
wife should guarantee the payments to be made by the husband. This was
to be effected by the wife backing five bills to be given by the husband
in respect of the payments after completion.

If the matter stood there, and I had nothing to qualify it, I should hold myself entitled to look at the document which was written very many months afterwards, and is in these terms :

Soon after you accepted his order numerous arguments came up ; in order to put an end to them and get you to complete the work in the agreed time I promised to guarantee the balance of £685.

A
I should have held that that was completely in line with the contract which was made, that it was a perfectly valid memorandum, and that she was bound to the full extent of this contract to guarantee it. However, counsel for the defendant has satisfied me that that simple view, which I thought at one time could be taken, cannot now be taken, having regard to the contemporaneous documents. I am quite satisfied that, foolish as it must appear, because quite obviously the one thing the plaintiffs were concerned to do, having made the discovery that Fagin was a worthless person, was to get this well-off wife to guarantee the whole debt, yet they did not do it. For some reason or other, they appear to have overlooked, as far as the guarantee was concerned, that amount of the payment which was to consist of £200 on the completion of the work. I am driven to that conclusion, as I have said, with reluctance, because I find that Fagin and his wife in this matter had no merits at all. However, that does not make me do violence to facts which appear to be clearly established in evidence. On the question of whether this guarantee was at the time meant to cover the whole or any part of the debt, I am bound, I think, to come to the conclusion that it was intended at the time, through inadvertence, to cover only part of the debt. It was a guarantee of the bills, which had been made the medium of payment to the plaintiffs, in respect of the £485 to be paid after the completion of the work. C D E

On this matter counsel for the defendant says : " There was on that correspondence never any undertaking to guarantee the debt. You must interpret it strictly as an undertaking to guarantee to back certain bills. Those bills were never presented to her. Therefore, she has never broken any undertaking." That is how it is put, but I do not accede to that view. To my mind, the substance of the matter is that, on or about July 21, this woman had undertaken and had guaranteed to cover the liability of her husband which followed the second £200, that is to say, the liability on the bills, the liability for the last £485 which was to be paid by bills. I think that that was the contract. The mere medium of the payment, the bills, were not of the essence of the contract at all. The contract was, as I find it, to guarantee the debt. It must be borne in mind, as I pointed out during the hearing of this case, that a contract to back a bill is not in the least inconsistent with a contract to guarantee a debt. In their essence they are similar things. They are, of course, not the same in their legal operation, but in their essence and conception they are the same. F G H

Then the question arises whether there is, within the Statute of Frauds,

- any note or memorandum in writing which is of sufficient evidential value of the terms of this guarantee. I hold that the later letter written by the defendant, read with the earlier correspondence, is a memorandum or a note in writing showing that the defendant had undertaken to guarantee the balance—but what amount? The letter says £685, but
- A for the reasons I have pointed out, I think that that is a mistake and should have been £485. At any rate I am not doing her any injustice if I hold that, and I do not see any reason why I cannot hold that the document, which would be a perfectly good note or memorandum in writing evidencing liability to pay £685, cannot *a fortiori* be made to
- B cover that which is much less than £685, on the principle that the greater necessarily includes the less. I, therefore, hold that the plaintiffs are entitled, subject to other matters which have got to be considered, as against the defendant to the sum of £485 on a guarantee to pay Fagin's liability for that amount.
- C The next matter that I have to consider is this. It is said by counsel for the plaintiffs that in the circumstances of this case there arises a liability to pay on a *quantum meruit* for the balance between £485, which I have held to be covered by the guarantee, and whatever may be found to be ultimately due under this contract. It is said by counsel for the
- D defendant on the other hand that you cannot possibly have a *quantum meruit* in a case like this, because you can only have a *quantum meruit* arising where A and B have contracted, and for some reason or other the contract has failed; then you may have a *quantum meruit*, but only as arising between the same parties. I walk warily in the
- E fields of law, but I cannot myself see why that should be. I cannot see any reason or any principle which should prevent persons making themselves liable upon a *quantum meruit* to pay a contractor merely because that contractor has a contract with someone else. Take the very facts of this case. Here there is a completely worthless purchaser,
- F Fagin, who is not worth a penny. His wife could make him bankrupt to-morrow. He is living entirely upon her charity. He makes a contract, and he makes it in circumstances in which the contractors to him are under the impression that he is a person of substance and the freeholder of the premises on which the work is to be done. They find out he
- G is not, and they say—and no one could disbelieve them—they have said it in writing: "We are not going to do another ounce of work on this place until you get us someone better than you." In those circumstances, a lady comes along who is the owner of the premises, and evidently a woman of substantial means. What is there to prevent her
- H making herself liable by saying to the contractors: "You go ahead with this work"? Then they do it. It is work for the benefit of her premises. Every pennyworth has gone on to her freehold property. I cannot see why she should not, side by side with the liability of her husband, the ostensible contractor, put herself in a position to be liable on a *quantum meruit*. Accordingly, I find, as often happens, that the plaintiffs have

done work upon a request, because the letter written by the defendant says so. It is a request by the owner of the property to do work on that property, and the work was subsequently done by the contractors. Why should not she pay for it? In those circumstances I am going to hold that as far as the balance between the £485 (for which she is liable as a guarantor) and the amount which is going to be ultimately due is concerned, the plaintiffs are to succeed against her as on a *quantum meruit*. A

Declaration that defendant liable to pay plaintiffs £485 on the guarantee and balance on a quantum meruit or alternatively the whole sum claimed on a quantum meruit, subject to inquiry as to damages by the Official Referee. Costs of inquiry reserved. Stay of execution on terms. B

Solicitors: *Barnett Janner* (for the plaintiffs); *Wm. White & Co.* (for the defendant).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.] C

BROOME AND ANOTHER v. PARDESS CO-OPERATIVE SOCIETY OF ORANGE GROWERS (ESTABLISHED 1900), LIMITED. D

[KING'S BENCH DIVISION (Hilbery, J.), **July 20, 21, 1939.**]

Contract—Implied terms—Business efficacy—Broker's contract—Sale of fruit by agent—Advance to grower by agent—Shipment unsound on arrival and unsaleable in market—Implied term that fruit on arrival to be of merchantable quality. E

The plaintiffs, a firm of London fruit brokers, entered into a contract with the defendants, who were producers of oranges in Palestine, to sell the defendants' oranges in London, on the terms that in any event they should advance to the defendants 7s. 6d. per case, and that on sale their charges should be 6d. plus 7½ per cent. gross per case, all surplus on sale above 7s. 6d. per case to be remitted to the defendants. During the growing season covered by the contract the weather had been abnormally wet, with the result that the oranges, though apparently shipped in good condition, were, on arrival in London, to a large extent, unsaleable and, such as were saleable, required repacking. The plaintiffs were consequently unable to sell the oranges in the market, and being bound to pay the defendants the guaranteed advance, suffered a considerable loss. They thereupon brought this action for damages, and contended that there was an implied term in the contract that the goods would be of merchantable quality, so that they could be sold in the ordinary course of business. The defendants contended that the contract was complete in itself, and that no term could be implied to give business efficacy to it:— F

HELD: the parties were acting in a common interest for the purpose of selling the defendants' goods, and there must be implied into the contract a term that the goods should be in such a condition as to be saleable in the London market. G H

[EDITORIAL NOTE.] The contract here is not one of sale and purchase and is therefore not within the Sale of Goods Act, 1893. The contract was one between a grower and shipper in Palestine and a broker on the London market, and the question is not whether all the conditions and warranties of the Sale of Goods

Act, 1893, should be implied into such a contract, but simply whether, in this particular contract, there should be implied a term that the goods should reach London in a merchantable state. No doubt the decision is of some general application to similar broker's contracts, but it must be read as a decision on a particular contract and the generality of its application left for further consideration by the courts.

- A AS TO BROKERS' CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 38-42, paras. 42-48; and FOR CASES, see DIGEST, Vol. 12, pp. 610-612, Nos. 5044-5058.]

Cases referred to :

- (1) *Livock v. Pearson Brothers* (1928), 33 Com. Cas. 188; Digest Supp.
 (2) *The Moorcock* (1889), 14 P.D. 64; 12 Digest 611, 5048; 58 L.J.P. 73; 60 L.T. 654.
 B (3) *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488; 12 Digest 610, 5042; 60 L.J.Q.B. 734; 65 L.T. 286.
 (4) *Reigate v. Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K.B. 592; 12 Digest 611, 5052; 87 L.J.K.B. 724; 118 L.T. 479.
 (5) *Re Comptoir Commercial Anversois & Power, Son & Co.*, [1920] 1 K.B. 868; 12 Digest 608, 5032; 89 L.J.K.B. 849; 122 L.T. 567.
 C (6) *Beer v. Walker* (1877), 46 L.J.Q.B. 677; 39 Digest 442, 714; 37 L.T. 278.
 (7) *Ollett v. Jordan*, [1918] 2 K.B. 41; 25 Digest 110, 336; 87 L.J.K.B. 934; 119 L.T. 50.

D ACTION for damages for breach of an implied term in a contract for the sale by the plaintiffs of the defendants' goods in the London market that the goods should be of merchantable quality. The fact and arguments are fully set out in the judgment.

A. T. Miller, K.C., and *Neville Faulks* for the plaintiffs.

Rt. Hon. Sir William Jowitt, K.C., *B. B. Stenham* and *C. D. Aarvold* for the defendants.
 E

HILBERY, J. : The plaintiffs in this case are a well-known firm of Covent Garden fruit brokers. The defendants are a very large organisation of fruit growers and shippers in Palestine with a head office at Tel-Aviv, a branch office at Haifa and a London office. They are perhaps
 F the largest shippers from Palestine of such fruits as oranges, grape fruit and other fruits now being grown in Palestine. They ship them for sale to a great extent in the United Kingdom, and in London apparently the principal places at which they entrust their goods to brokers for sale are in Spitalfields Market auctions and with the brokers in Covent Garden,
 G who do business more particularly negotiating separate and private sales.

Prior to Oct., 1936, the plaintiffs had had consignments of fruit from the defendants for sale, and they had sold them on the basis upon which business is very generally done by the fruit brokers in Covent Garden,
 H receiving consignment goods from producers and shippers abroad—namely, sale on approved advances. They had acted as brokers for the defendants, on the terms that the defendants would ship and, after shipment, would draw upon the plaintiffs for a certain sum per case of the oranges shipped, which would be an advance made by the brokers. The goods would then be sold after their arrival in

London. The broker in London would first of all obtain delivery of the goods from the ship by paying the freight and would pay the duty and, out of such sum as he might have agreed with the defendants for charges, would meet any other expenses such as landing charges and haulage from the docks, and, after sale of the fruit, would account to his principals, the defendants, deducting from the amount he received on selling their goods first of all the amount of the charge which was allowed to him, $7\frac{1}{2}$ per cent. on the gross sales as brokerage, freight, duty, and then the advance and, in the case of an approved advance, if the sale price had realised enough to meet those outgoings and left a balance after meeting the approved advance or loan that had been made by the broker, the broker remitted the balance to the defendants. If, on the other hand, the total sale price did not give a surplus after meeting those outgoings but left the broker out of pocket, then the defendants had to remit the deficit to the broker. There were terms quite well understood between the parties.

The defendants, so far as the market in oranges was concerned, marketed here three well-known brands of oranges. The first quality was an orange called Pardess; the second quality an orange called the Ophir brand, and I think the third quality was called Tabor. When the season for the shipment of oranges from Palestine was coming round, the defendants wrote to the plaintiffs a letter of Oct. 10, 1936, in these terms, confirming a conversation of the previous day:

It was agreed to supply you during the season 1936-37 40,000 cases of Ophir oranges at the following terms: 1. Quantity—40,000 cases of oranges, Ophir brand. Approximate basis of shipment being 30 per cent. November-December and 70 per cent. January-March. 2. Price—

I pause to say that "price" was an inappropriate expression, because this was not a contract of sale and purchase; however, it is so put in the contract—

Guaranteed advance of 7s. 6d. f.o.b., Palestine ports, for the entire season. All surpluses over and above this price will be remitted by you to our Head Office in Tel-Aviv. 3. Specification—25 per cent. sizes 120/128, 60 per cent. sizes 140/150/160, 15 per cent. sizes 180 and smaller. 4. Charges—6d. and $7\frac{1}{2}$ per cent. gross per case. These charges will also cover the repacking expenses, as and when incurred by you. We shall let you have free consignments of grape fruit according to the market requirements. As informed we are letting you have 200 cases of grape fruit on the m/v Gerd which is due in London on or about the 18th instant. We trust that you will be able to obtain for us satisfactory prices and await your confirmation of the above arrangement.

In short, what happened was that the defendants began to make shipments on account of these 40,000 cases for sale by the plaintiffs on Nov. 23, 1936, by the steamship *Volturmo*. They went on shipping at intervals in ten different ships down to Jan. 23, 1937, and the oranges came forward much as the parties contemplated they would, and were dealt with by the plaintiffs. No complaint was really made by the plaintiffs about those first supplies. The last of the first ten vessels bringing forward parcels of these goods which were satisfactory consignments was the steamship *Olga*, which loaded on the Jan. 23, 1937,

and arrived in London on Feb. 10. Thereafter the consignments which came forward were, the plaintiffs complain, oranges that were, by the time of their arrival in London, unsaleable as Ophir brand oranges as they arrived, and were still unsaleable as Ophir brand oranges of a merchantable quality after any normal percentage of repacking had been

A done, and could only be made saleable to a certain extent as Ophir brand oranges of merchantable quality by an excessive amount of repacking, and only a small percentage could be made saleable as Ophir brand oranges even with that excessive amount of repacking, large numbers having to be sold as wet, wasty and slack, because their condition was such as

B to make it impossible to repack them. Upon that the plaintiffs say that there was a breach of the fundamental condition which must of necessity be implied in this contract, that they should be provided with oranges of the Ophir brand which, with a reasonable degree of repacking, would be saleable in London as merchantable oranges of the Ophir brand, and

C they say that that is a fundamental condition which has of necessity to be implied in the contract.

The defendants, on the other hand, contend in the first place that the contract leaves no room for any implication of a term. The parties had reduced into writing the terms upon which they agreed and those terms

D reduced into writing, in the surrounding circumstances in which they were reduced into writing, leave no room for the implication of such a term, the defendants' contention being that no such term is necessarily to be implied in the nature of the contract which the parties had made in order to give the contract business efficacy. That gives rise to a question

E which, in my view, is a question of the utmost difficulty and, I suppose, of some importance. Cases where the court is invited to imply a term are always difficult. It is not difficult to find from the books clear and binding expositions of the principle of law which has to be applied, but, as is so often the case, while it is easy to state the principle in the abstract

F so that anybody academically interested in law might profit by that exposition, the practical lawyer finds that the individual case gives the greatest difficulty in the application of the principle.

I will refer to a recent case in which BRANSON, J., stated the effect of the authorities quite compendiously, and that is *Livock v. Pearson*

G *Brothers* (1), where he said, at p. 193 :

It is necessary to consider for a moment the principle on which the courts have acted when asked to imply terms into contracts between parties. The principle has, I think, been quite definitely laid down, and it does not matter whether one refers to *The Moorcock* (2) or *Hamlyn v. Wood* (3), or to the two cases quoted by Mr. Jowitt, *Reigate v. Union Manufacturing Co.* (4) and *Re Comptoir Commercial Anversois & Power, Son & Co.* (5). In some cases it is put from the affirmative side and in others from the negative side, but in either case the principle is that the implication is one which, as BOWEN, L.J., says in *The Moorcock* (2), the law draws, from what must obviously have been the intention of the parties, with the object of giving efficacy to the transaction. There you have the words "must obviously have been the intention of the parties." LORD ESHER, M.R., uses very similar language in *Hamlyn v. Wood* (3), at p. 491. He says : "I have for a long time understood that rule to be that the court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an

H

implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned." SCRUTTON, L.J., uses language which means exactly the same thing in *Re Comptoir Commercial Anversois & Power, Son & Co.* (5), at p. 899: "they ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted." A

That being the principle which I have to apply, it is necessary I think to see what were the surrounding circumstances germane to the matter the parties had to contract about at the time when they were making their contract. The defendants, on the one hand, are shippers of goods which were to be sold on the London market. They were known as first-class traders and as reliable people whose branded goods were known to be goods of a standard according to the grading given to them by the Pardess Company and were of a quality and saleability known in the London market. The plaintiffs, on the other hand, were brokers with experience of handling Pardess goods. They knew, as of course both parties knew, certain other things. They knew that they were both contracting about a perishable fruit. They knew that the orange was one of the more perishable fruits; they knew that the keeping qualities of the orange were less if picked later in the season than if picked earlier; they knew that later picked oranges coming forward in the ordinary way would have a shorter life as oranges of the Ophir brand in good marketable and merchantable condition. As I say, the plaintiffs on their part, as brokers in the London market, having handled the Pardess goods for at least two seasons before they knew what the defendants knew. They knew what to expect on arrival in London of goods so far as wet or wasty oranges were concerned and oranges that would require repacking. The goods being perishable oranges shipped from Palestine had undergone a voyage, the normal duration of which was 16 to 19 days. Each of the parties knew that there must, in the ordinary course of events, be a number of oranges which on arrival would be found to have deteriorated, or at any rate have begun to go bad and would require to be extracted from one case and replaced by good oranges of the same brand taken from amongst the sound oranges in another. Whether that was done, where there were several oranges in a case obviously requiring replacement, by the process which was then called repacking, or whether it was done by the process called plugging where it was only one orange in a case that was bad and therefore a danger to the other oranges in the case and of course a detriment in the selling of the case, it was known to both parties that there was to be anticipated a certain amount of repacking. Those, in short, were the matters known to both parties save for this. I am satisfied that the plaintiffs knew that there was a rigorous Government inspection in Palestine of oranges which were for shipment to the London market. It was a rigorous B
C
D
E
F
G
H

inspection to ensure that articles which were being shipped were proper articles in a fit condition for shipment. The plaintiffs knew that there was such an organisation and inspection, although they were not aware of the details of such organisation and inspection.

- Those are the surrounding circumstances in which the contract for
- A this season's goods was entered into, save for this, that, whereas in the previous season the business had been done on accommodation advance terms, in this season the parties agreed upon a different term with regard to the advance. This contract was the first one on which the plaintiffs gave what the contract calls a guaranteed advance. A
- B guaranteed advance, as used in this contract, in my opinion meant, in contradistinction to an approved advance, that if there was at the end of the sale of the articles by the plaintiffs, owing to the market fluctuations, a deficit, not enough to meet the advance and those other payments and outgoings which the parties tacitly understood the plaintiffs would
- C be called upon to make, then the plaintiffs should stand that loss and not be entitled to look to the defendants to remit it to them, as they would have to do if it were an approved advance. That was what I am satisfied these parties, as business men making this contract, meant by guaranteed advance. When I have said that, it does not by any means conclude
- D the difficulty of the point that arises for decision here. It was because that was the meaning of guaranteed advance that in the next sentence the contract went on to say "all surpluses over and above this price will be remitted by you to our head office in Tel-Aviv." It was because surpluses had to be provided for and what should be done with surpluses,
- E and there was no need to stipulate what should happen in the case of a deficit that surpluses were provided for, and it was stipulated that surpluses over and above the price mentioned should be remitted to the head office in Tel-Aviv.

- It would perhaps be convenient, having stated those circumstances
- F which surrounded the making of this contract, if I were now to proceed, first of all, to see what is the construction of the written contract in those circumstances which should be put upon it by the court. I approach this contract, and I think it is fundamental to approach this contract, as and for what it is. That sounds obvious, but it is very important,
- G and, to my mind, it is the guide to the solution of the problem before me. I approach it, first of all, as a contract between a principal who wants his goods sold in a particular market and an agent who is undertaking to sell those goods for him. It is, in other words, what the business man calls a consignment contract. It is not a contract of
- H purchase and sale. Though the word "price" appears in it, it is obviously not a contract in which any price is being paid in the ordinary way for an article. It is a contract of employment by a foreign shipper, a grower, of a London broker to act for him in the sale of his goods, when they arrive in London and can be made available by the ordinary processes for sale on the London market. The goods under it in my view remain

the property and are intended to remain the property of the defendants, the shippers, passing, as of course the defendants do under the contract, sufficient special property to the broker in London to enable him to give a good title to his purchaser. Under it the defendants undertook to supply the broker during the season 1936-37 with 40,000 cases of Ophir oranges.

It is said that, inasmuch as what is stipulated for is 40,000 cases of oranges of the Ophir brand with a guaranteed advance of 7s. 6d. f.o.b. Palestine ports for the entire season, when the defendants put on board at the Palestine ports goods which were oranges of the Ophir brand they discharged their obligation; but I ask myself whether, having regard to the fundamental purpose of this contract, it can be so read. The broker makes an advance of 7s. 6d. on the express term, it is true, in the contract f.o.b. Palestine ports. If this were a contract of purchase and sale, I think it is conceded that the point at which the seller would have to deliver the goods in accordance with his contract is primarily on board the vessel, but it is pointed out that even if this were a direct purchase and sale contract, in the case of perishable goods coming forward from a distance and having to undergo a normal journey, the seller would be under an obligation which was in excess of the express obligation to put on board goods which, at that moment, were goods in accordance with the description in the contract. It is clear to my mind that, if this were a contract as between a buyer and seller, where the parties are supposed to contract at arm's length and where the over-ruling principle is that of *caveat emptor*, it would not be right to say, having regard to the decisions, that these defendants would have discharged their obligation if they had merely put over the rail of the ship at the Palestinian port oranges which were oranges of the Ophir brand at that moment if those oranges put on board, though they were Ophir oranges at that moment, were in fact in a condition which meant that they were incapable of standing the voyage for which they were being shipped.

Beer v. Walker (6) was a case in which there was a sale of a perishable article, namely, rabbits intended for human consumption, and the wholesale provision dealer in London contracted to send them weekly from London by rail to a retail tradesman at Brighton, the cost of the railway carriage as well as the price of the rabbits being paid by the tradesman in Brighton. The railway was in those circumstances the agent of the purchaser, and it was argued that the warranty of merchantability of the rabbits only applied at the time of the delivery to the railway, for it was said the railway company were the agents of the tradesman in Brighton, and delivery to the railway company was the same as delivery to that tradesman; but the court held that there was an implied warranty which extended to the time at which, in the ordinary course of transit, the rabbits would reach the Brighton tradesman, and not only to that time, but that it continued until that Brighton tradesman

had a reasonable opportunity of dealing with them in the ordinary course of business. That case was expressly approved by this court in *Ollett v. Jordan* (7), in which ATKIN, J., said at p. 47 :

A As to that, I think that the effect of the decision in *Beer v. Walker* (6) is that the condition that the goods must be merchantable means that they must be in that condition when appropriated to the contract and that they will continue so for a reasonable time. That does not necessarily mean that goods shall be merchantable on delivery if the vendee directs them to be sent by a long and unusual transit. It is, however, not necessary to decide that.

B Those words seem to me to be strong to show that what is fundamental is that goods must be merchantable, and, where they are perishable goods and the contract contemplates that they have a transit to undergo, merchantable not merely at the beginning of the transit, though that would appear to be the place for delivery under the contract, but they must be merchantable in the sense that at the place for delivery under the contract they are in a suitable and fit condition for the transit normally C to be expected.

Those cases, deciding that as between a vendor and a purchaser, where the overriding principle is that of *caveat emptor* and the parties are considered as making their bargain at arm's length, appear to me to throw a good deal of light on the interpretation to be put on this D contract. This contract is not one to which the principle of *caveat emptor* applies. The plaintiffs were not buying from the defendants. The plaintiffs were undertaking to act for the defendants. They were making common purpose with the defendants in the marketing of the defendants' goods. The fundamental purpose of the contract here was E the provision by the defendants in London of their goods for sale by the plaintiffs upon the terms of this contract, and the terms of this contract more particularly dealt with the number of cases with which the plaintiffs were to be supplied, the times at which that large quantity should be brought forward—that is, 30 per cent. November-December and 70 per F cent. January-March—and, when dealing with the guaranteed advance which the parties were agreeing on, that it should be 7s. 6d. per case and, when they said f.o.b. Palestine ports for the entire season, they did not mean as a matter of construction that, in those circumstances, the plaintiffs obtained their delivery, as they might have done under G a purchase and sale contract, at the ship, but that they were to pay all the charges in connection with the fruit down to the time that it went over the ship's rail and, having done that, as there was an advance being made by the plaintiffs, that would be the time for the advance to be made. No time is otherwise indicated in the contract as the time H at which the advance falls to be made, and I find that the parties acted consistently with that view, for the advice of shipment comes forward and upon the same day there comes forward the advice of draft, and apparently sent forward is a sight draft presented at some time thereafter. It does not seem to me, at least it has not been demonstrated to me, that it is a date dependent on the arrival of the fruit, but it comes

forward in the course of a few days and is then in the ordinary course of events met by the broker and in this case it did come forward and was met by the broker. It does not seem to me, therefore, that "f.o.b. Palestine ports," even if one were considering this contract as a purchase and sale contract, would in the particular circumstances, having regard to the decisions to which I have referred, necessarily mean that the defendants have discharged their obligation by merely putting on board the steamship goods which were Ophir brand oranges at that moment. They would even then have had to put on board goods which were Ophir brand oranges in such a condition that they would continue so for a reasonable time; that is to say, in the light of the purpose of this contract, that they would continue in that condition for a time which would be a reasonable time in which to put them on the London market.

Now it is quite true that it was conceded here and agreed that "the oranges provided by the defendants for the plaintiffs were oranges from pickings made in the ordinary course of husbandry by the members of the defendant society from their 1936-37 crop and were oranges grown, graded, packed, despatched and shipped in the usual manner by the members and/or the defendants, and that the oranges provided by the defendants were fairly representative of the 1936-37 crop." I am satisfied that the oranges, after the first ten shipments which were put on board, were in fact oranges which had been picked after an excessively wet season, or after excessive rains and exceptional weather in Palestine, and were oranges therefore overloaded with moisture to a very large extent. By "overloaded" I mean that they contained such a high percentage of moisture that they could not remain saleable Ophir brand oranges of merchantable quality after a reasonable time for transit and handling on the London market had elapsed. On account of the exceptional weather, large numbers of them were at the time of shipment oranges in such a condition that, at the expiration of the time which would necessarily elapse before they could be put on the London market, they would not be of a merchantable quality.

I have stated my views of the result of the words in the contract "guaranteed advance" and the reason for the inclusion of the expression "all surpluses over and above this price will be remitted by you to our head office in Tel-Aviv." I need not say anything about the specification, and I come to the fourth paragraph which certainly gives more difficulty. There it is to be observed that the parties were specifically dealing with charges under the heading "Charges" and they provided that the charges—that is, the charges of the plaintiffs—should be "6d. and 7½ per cent. gross per case." "These charges will also cover the repacking expenses as and when incurred by you"—that is to say, incurred by the plaintiffs. The parties were there clearly contemplating that some of the oranges might arrive in such a condition as to require repacking, but they were contemplating that in the light of experience

and they were contracting in the light of experience and of what each of the parties then expected. Another way of stating that seems to me to be that these parties, having regard to the particular relationship which was being created between them, were contracting with reference to the normal and not with reference to the abnormal. They were

- A contracting, as I have said, for putting on the London market the defendants' goods, and they were contracting at all times primarily for the marketing of the defendants' goods and the services of the plaintiffs towards the marketing of those goods in London. When they are dealing with charges and say "6d. per case" and "these
- B charges will also cover the repacking expenses," while it is true they were dealing expressly with the subject of repacking, it is to be observed that they were obviously dealing and intending to deal with the normal amount of repacking, because in that 6d. there is to be included the payment for such things as haulage and dues, and the parties must have
- C known approximately what was the ordinary amount that would be required per case reasonably to meet the normal charges.

In those circumstances, the contract having gone that far, and the season 1936-37 having turned out to be an abnormal season, when the goods came forward, something like 40 per cent. were lost in repacking,

- D or shot as useless, or sold as wet, slack and wasty and were only saleable in that way by reason of the abnormal circumstances of the season. When I find that that is the contract in its express terms, is it to be said that the contract excludes any implication of terms, or is the right view that the contract necessitates the implication of terms? The mere
- E supervention of a bad season obviously is no ground for implying any term in the contract. That seems to me to be beyond doubt. The mere fact that the parties have in the result acted upon terms which have resulted in a catastrophe to one party is no ground for implying a term. The term is only to be implied if it is necessary to give business
- F efficacy to the bargain. If this were a bargain of purchase and sale other considerations would arise, but when I look at this bargain and see that what the parties have intended all along is that the shippers shall have the services in London in the London market of the plaintiffs, and supply the plaintiffs with goods in the London market which the
- G plaintiffs are to sell, it does appear to me that the contract cannot be given the sense which the parties intended it to have unless some term is implied making it plain that the goods of the defendants which they want to sell and which are to be sold in the London market, are oranges of the Ophir brand in saleable merchantable condition as such. What
- H the parties appear to have contemplated was certainly the sale of Ophir oranges in the London market in saleable and merchantable condition, because they have arranged in the contract for a charge for some repacking, and some repacking is done in the normal way, and is expected to ensure that the oranges may be sold, not merely as oranges of Ophir brand, but as oranges of Ophir brand in a saleable and merchantable

state. The very presence of some provision for repacking seems to me to indicate that the parties are intending to contract for the sale by the plaintiffs of oranges of the Ophir brand in a saleable and merchantable state in London, and, contracting as they do, in the light of some recognised custom, as the plaintiffs tell me (and it is not contradicted), it appears to me that what the parties would have to read into the contract if they had been asked about it, would be that they should supply during the season 40,000 cases of oranges Ophir brand f.o.b. Palestine in such a condition as to be saleable as Ophir brand oranges on the London market of merchantable quality save for the usual 5 per cent. lost in repacking. A

If no such term is implied, and if the defendants' contention is right, then although the purpose of this contract is to market Ophir brand oranges of the defendants in London through the agency of the plaintiffs, if the defendants had put Ophir brand oranges in a then marketable state in the ship at the Palestine port, though they had put them in a condition such that they must of necessity be a rotten pulp when they arrived in London, nevertheless they would have performed their contract. That seems to me to show that the fundamental purpose of this contract was the marketing in London of saleable Ophir brand oranges of merchantable quality. B C D

In the very exceptional circumstances of the case, I think it is a matter of necessity, in order to give effect to what the parties obviously intended to bring about by this contract, that the implied term which I have indicated should be written into it, save for the normal amount of repacking of 5 per cent. Each of the parties knew that repacking up to 5 per cent. was the normal repacking and they bargained with that in view. Acting as they were in a common interest, it might very well be that neither party would think it necessary to put into this contract a term as to fruit which came forward the total of which that required repacking, or must be sold as wet or wasty, or shot as useless, would amount to anything like 40 per cent. of the bulk. They would never have thought it necessary to write that in, since each knew that the whole purpose of the contract was to enable the broker in London to sell for the best possible price he could get for the goods of his principal, the defendants, and the desire of the defendants would be to maintain their own good name in the market and the good name of Ophir brand oranges, and each would, in those circumstances, in my view, regard it as a necessary term, which need not be written in because each of them would understand it. E F G

In those circumstances, I think that the case for the plaintiffs is established in principle and the question of the amount of damages can be ascertained by the appropriate tribunal. I daresay there is no need for me to make an order about that because the parties will either agree on some reasonable figure or agree the tribunal to assess it. There must, therefore, be judgment for the plaintiffs on the point of principle H

with costs and liberty to apply. If the parties do not agree the damages or agree the tribunal which shall decide them, I will appoint it.

Judgment for plaintiffs with costs and liberty to apply.

Solicitors : *Tanner & Worley* (for the plaintiffs) ; *Herbert Oppenheimer, Nathan & Vandyk* (for the defendants).

A [Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

SWETTENHAM v. SWETTENHAM.

[COURT OF APPEAL (MacKinnon and Luxmoore, L.JJ., and Macnaghten, J.), **May 1, 2, 19, 1939.**]

Divorce—Maintenance—Lunatic spouse—Purchase of annuity out of patient's capital—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190—Matrimonial Causes Act, 1937 (c. 57), s. 10 (2).

C The registrar's report as to the maintenance of a lunatic wife recommended that the husband should covenant to pay an annuity of a stated amount during the joint lives of himself and the wife, and should secure a named sum for her benefit during her life, and that £1,500, being accumulations of the wife's capital in the hands of her receiver, should be expended in the purchase of an annuity for her benefit. The registrar added : " I have endeavoured to ensure that she shall have all the care and reasonable comforts and amusements that she has had for the last 8 years, or is likely to need ; and have paid special regard to ensuring the continuation of this should the husband predecease her." The husband was nearly 90 years of age and the wife nearly 80 years of age. It was held that the statement of principle by the registrar was the correct one to be followed in such cases, and that the court had power to order a receiver of the patient to expend moneys in his hands in the purchase of an annuity for the wife. The respondent appealed to the Court of Appeal. It was agreed by both parties that the order made below could not stand, as it exceeded the jurisdiction of the court in that it purported to bind the Master in Lunacy.

F A form of order was agreed, and was approved by the Master in Lunacy. It provided (i) for a payment of £115 per annum free of tax payable monthly ; (ii) that all the accumulations of the wife except for £350 should be used to purchase an annuity ; (iii) that the husband should provide such sums as might from time to time be required to make the income of the respondent up to £750 per annum ; and (iv) that these payments should be secured after the death of the husband by an irrevocable charge on the marriage settlement funds.

G [EDITORIAL NOTE. The previous order having, in some respects exceeded the jurisdiction of the court, the order here settled has been approved by the Court of Appeal and will be a guide in drafting similar orders in future.

AS TO MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 785-788, paras. 1244-1249 ; and FOR CASES, see DIGEST, Vol. 27, pp. 500-510, Nos. 5355-5480.]

Case referred to :

H (1) *C.L. v. C.F.W.*, [1928] P. 223 ; Digest Supp. ; 97 L.J.P. 138.

APPEAL by the respondent from a decision of HENN COLLINS, J., dated Dec. 21, 1938, and reported [1939] 1 All E.R. 161, where the facts are fully set out.

Noel Middleton, K.C., and *William Latey* for the appellant.

Melford Stevenson for the respondent.

Middleton, K.C. : It is submitted that the Divorce Division had no jurisdiction to make this order on the Master in Lunacy. The order made should have been larger and one that would have insured something being paid at the death of the petitioner. [Counsel referred to *C.L. v. C.F.W.* (1).] The sum now given is not enough to pay for the wife's daily needs. Before any change is made the assent of the Master in Lunacy should be obtained ; he will deal with the matter on a proper basis. The fact that there has been a decree should not in any way affect the sum paid. The court has power under the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 14 (1) (b), to vary this order. A

Stevenson : The real trouble is that a mistake was made when this order was drawn up. It ought to have avoided any imperative form. The petitioner was and is anxious to pay all he ought in order to provide for the reasonable comfort of the respondent. Any order made for maintenance must take into account the wife's fortune. An annuity is a particularly attractive investment for a woman of 80. The capital that she has is the result of overpayments by the husband. She has no near relations, and no testamentary capacity, and she has not made a will. There was never any intention of binding the Master in Lunacy to do anything. If she were not a lunatic, there is no question but that the court would have taken the sum of the accumulations into account. The order should be left as it is, save that the imperative words should be changed. B

The case was adjourned in order that the parties could try and agree a form of order. C

The following order was agreed between the parties and approved by the Master in Lunacy : D

On reading the Notice of Appeal dated the 2nd day of February 1939 filed by the Appellant the Respondent by way of Appeal from the Order of Mr. Justice Henn Collins dated the 21st day of December, 1938, and on hearing Counsel thereon on behalf of the Appellant and the Respondent and it having been ordered on the said 19th day of May 1939 that, subject to the approval of a Master in Lunacy of the Order hereinafter made, the appeal be allowed and the said Order made, and the said Order having been approved by a Master in Lunacy by Order dated the 14th day of June 1939 directing *inter alia* the Receiver to purchase at the price of £990 an Annuity in the name and for the life of the Respondent in the Commercial Union Assurance Co., Ltd., such sum to be varied and paid as is directed in the said Order, IT IS THEREFORE ORDERED on the 15th day of June 1939 that the said Appeal be allowed and that the said Order of the Judge dated the 21st day of December 1938 be discharged save in so far as it refers to costs. E

AND IT IS BY CONSENT FURTHER ORDERED :—

1. That the Petitioner do pay to the Respondent during their joint lives or until further Order for her maintenance such a sum as after deduction of income tax thereon shall amount to the sum of £115 per annum payable monthly the first monthly instalment to be paid on the 5th day of June 1939. F

2. That the Petitioner do from the date of purchase of the said Annuity directed to be purchased under the said Order dated the 14th June 1939 pay to the Respondent during the joint lives of the Petitioner and the Respondent such further sums (if any) as shall be certified from time to time by the Master in Lunacy to be immediately required for the maintenance of the Respondent but not exceeding in the aggregate in any one year ending the 4th day of June such a sum as after deduction of income tax thereon shall together with the income from all sources of the Respondent for that year after deduction of income tax at the net rate payable by her thereon amount to £750. G

3. That the Petitioner do until the purchase of the said Annuity pay to the Respondent in addition to any payment made under the provision of paragraph (1) hereof all such sums (after expenditure of the sums representing income now standing to the credit of the accounts in Court intituled Dame Constance Sydney Holmes Swettenham 1930 No. 806 and Dame Constance Sydney Holmes Swettenham 1930 No. 806 Proceeds of Sale of Furniture or in the hands of Francis John Bryant the Receiver appointed on behalf of the Respondent) as shall be certified by the Master in Lunacy as being required for the maintenance of the Respondent until the purchase of the said Annuity.

4. That the Petitioner do at his own cost and expense in all things within 28 days of the date hereof irrevocably appoint that the Trustees of the Marriage Settlement made between the parties dated the 19th day of February 1878 shall henceforth hold the Policy of Insurance dated the 25th January 1878 together with the funds to be derived therefrom subject to the life interest therein of the Respondent upon trust to pay in the first place to the Respondent during her lifetime from and after the death of the Petitioner such sums as would have been payable by the Petitioner under paragraph (2) hereof if the Petitioner were then still living the Deed of Appointment to be settled by the Judge in case the parties differ;

5. The Respondent's costs of the Appeal which are to include the costs of the Application on behalf of the Respondent before the Master in Lunacy for approval of this compromise and of obtaining the said Order of the 14th June 1939 including a Certificate for two Counsel upon such application before the Master in Lunacy are to be paid by the Petitioner.

Solicitors: *Lowe & Co.* (for the appellant); *Gordon, Dadds & Co.* (for the respondent).

[Reported by E. FULLER BRISCOE, ESQ., Barrister-at-Law.]

CANADA RICE MILLS, LTD. v. R.

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright, Lord Romer), **July 13, 14, 1939.**]

Privy Council—Canada—Revenue—Sales tax—Sales company formed by manufacturing company—Whether agents of manufacturing company—Special War Revenue Act (R.S.C., 1927, c. 179), s. 86 (1), as amended by Statutes of Canada, 1932, c. 54, s. 11.

The Special War Revenue Act, 1915 (as amended in 1932), s. 86 (1), is as follows: "There shall be imposed; levied and collected a consumption or sales tax of six per cent. on the sale price of all goods: (A) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof." The appellant company manufactured rice products and were liable to tax under the Act. In 1935 they had formed a sales company, which was an independent partnership, and which sold the products of the appellants to consumers or in the market. The sales company consisted of a partnership between all the shareholders in the appellant company, including the directors, and the partners were interested in the partnership in exactly the same proportions as those in which they held shares in the appellant company. The appellants paid sales tax on the prices at which the rice was transferred to the sales company, and the respondent claimed to be entitled to tax on the price obtained in the market from the purchasers. On a claim for the balance of tax, which the respondent maintained was due, it was held in both the Exchequer Court and the Supreme Court that when the appellant company sold to the sales company and the sales company sold to the market, the sales company were only selling in fact as agents for the appellant company. The appellants contended that there was no evidence to support these findings, that there were independent sales by the appellants to the sales company, and that they were liable to pay sales tax only upon the

price paid to them by the sales company for the rice and not upon the price received by the sales company from its customers :—

HELD : there was ample evidence upon which the courts could come to the conclusion that the transactions were in fact being conducted throughout by the sales company for and on behalf of the appellant company. The sales were, therefore, sales by the appellant company, and the price received was the sale price of the goods produced or manufactured by the appellants, and they were liable to pay the balance of the tax. A

[EDITORIAL NOTE.] It was here attempted to prove that a selling company had been created which was operating as a company distinct from the manufacturing company. Such arrangements are common enough, but it is here held that, upon the arrangements here made, the selling company were not operating as a separate entity, but merely as agents of the manufacturing company. The matter is one of some importance in certain respects, and here, its importance arises upon a question of liability to tax. B

AS TO COMPANIES AS SEPARATE ENTITIES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 11, 12, para. 1; and FOR CASES, see DIGEST, Vol. 9, pp. 32-35, Nos. 1-18.] C

Cases referred to :

- (1) *R. v. Colgate-Palmolive-Peet Co., Ltd., & Palmolive Manufacturing Co. (Ontario), Ltd.*, [1932] Ex.C.R. 120; Digest Supp.; varied *sub nom. Palmolive Manufacturing Co. (Ontario), Ltd. v. R. & Solgate-Palmolive-Peet Co., Ltd.*, *R. v. Colgate-Palmolive-Peet Co., Ltd., & Palmolive Manufacturing Co. (Ontario), Ltd.*, [1933], S.C.R. 131. D
- (2) *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co.*, [1921] 2 A.C. 465; 9 Digest 35, 15; 90 L.J.K.B. 1252; 126 L.T. 70.
- (3) *Gramophone & Typewriter, Ltd. v. Stanley*, [1908] 2 K.B. 89; 9 Digest 35, 14; 77 L.J.K.B. 834; 99 L.T. 39.
- (4) *R. v. B.C. Brick & Tile Co., Ltd.*, [1936] Ex.C.R. 71; Digest Supp.
- (5) *Lapointe v. J. T. Wait & Co. & Crystal Products Co.* [1938] 4 D.L.R. 418. E

APPEAL by special leave from a judgment of the Supreme Court of Canada [SIR LYMAN P. DUFF, C.J., CROCKET, DAVIS, KERWIN, HUDSON, JJ.], dated Feb. 20, 1939, affirming a judgment of the Exchequer Court [MACLEAN, J.], dated Aug. 13, 1938. The judgment of their Lordships was delivered by LORD ATKIN. F

Martin Griffin, K.C., for the appellants.

F. P. Varcoe, K.C., and *Frank Gahan* for the respondent.

Griffin, K.C. : The sales company was not carrying on business for, or as agent of, the appellant company. It was an effective legal partnership entitled to be a buyer and was a buyer and not an agent. All that is required to constitute a sale is a real buyer and a real seller and an actual as opposed to fictitious transaction. The sales tax is payable on the "sale price" of the goods because sect. 86 (1) of the Act so states. There is nothing suggested in this case of intentional evasion, bad faith, or fictitious sales. [Counsel referred to *R. v. Colgate-Palmolive-Peet Co., Ltd.* (1), *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd.* (2), *Gramophone & Typewriter, Ltd. v. Stanley* (3), *R. v. B.C. Brick and Tile Co., Ltd.* (4), *Lapointe v. J. T. Wait & Co. & Crystal Products Co.* (5).] G

Counsel for the respondent were not called upon. H

LORD ATKIN : This is an appeal from the Supreme Court of Canada who dismissed an appeal from the President of the Exchequer Court on a claim by the Crown for sales tax on transactions by the appellant company. The case has been disposed of, as it appeared to their Lordships, in both courts upon the footing that the sales in question had in fact been made
A by the appellant company, who will be referred to as the mills company. The tax is payable under the provisions of sect. 86 of the Special War Revenue Act, originally of 1915, which has been amended at different times. The relevant part of the section is as follows :

B (1) There shall be imposed, levied and collected a consumption or sales tax of six per cent. on the sale price of all goods : (a) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.

The mills company had been formed for some considerable time for the purpose of what is called manufacturing rice products, that is to say,
C they bought rice in the raw state, and they manufactured it into a finished product, and the tax was made eventually a tax which fell upon them. The defence of the company is that these particular sales in respect of which the balance of tax was claimed, were not made by them, but were made by the sales company, which was an independent
D partnership which was formed in 1935. What is said is : " We, the mills company, sold our product to the sales company and then the sales company sold it to the consumers or sold it in the market and we are only liable for the price which we received from our sales to the sales company." The sales company was formed in circumstances which did throw some
E suspicion on its formation as being formed specially for the purpose of evading the tax, but it is not necessary to say that, because there is certainly evidence that it was in contemplation to form such an association at one time before the question of the tax came into existence. When it was formed it consisted of a partnership between all the share-
F holders in the mills company, including the directors, and the partners were interested in the partnership in exactly the same proportions as those in which they held shares in the mills company. It has been found by both courts in Canada that, when the mills company sold to the sales company and the sales company sold to the market, the sales company were only
G selling in fact as agents for the mills company. The Supreme Court came to the conclusion that that was the finding of the President of the Exchequer Court, and their Lordships think they rightly came to that conclusion ; they themselves were of opinion that that was the correct view of the facts. It appears to their Lordships that there were ample grounds
H upon which both courts could come to that conclusion. In those circumstances, it would appear to their Lordships to be an ordinary case of two concurrent findings on a question of fact, but, inasmuch as the Board has listened to a forcible argument of counsel for the appellants on this matter, suggesting that there was no evidence to support the findings, they would mention some of the considerations which seem to afford

evidence, taken together, upon which a court could very properly come to that conclusion.

To begin with, the transaction would be a very remarkable transaction, if in fact there were independent sales to the sales company, for it would mean that the mills company had sold their product to persons who were shareholders and who also included their own directors, at less than the market price. It seems to their Lordships very doubtful whether such a transaction could be within the powers of the company at all, even though the persons to whom they sold it were in fact the shareholders, and the whole of the shareholders in the company. When they come to consider whether or not there was here in fact a sale to the partners as an independent sale upon which the partners became personally liable to the mills company, on the one hand to accept delivery and become personally liable to the purchasers from them, on the other hand, to give delivery, there are very significant facts in the case. The partnership had no capital; it had no warehouse; the warehouse was the warehouse of the mills company; the offices were the offices of the mills company; and, what is rather significant for a company that on this footing must have been trading on a very large scale, it had no banking account; the only banking account was the banking account of the mills company. The servants who attended to the sales part of the business were in fact paid by the mills company, whose servants they had been before the partnership came into existence. The proceeds of the sales were all in fact received ultimately by the mills company, who are said to have accounted for the proceeds afterwards to this partnership. It was suggested that the property, when the goods were delivered to the sales company, there and then passed to the sales company from the mills company, so that, though the goods were sold on credit, the mills company were supposed to lose their hold upon the property as security for the unpaid amount.

The way in which the transaction was said to be carried out was that the books were kept at the office. No doubt it is true, as it was said, that they were kept by persons whose services were appropriated to the sales company, and in that sense they were servants of the sales company. The profits were ascertained on this part of the transaction, that is to say, the difference between the price at which the sales company had bought from the mills company and the price at which they had sold to the market, the difference having been in the hands of the mills company as part of the whole transaction. The profits would be the difference between those two prices less the cost of the wages of the different people who were employed in the selling part of the business, but neither the proceeds in gross nor the proceeds as so calculated were paid to the partnership as such, which is what might be expected if one were dealing with a real trading partnership selling rice; but apparently the division of the profits was calculated by the mills company, and cheques were sent to each of the partners in proportion to his holding in the partner-

ship. In other words, exactly the same position was reached as is reached in regard to the profits of the mills company. They would divide their profits by declaring a dividend amongst the shareholders, which would be distributed in this way, and these profits derived from the so-called sales part of it were divided in exactly the same way.

A All those facts put together appear to their Lordships to afford ample evidence—they deal with it because counsel for the appellants has suggested that there was no evidence upon which the courts could come to this conclusion—upon which the courts could come to the conclusion to which they did come, namely, that these transactions were in fact being conducted throughout by the sales company for and on behalf of the mills company. The sales were, therefore, sales by the mills company, and the price received was the sale price of the goods produced or manufactured by the mills company. Therefore, the appellants were properly liable to pay the balance of this tax.

C In those circumstances, their Lordships will humbly advise His Majesty that this appeal should be dismissed and the appellants must pay the costs of the appeal.

Appeal dismissed with costs.

Solicitors: *William A. Crump & Son* (for the appellants); *Charles D Russell & Co.* (for the respondent).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*]

E ATTORNEY-GENERAL (AT THE RELATION OF MARTIN)
v. MAYOR, ALDERMEN AND BURGESSES OF THE METRO-
POLITAN BOROUGH OF FINSBURY.

[(CHANCERY DIVISION (Simonds, J.), **July 28, 1939.**)]

F *Public Health—Housing—Letting part of clearance site for air raid shelter—Previous schemes refused approval by Ministers—Lease to company constructing shelter—Lease of shelter when constructed to authority—Validity of scheme—London Government Act, 1899 (c. 14), s. 5 (2), Sched. II, Part II—Housing Act, 1936 (c. 51), s. 30—Air-Raid Precautions Act, 1937 (c. 6), ss. 1 (3), 7.*

G The defendant authority prepared a scheme for constructing underground air raid shelters, but the Secretary of State refused to approve it. They then resolved to construct a shelter within a clearance area and submitted plans thereof to the Minister of Health with a request for a loan for the estimated cost thereof. The Minister refused to approve the proposed expenditure. They then entered into an agreement with a company, whereby they agreed to lease to the company some land which was a part of a clearance site, the company agreeing to construct a shelter on this land, and to lease the shelter, when constructed, to the defendants, at a rental of £50 a year and interest at 5½ per cent. on the capital cost of the shelter and a 2½ per cent. amortisation charge. The present action was brought by a ratepayer who claimed that the scheme was *ultra vires* the borough council on the grounds (i) that the letting to the company was not authorised by the Housing Act, 1936, s. 30, (ii) that this transaction was, in substance, the borrowing of money by the defendants for the purpose of

expenditure under the Air-Raid Precautions Act, 1937, which therefore required the consent of the Minister, and (iii) that the hiring agreement was unauthorised :—

HELD : (i) this was a letting within the Housing Act, 1936, s. 30.
(ii) this was not a borrowing of money, but an agreement to pay a yearly sum, and as such did not require the consent of the Minister under the Air-Raid Precautions Act, 1937.

(iii) it was the duty of the defendants to provide shelter for the inhabitants of the borough, and they were therefore justified, by virtue of the London Government Act, 1899, s. 5 (2), in acquiring the land in question in the way which they deemed expedient.

(iv) the scheme was therefore not *ultra vires* the defendants, and the action failed.

[EDITORIAL NOTE. The proposals of the authority having failed to receive approval by the Ministers concerned, the authority, admittedly for the purpose of avoiding such approval, devised a scheme whereby part of a clearance area was let to a company with an agreement for the letting back to the authority of a shelter to be erected on that land. The only question is whether the authority have kept within their statutory powers, and it is held that this result has been achieved.

AS TO CLEARANCE AREAS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 533-543, paras. 1134-1150.]

MOTION, treated as the trial of the action, by the Attorney-General at the relation of a ratepayer of the defendant borough council for an injunction restraining the defendant council from proceeding with a scheme for the provision of a deep air raid shelter, it being suggested that the scheme was *ultra vires* the defendant council. The facts and arguments are fully stated in the judgment.

R. O. Wilberforce for the plaintiff.

A. M. Trustram Eve, K.C., Erskine Simes and L. M. Jopling for the defendant council.

SIMONDS, J. : In this case the Attorney-General, at the relation of Mr. Martin, a ratepayer of the borough of Finsbury, moves to restrain the Mayor, Aldermen and Burgesses of the borough of Finsbury from entering into an agreement with a company called Shop Investments, Ltd. :

whereby (a) the defendants [the local authority] agree to demise a piece of land situated at Busaco Street within the borough of Finsbury, to Shop Investments, Ltd. ; (b) Shop Investments, Ltd., agree to construct in or under the said piece of land an air raid shelter ; and (c) Shop Investments, Ltd., agree to re-demise the said piece of land and shelter to the defendants at a rent of £7,400 per annum,

on the ground that it is *ultra vires* and void.

The genesis of the action is this. The Air-Raid Precautions Act, 1937, s. 1, imposed upon local authorities the duty of making provision as to arrangements to be made in their several areas for the protection of persons and property from injury or damage in the event of hostile attack from the air. It provided by sect. 1 (3) for air raid precaution schemes being prepared by the local authorities and to be submitted to the Secretary of State for his approval. Pursuant to that obligation the defendant authority prepared a scheme for constructing 15 under-

ground air raid shelters, at a total cost of over £1,300,000, to afford protection for the residents and workers in its area. That scheme was submitted to the Secretary of State in accordance with the Act, and the Lord Privy Seal, on whom the duty laid on the Secretary of State by the Act fell, refused to approve it, for reasons which he gave.

- A The defendant authority considered that refusal and the reasons given for it, and were not satisfied. They determined, notwithstanding the rejection of their proposals, to go on with it, if they could lawfully do so. So far, at any rate, as part of the scheme is concerned, they devised—
- B and I use the word without any offence—a scheme by which they could make, and have available for the inhabitants of their area, a deep shelter on a certain site in Busaco Street mentioned in the notice of motion. They resolved, if possible, to construct one of the shelters within the clearance area which was in the neighbourhood of Busaco Street. They submitted plans, specifications and bills of quantities to the Minister
- C of Health, and requested him to authorise a loan for the estimated cost thereof under sect. 7 (3) of the Air Raid Precautions Act, 1937.

The financial provisions of the Air-Raid Precautions Act, 1937, are contained in sect. 7 and the following sections. Sect. 7 (1) is as follows :

- D (1) Any local authority may incur expenditure for the purpose of making provision for the protection of persons and property from injury or damage in the event of hostile attack from the air, whether or not such expenditure is incurred in pursuance of an air-raid precaution scheme.

- I call attention to those words. The power of the local authority is clear. It may incur expenditure for the protection of persons and
- E property within its area, notwithstanding that such expenditure is not incurred in pursuance of an air raid precaution scheme. Sect. 7 (3) provides :

- F For the purpose of defraying any expenditure of a metropolitan borough council under this Act, the council may borrow money in accordance with and subject to the provisions of the Metropolitan Management Acts, 1855 to 1893, as amended by the London Government Act, 1899 : Provided that the Minister of Health shall, instead of the London County Council, be the authority for sanctioning the borrowing of any money under the powers conferred by this section,

with certain exceptions which are immaterial.

- Accordingly, it was under that section that application was made
- G to the Minister of Health to approve certain expenditure with regard to air raid shelters, which the local authority purported to consider necessary. That sanction was refused by the Minister of Health. The local authority, however, as they were entitled to do, still adhered to the view that their scheme was a proper one, and that it was their duty
- H to carry it out, if they lawfully could, for the benefit of the inhabitants of Finsbury. Accordingly they embarked on this transaction, the validity of which is challenged by the plaintiff.

The scheme was this. They purported to enter into an agreement, if they could lawfully do so, with Shop Investments, Ltd., under which they would grant to the company a parcel of land, part of a clearance

site under the Housing Act, 1936, with full right for the company to enter on it, with certain reservations which are not material, and the company would be bound forthwith to begin the excavation and construction under the land of a shelter. That shelter was to be erected in accordance with the directions and subject to the supervision at all points of the county council and the local authority. The building contract is described in the agreement, and its contents are prescribed. There is a provision in cl. 22 as to what is to happen on the outbreak of war, a clause which, in effect, enables the local authority to re-enter on the land and authorises the company to stop work upon it. Cl. 23 provides that if and when the shelter to be comprised in the lease shall have been entirely finished and completed in accordance with the provisions contained in the agreement, the council is to grant and the company is to take a lease, the form of lease being set out in the schedule to the agreement. It is provided that, upon the completion of the shelter, the company shall let and the council shall take on hire the shelter for a term of 38 years from the quarter-day immediately preceding the date certified as the date of the completion of the shelter in consideration of annual payments to be calculated in accordance with the provisions thereafter set out. The rent under the lease to be granted under this agreement by the council is £50 per annum and the term is to be for 40 years.

Contemporaneously, as I have said, with the grant of the lease there is to be what is called a hiring of the shelter to the council, and the terms of that are set out in the second schedule to the agreement. It is only material to observe that the payment was to be the rental of £50 per annum together with interest at the rate of 5½ per cent. per annum of the capital cost of the shelter to be constructed on the land, and the annual amount required for amortisation of the capital cost calculated upon interest at the rate of 2½ per cent. per annum.

The validity of this agreement is challenged on numerous grounds. In the first place, it is said that the letting by the local authority to the company is not authorised by the Housing Act, 1936, s. 30, under which alone the defendant authority have purported to grant the lease. The Housing Act, 1936, s. 30, provides what a local authority may do when it has declared an area to be a clearance area within the meaning of Part III of the Act. It enacts as follows :

(1) A local authority who have under this Part of this Act purchased any land comprised in, or surrounded by, or adjoining, a clearance area shall, as soon as may be cause every building thereon to be vacated and, subject to compliance with any provision contained in a compulsory purchase order with respect to the carrying out of re-housing operations, shall deal with that land in one or other of the following ways, or partly in one of these ways and partly in the other of them, that is to say :

First, they are to demolish the buildings and thereupon one of two alternatives are open to them. They may either

sell or let the land, subject to such restrictions and conditions, if any, as they think fit, or may, subject to the approval of the Minister, and subject to the like restrictions as are contained in the Local Government Act, 1933, s. 163, with respect to the

appropriation of land by local authorities under that section, appropriate the land for any purpose for which they are authorised to acquire land. . . .

What the local authority here propose to do is to let the land subject to such restrictions as they may think fit. It is a condition of the validity of such a lease that it is to be at the best rent which can reasonably be obtained having regard to any restriction or condition imposed.

I think that the simple question which I have to decide is whether the lease which, in pursuance of this agreement, if they can lawfully make it, the local authority propose to grant, is a letting within the Housing Act, 1936, s. 30. I do not find it possible to say that it is not. I think notwithstanding that the agreement provides, first, for a lease, and, secondly, for what is called a hiring of the shelter which is to be erected under the terms of the agreement, this is in substance, as it is in form, a letting of the clearance area, or so much of it as the local authority think fit to let. It is quite true that the letting itself is part of a larger transaction, and I shall have to investigate the validity of the other part of that transaction; but I think that this is in substance, as it certainly is in form, a letting of the clearance area. Therefore, upon the first ground, the objection to the validity of that part of the agreement which consists in the agreement to let, so far as it goes, fails.

The next point which I have to consider is this. It will have been observed from the subsection to which I have already called attention that, if for the purposes of any expenditure under the Air-Raid Precautions Act, 1937, s. 7, it is necessary to borrow money, then the consent of the proper Minister has to be obtained. This transaction as a whole has been challenged on the ground that, although on the face of it the local authority will do no more than pay a rent under the hiring agreement, yet in substance what they are doing is to borrow money. In my view that objection also fails. What the local authority are doing is to bind themselves to pay a certain sum from year to year. That sum they will pay out of revenue, that is to say, out of rates or the rate fund. That is an obligation into which, as it appears to me, they are at liberty to enter. It is just as if they had agreed to purchase something for which they did not think fit to pay, or perhaps were not able to pay, in one year, and by agreement between themselves and the vendor agreed that the purchase price should be paid by instalments over a series of years. As I understand the law, there can be no objection to that. It is quite true that the district auditor may challenge such payment if for any reason he thinks that it is challengeable; but it is not a borrowing of money which requires for the safeguarding of the ratepayers the previous sanction of some other authority. Accordingly, although it is quite true that this is a financing by a third party of expenditure which the local authority have incurred, it cannot be said, in my view, that the local authority are borrowing so as to require the previous sanction of the Minister under the provisions of the Air-Raid

Precautions Act, 1937. They are incurring expenditure which falls within that section and they are incurring that expenditure out of the rates this year and in future years, but they are doing so without borrowing money.

The third objection which was taken to this transaction is this. It is said that the hiring agreement, which is an integral part of the purchase agreement, that is to say, the agreement under which the local authority are to rent the shelter when it has been constructed, is unauthorised. On that the local authority can call in aid the London Government Act, 1899, s. 5 (2), which provides : A

As from the appointed day the powers of the London County Council under the enactments mentioned in Part II of the Second Schedule to this Act may, subject to the conditions mentioned in that Schedule, be exercised also by each borough council as respects their borough. B

Part II of the Second Schedule so far as it is relevant to boroughs is that this power of the county council may be exercised by the borough council under powers contained in the Local Government Act, 1888, s. 65, which section relates to the acquisition of land ; that is, an acquisition either by purchase or by lease. The condition of exercise prescribed by the same Part of the same Schedule is : C

The power to be exercised only where the land is required for the purpose of any of the powers or duties of the borough council. D

The power, if not the duty, of the borough council under the Air-Raid Precautions Act, 1937, s. 7, which I will read once again, is :

Any local authority may incur expenditure for the purpose of making provision for the protection of persons and property from injury or damage in the event of hostile attack from the air . . . E

For the purpose of making that provision this local authority deem it expedient to acquire a certain shelter. Accordingly it seems to me that they must be justified, in order to make that provision, in acquiring the land in the way which they think expedient. They think it expedient to do so by taking a lease of or renting this particular shelter. It follows that they must pay the rent which, as a matter of bargain, has to be paid for the renting of this particular shelter, and it appears to me that in doing so they are acting within the powers of the London Government Act, 1899, s. 5, as applicable to this particular case. F

Accordingly, I think that on all the points the objections taken on behalf of the plaintiff fail and that I must refuse this motion. G

Motion refused. Motion to be treated as trial of the action.

Solicitors : *F. Basil Guedalla* (for the plaintiff) ; *J. E. Arnold James*, Town Clerk, Finsbury (for the defendants). H

[Reported by F. HONIG, Esq., Barrister-at-Law.]

UNDERWOOD v. UNDERWOOD AND HAIGH (POCOCK SHOWING CAUSE).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), July 27, 1939.]

A *Divorce—Costs—Husband's petition alleging adultery with named co-respondent—Decree nisi with costs—Intervention by member of the public—Issue resulting in finding of no adultery—Whether order against co-respondent as to costs should stand.*

B A husband was granted a decree *nisi* on the ground of his wife's adultery, and was awarded damages and costs against the co-respondent. As a result of a subsequent intervention by a member of the public, it was found that adultery had not been committed, and the respondent then applied to have the decree rescinded, the petition dismissed, and the order against the co-respondent for damages and costs rescinded. The respondent and co-respondent had sworn by affidavit that their failure to defend the petition had been due to the fault of their then solicitor:—

C HELD: the decree *nisi* and order for damages would be rescinded and the petition dismissed, but the order for costs against the co-respondent must stand.

[EDITORIAL NOTE. In general where a decree is rescinded the order for costs falls with it, but the whole matter of costs is one wholly in the discretion of the court, and in a proper case the order for costs may be allowed to stand.

D AS TO COSTS ON SHOWING CAUSE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 773; 774, para. 1222; and FOR CASES, see DIGEST, Vol. 27, pp. 485-487, Nos. 5160-5193.]

E SUMMONS by the respondent to rescind a decree *nisi* of dissolution of marriage granted to her husband, the petitioner, and for rescission of the consequent orders against the co-respondent for payment of damages and costs. The petition was heard as an undefended suit in Oct., 1938, and the petitioner was granted a decree *nisi* with costs and awarded £100 damages and costs against the co-respondent. In Mar., 1939, the respondent and the co-respondent made an unsuccessful application to the Court of Appeal for leave to apply out of time for a new trial. Thereafter the respondent's brother, William John Pocock, intervened in the suit as a member of the public to show cause why the decree *nisi* should not be made absolute on the ground that the respondent had not in fact committed adultery. In the result an issue was ordered to be tried on oral evidence as to whether or not the respondent and co-respondent had committed adultery. On the trial of this issue the respondent's brother was the plaintiff and the petitioner the defendant. On July 11, 1939, HENN COLLINS, J., on the hearing of the issue found that adultery had not been committed, but intimated that he was not prepared at this stage to deal with the matter which arose to be determined in consequence of that finding, so that the matter fell to be dealt with on the present summons.

H Earl of Drogheda (Hon. Victor Russell with him) for the respondent in the suit, the applicant in these proceedings.

J. B. Lately and *J. L. S. Hale* for the petitioner in the suit, the respondent in these proceedings.

The co-respondent was not represented on the summons.

Earl of Drogheda : As a result of the judgment of HENN COLLINS, J., the decree granted to the petitioner should be rescinded and the petition dismissed. There being no finding of adultery against the respondent A and co-respondent, the orders against the co-respondent for damages and costs should be rescinded also.

Lately : I cannot resist this application in so far as it relates to the rescission of the decree, the dismissal of the petition and the rescission of the order as to damages, but the order for costs should not be reversed. B The petitioner has done nothing to which anyone could take objection. The petition and all subsequent process were properly served. The reason why the suit was undefended was, according to the affidavits, the negligence of the advisers of the wife and the co-respondent. It would be a great hardship on the petitioner, who is in no way at fault, if he C has to bear the whole cost of these proceedings. There is no real ground upon which it can be said that these costs should be taken away from the petitioner. The co-respondent can take steps against those advising him, which are not open to the petitioner.

D
HODSON, J. : I think the decree *nisi* must be rescinded and also the order for damages. The order for costs must stand and the co-respondent be left to his remedy, if any. There will be no order as to the costs of this application.

E
Solicitors: *Piper, Smith & Piper* (for the respondent) ; *T. & N. Blanco White* (for the petitioner).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]



